

Additional Comments and points of Dissent

By Senator Brian Greig

on behalf of the Australian Democrats

1.1 While acknowledging the many changes and amendments made to this Bill, and the many strong recommendations from the Senate Committee, the Australian Democrats remain opposed to it. We consider it still represents a disproportionate, badly targeted and possibly unconstitutional response to the threat of terrorism in Australia.

1.2 This Bill undermines a number of fundamental rights and freedoms that have long been accepted as central tenets of our democratic system and essential to the effective rule of law.

1.3 The Government's responsibility is to protect, not only the safety of Australian people, but also their welfare. One should not be at the expense of another and the Government must be careful to get the balance right.

1.4 The Democrats believe that this Bill gets the balance wrong.

1.5 Whether or not Australia's existing anti-terrorism arrangements are sufficient is a matter for the Government to clearly demonstrate to the Australian public. The Government bears the burden of proof to establish that there is need for new legislation, particularly when the proposed legislation represents a radical departure from existing arrangements, as this Bill does.

1.6 As the NSW Council for Civil Liberties said in its submission to the Committee:

[I]f there is a need to limit or remove fundamental civil liberties then the burden of proof must be on the government to demonstrate to the people of Australia that these powers are both required and will actually work.¹

1.7 The Government has failed to discharge this burden.

1.8 Even if the Government were to establish the need for legislative change, it would then need to demonstrate that the proposed legislation constitutes a proportionate response to the threat of terrorism.

1.9 This accords with the position adopted by the General Assembly in Resolution 56/160 on 'Human Rights and Terrorism', the Preamble of which acknowledges 'that all measures to counter terrorism must be in strict conformity with the relevant provisions of international law, including international human rights standards'.

1 NSW Council of Civil Liberties, *Submission 132*, p. 1.

1.10 The Democrats do not accept that the draconian measures proposed by this Bill represent a proportionate response to the threat of terrorism. In this respect, we note the unique features of this Bill – such as the power to detain non-suspects – which have not been considered necessary in comparable countries, such as the United Kingdom and the United States.

The Right to Silence and Privilege Against Self-Incrimination:

1.11 There is no right to silence or privilege against self-incrimination for persons detained under this legislation. A person will be compelled to provide the information sought by ASIO or face 5 years imprisonment.

1.12 Strict liability attaches to this offence and the person being detained bears the burden of proof to establish that they do not have the information sought.

1.13 This provision directly contravenes a person's right to be presumed innocent until proven guilty. It will require innocent Australians to discharge a burden of proof in order to escape a penalty of 5 years imprisonment. The Democrats support the Committee's recommendation that this evidential burden of proof be removed.

1.14 The right to be presumed innocent is a non-derogable right enshrined in Australian common law, as well as Article 14(2) of the *International Covenant on Civil and Political Rights*, and Article 11 of the *Universal Declaration of Human Rights*.

1.15 The Democrats oppose the abrogation of the right to silence in circumstances where no use immunity, including derivative use immunity, applies to the information provided. Although use immunity applies to information provided during the course of questioning under the Bill, derivative use immunity does not.

1.16 Given that the primary purpose of this Bill is to facilitate the collection of intelligence relating to terrorism, the Democrats believe that derivative use immunity should apply to information obtained pursuant to its provisions.

1.17 If, however, questioning conducted under this legislation is intended to be used for the dual purpose of criminal prosecutions, then the right to silence must apply and detained persons must have full and free access to a legal practitioner of their choice.

Legal Representation:

1.18 The Democrats welcome the amendments made to the Bill regarding access to legal representation, however we consider they do not go far enough.

1.19 The right to legal representation under this Bill remains severely limited. Firstly, subsection 34C(3C) provides that a person does not have a right to contact a lawyer during the first 48 hours of detention in certain circumstances.

1.20 Secondly, a person detained for questioning does not have the right to a lawyer of his or her choice. He or she will only have access to a lawyer approved by the Attorney-General pursuant to section 34AA.

1.21 In determining whether to approve a lawyer for the purposes of the Act, the Attorney-General must take into account any material which he or she considers is relevant. This broad provision incorporates a very subjective assessment into the approval process.

1.22 Thirdly, the Bill makes no provision for access to a lawyer in circumstances where the detained person lacks sufficient funds to engage one. The right to legal assistance without charge for those who lack the means to pay is enshrined in Article 14(3)(d) of the *International Covenant on Civil and Political Rights*, and Principle 6 of the *United Nations Basic Principles on the Role of Lawyers*.

1.23 Given the severity of the penalties which attach to non-compliance under the Bill, the right to legal representation irrespective of a detained person's ability to pay is essential. The Democrats fully support the Committee's recommendation that Legal Aid be available to detainees.

1.24 Fourthly, a lawyer may be removed by the prescribed authority if he or she is 'unduly disrupting the questioning'. This is an entirely subjective test and opens the way for prescribed authorities to adopt a broad interpretation when determining whether conduct is 'unduly disrupting'.

1.25 It is particularly disturbing, given that subsection 34U(4) provides that the lawyer may neither intervene during questioning, nor address the prescribed authority, except to request clarification of an ambiguous question. In this context, it is foreseeable that a lawyer might be removed for simply acting within the parameters of what would usually be considered appropriate legal representation.

1.26 Fifthly, proposed subsection 34U provides that a lawyer commits an offence if he or she communicates information relating to the questioning to a third person other than a prescribed authority, a person exercising authority under a warrant, the Inspector-General of Intelligence and Security, or the Ombudsman.

1.27 This provision may prevent a lawyer from challenging the validity of the detention in a court of law.

1.28 Article 9.4 of the *International Covenant on Civil and Political Rights* provides that:

Anyone who is deprived of their liberty by arrest or detention shall be entitled to take proceedings before a court, in order that the court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

1.29 This Article enshrines in international law the ancient common law doctrine of *habeas corpus*. As a fundamental principle of the common law, the right of a

detained person to be brought before a judge is enforceable by Australian courts. However, any lawyer who sought to pursue such an action at common law would risk a 2 year imprisonment.

1.30 The right to legal representation is further rendered hollow by the fact that the Bill enables confidential communications between the detained person and his or her lawyer to be monitored. The right to confidential communications between legal practitioners and their clients is a fundamental principle of the common law and essential to the effective rule of law. It is also recognised in Principle 22 of the United Nations Basic Principles on the Role of Lawyers.

1.31 It is essential that persons detained under this legislation have the opportunity to communicate privately with their legal practitioner. The Democrats support the Committee's recommendation 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.

Detention of Non-Suspects:

1.32 The Democrats find it particularly disturbing that this legislation applies to all Australians whether or not they are charged with, or suspected of, terrorist activity. This makes the radical deviation from well-accepted human rights and civil liberties even more unjustifiable.

1.33 It is significant that comparable jurisdictions have not considered it necessary to adopt this approach. In particular, neither the United States nor the United Kingdom have made any provision for the detention of non-suspects in their comprehensive legislative regimes.

1.34 The Democrats agree that there are compelling arguments for applying special considerations to groups such as legal and medical practitioners, and possibly journalists. On this basis, we support the Committee's recommendation that the Bill be amended to provide that legal professional privilege is not affected.

1.35 The Democrats believe, however, that rather than introducing limits on the application of the Bill to specific groups, a more preferable approach would be to limit its application to those suspected of direct involvement in terrorism offences.

1.36 Like Amnesty International, the Democrats oppose the detention of a person unless the person is charged with a recognisable criminal offence or action is being taken to deport the person to another country where:

the person would not risk being subjected to an unfair trial, the death penalty, torture or other cruel, inhuman or degrading treatment or punishment, or other serious human rights abuses by state or non-state actors.²

2 Amnesty International, *Submission 136*, p. 6.

1.37 It is arguable that the detention of non-suspects under this legislation would contravene Article 9 of the *International Covenant on Civil and Political Rights*, which prohibits arbitrary detention.

1.38 The application of this Bill to non-suspects is one of the primary reasons underlying the Democrats opposition to it. Even if the Bill were to be radically improved in order to address human rights and civil liberties concerns, its application to non-suspects would remain fatal to our support.

Children:

1.39 The Democrats are deeply concerned that this Bill enables the detention and questioning of children. We welcome the proposed amendments preventing the questioning of minors below the age of 14, however minors between the ages of 14 and 18 may still be questioned.

1.40 We note the provisions of Article 37 of the *Convention on the Rights of the Child*, ratified by Australia in 1991, which states that:

'No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort for the shortest period of time.'

1.41 The Democrats are also concerned that the Bill permits the strip-searching of minors over the age of 14 years. We believe that any power to strip search a minor under this legislation should, at a minimum, be made consistent with the requirements of s34ZI(2) of the *Crimes Act 1914* (Cth), whereby the authorisation of a Magistrate must be obtained before a minor is strip searched.

1.42 Notably, the PJC recommended in its Advisory Report on the Bill, that the Bill should not apply to persons under the age of 18 years. The Democrats concur with that recommendation and are disappointed to see that it has not been acted upon by the Government. We are pleased that this Committee has now echoed that recommendation.

Constitutionality:

1.43 There are a number of grounds upon which the constitutionality of this Bill might be questioned, particularly with respect to its implications for the separation of powers.

1.44 Firstly, it is arguable that the Bill invests Federal Magistrates and Judges with powers which are inconsistent with their judicial functions, contrary to the High Court's decision in *Grollo v Palmer*.³

1.45 Given its radical departure from fundamental principles of the common law, such as legal professional privilege, it is possible that a Court would find that the

3 (1995) 184 CLR 348.

regime established by the Bill is not only inconsistent with, but repugnant to, the judicial power of Chapter III judges. The Democrats concur with Professor William's argument that the involvement of judges in this process has the potential to 'undermine public confidence in the judicial system'.⁴

1.46 Another basis on which the Bill potentially breaches the separation of powers is that it invests the Executive with the power to detain individuals who have not been charged with an offence. This is potentially inconsistent with the High Court's decision in *Chu Keng Lim v Minister for Immigration, Local Government and Ethnic Affairs*⁵.

1.47 Furthermore, it would be open for a Court to question the power of the Commonwealth to enact such legislation. Although there are clearly a number of heads of power (including the Defence power, External Affairs power and the Executive power) upon which the Commonwealth might rely to pass anti-terrorism legislation, it must also ensure that the legislation is reasonably capable of being considered as appropriate and adapted to an identified constitutional purpose under one or more of these powers.

1.48 As stated above, the Democrats believe this legislation represents a disproportionate response to the threat of terrorism and this may be a relevant consideration for a Court in determining the constitutionality of the legislation.

1.49 The Democrats are concerned by the constitutional ambiguities associated with this Bill. Clearly, it is undesirable from a policy and administrative perspective for the Government to pursue a legislative regime, aspects of which may subsequently be declared to be invalid.

Absence of a Bill of Rights:

1.50 The Australian Democrats are disappointed that this Bill is being considered in the absence of an Australian Bill of Rights.

1.51 The Democrats have previously introduced a Private Member's Bill – the Parliamentary Charter of Rights and Freedoms Bill 2001 – which sought to establish a charter of rights or freedoms, facilitated by the Human Rights Commission.

1.52 This Bill was intended as the first step towards ultimately achieving an Australian Bill of Rights by way of a Constitutional referendum.

1.53 As the ASIO Bill so clearly demonstrates, Australians do not have any guarantee that their rights and liberties will be respected by the Government of the day. Those rights and liberties are not inalienable and may be overridden by clear legislative intent.

4 Professor George Williams, *Submission 22*, p. 6

5 (1992) 176 CLR 1.

1.54 Australia is now the only remaining common law country which lacks a Bill of Rights. There is no reason to justify Australians being exposed to potential derogations of their fundamental human rights and freedoms, when the citizens of other common law countries are not.

1.55 The Democrats will continue to advocate for an Australian Charter of Rights and Freedoms.

Accountability of ASIO:

1.56 This Bill seeks to vest police powers in an intelligence agency.

1.57 The Democrats are deeply concerned about the accountability implications of such an arrangement.

1.58 The powers vested in ASIO by this Bill are wide-ranging and coercive. As the Law Council of Australia states, it is imperative that such powers 'only be exercised under Executive authority and under proper accountability mechanisms'.⁶

1.59 A recent finding by American judges reinforces the need for such accountability. It was found that the United States Justice Department supplied false information with respect to more than 75 applications for search warrants and telecommunications intercepts relating to terrorist suspects.⁷

1.60 In order to guard against similar misuse of powers under this Bill, it is essential that rigorous accountability mechanisms be put in place. However, the level of accountability required would be inconsistent with the intelligence functions of ASIO. As argued by Professor Williams, 'it would be difficult, if not impossible, for ASIO both to be sufficiently secretive to adequately fulfil its primary mission, as well as to be sufficiently open to scrutiny to exercise the powers set out in the ASIO Bill'.⁸

1.61 The Democrats note with interest suggestions it would be more appropriate to invest such powers in the Australian Federal Police ('AFP') or, alternatively, the Australian Crime Commission ('ACC'). We are sympathetic to such arguments, particularly given the rigorous accountability regime which already exists in relation to AFP officers. However, we believe that simply transferring these powers to the AFP, or the ACC, would fail to address the many other concerns associated with this Bill.

6 Law Council of Australia, *Submission 299*, p. 3.

7 T Kelly, 'Court Reveals FBI Deceit', *Sun Herald*, 25 August 2002.

8 Professor George Williams, 'One Year On: Australia's legal response to September 11', (2002) 27(5) *Alternative Law Journal* 212.

Sunset Clause:

1.62 Given that this Bill represents a radical departure from fundamental rights and freedoms within Australia, and this departure is said to be necessary in order to address the present threat of terrorism, there is a strong argument in favour of incorporating a sunset clause into the Bill.

1.63 In this respect, Australia should take guidance from the *Guidelines of the Committee of Ministers of the Council of Europe on Human Rights and the Fight Against Terrorism*. Article 15 of those Guidelines provides that any derogation from the observance and protection of human rights in an attempt to address the threat of terrorism should be limited 'to the extent strictly required by the exigencies of the situation, as well as within the limits and under the conditions fixed by international law'.

1.64 In contrast, this Bill will permanently abrogate a number of fundamental rights and freedoms and the Government has failed to demonstrate that such measures are required at all, even on a temporary basis.

1.65 The Democrats support the Committee's recommendation that a sunset clause be incorporated into the Bill.

Conclusion:

1.66 With specific reference to Article 6 of General Assembly Resolution 56/160, the Democrats hold the view that this Bill is neither 'necessary' nor 'effective', nor does it accord with 'the relevant provisions of international law, including international human rights standards'.

1.67 We concur with Professor George Williams that, despite the substantial amendments which have been made to the Bill, it 'remains rotten at its core'.

1.68 Accordingly, the Democrats support the call of the many individuals and organisations that have urged the Parliament to oppose this Bill.

Senator Brian Greig