The Parliament of the Commonwealth of Australia

Senate Legal and Constitutional Legislation Committee

Consideration of Legislation Referred to the Committee

Provisions of the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002

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Secretariat

Mr Peter Hallahan	Secretary
Mr Noel Gregory	Principal Research Officer
Ms Louise Gell	Principal Research Officer
Mr Anthony Marinac	Principal Research Officer
Ms Michelle Lowe	Executive Assistant

Committee contacts

Legal & Constitutional Committee
S1.108
Parliament House
CANBERRA ACT 2600

Telephone: (02) 6277 3560
Fax: (02) 6277 5794
E-mail: legcon.sen@aph.gov.au
Internet: www.aph.gov.au/senate_legal

TABLE OF CONTENTS

MEMBERS OF THE LEGISLATION COMMITTEE iii

REPORT 1

Background 1

Constitutional issues...2

Can the executive authorise the detention of someone who is not a suspect for the purpose of questioning? 3

Is the issuing of questioning warrants by magistrates an exercise of executive power that is incompatible with their role as judicial officers? 4

Powers proposed in the Bill 4

Conclusion..6

DISSENTING REPORT OF SENATOR GREIG ON BEHALF OF THE AUSTRALIAN DEMOCRATS 9

REPORT BY SENATOR COONEY AND SENATOR BROWN................11

REPORT

Background

1.1 On 21 March 2002, the Senate referred the provisions of the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 (the ASIO Bill) to the Committee for inquiry and report by 3 May 2002.

1.2 On the same day, the House of Representatives resolved that the same Bill be referred to the Parliamentary Joint Committee on ASIO, ASIS and DSD (the PJC) for consideration and an advisory report, also by 3 May 2002.

1.3 The reporting dates for both Committees were subsequently extended. The PJC presented its report on 5 June. The Legal and Constitutional Committee tabled an interim report on 3 May, advising that it had agreed to complete its inquiry after the PJC had tabled its report.

1.4 The reference of the same Bill simultaneously to both Committees placed this Committee in a somewhat difficult position. On one hand, the Committee has an obligation to report to the Senate on the matter. On the other hand, the Committee recognises the inherent difficulties involved in two Committees investigating the same matter or one Committee commenting on another Committee's current work.

1.5 The Committee recognises that the two Committees have different roles. In matters concerning security operations, particularly relating to the security and intelligence organisations such as ASIO, inquiries are most appropriately undertaken by the PJC.

1.6 On legal and constitutional matters contained in legislation, consideration of which is this Committee's role, the Committee has noted the attention given to those issues by the PJC. The Committee took a conscious decision that it would not adjudicate on the PJC's report. However, the Committee has a number of additional observations that it wishes to make.

1.7 While the Committee did not actively pursue the reference for the reasons outlined, it did receive information from a number of sources on the matter. These included:

- several witnesses who gave evidence and made submissions during the Committee's consideration of the Security Legislation Amendment (Terrorism) Bill 2002 [No. 2] and related Bills commented on the ASIO Bill;
- correspondence received by the Committee; and
- individual members of the Committee have also continued to receive expressions of concern and representations from community groups, including further representations from the Islamic community in Australia.

1.8 For these reasons, the Committee has decided that it is appropriate to place the information it has received on the record in this short report, to identify important issues of concern and to make some observations as far as it is possible to do so without a further public inquiry process.

1.9 During the Committee's recent inquiry into the Security Legislation Amendment (Terrorism) Bill 2002 [No. 2] and related Bills, the Director-General of Security, Mr Dennis Richardson, advised the Committee that the tragic events of 11 September 2001 represented a profound shift in international terrorism and had heightened the level of threat against Australia.[1] Mr Richardson gave evidence that the existing legislative framework was inadequate to deter and seek to prevent terrorism. Similar views were expressed by the Australian Federal Police (AFP). The Committee noted that Australia has signed various international treaties that seek to address terrorism and that United Nations Security Council Resolution 1373 adopted on 28 September 2001 indicated a worldwide determination to prevent acts of terrorism and punish those who commit them.[2] The Committee accepted that new legislation to achieve a comprehensive approach to dealing with terrorism was justified.[3]

1.10 The information and representations received by the Committee have focussed on two key areas:

- constitutional issues; and
- powers proposed in the Bill.

Constitutional issues

1.11 Two constitutional issues were brought to the Committee's attention. These issues were:

- the constitutionality of the Executive authorising the detention of a person who is not a suspect; and
- whether the issuing by magistrates of warrants for questioning of an individual is an exercise of executive power that is incompatible with their role as judicial officers.

1.12 The first of these issues was brought to the Committee's attention in correspondence received from Professor George Williams, Faculty of Law at the University of New South Wales, and by Dr Greg Carne of the Faculty of Law at the University of Tasmania in his correspondence of 6 June 2002. Professor Williams also raised this issue with the PJC (in *Submission 148* and in evidence), as did the Law Council (*Submission 147*, p. 11) and Mr Joo-Cheong Tham (*Submission 133*, pp. 15-18).

1.13 The second issue was also brought to the Committee's attention by Professor George Williams and by Dr Carne.

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1 See Senate Legal and Constitutional Legislation Committee *Report on the Consideration of Legislation Referred to the Committee: the Security Legislation Amendment (Terrorism) Bill 2002 [No. 2] and Related Bills*, May 2002, pp. 23-25.

2 ibid, pp. 28-29.

3 ibid, p. 29.

Can the executive authorise the detention of someone who is not a suspect for the purpose of questioning?

1.14 In their correspondence to the Committee, Professor Williams and Dr Carne contended that the High Court's comments in *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 raised doubts about the administrative power to detain Australian citizens not involved in or suspected of a criminal offence, save in a relatively limited set of identified and exceptional circumstances. In that case, Brennan, Deane and Dawson JJ indicated that the power to detain citizens in custody was, with some qualifications, essentially punitive and therefore existed only as an incident of the judicial function of adjudging and punishing guilt. On this basis, according to Professor Williams and Dr Carne, the Bill's grant to AAT members of power to issue questioning warrants constituted the invalid vesting of judicial power in the Executive.

1.15 The Committee noted that the Attorney-General's Department had submitted to the PJC that the detention authorised by the Bill could reasonably be regarded as not punitive in character and the conferral of that power on the Executive was therefore valid.[4] While the PJC did not specifically discuss this issue in its conclusions, their recommendations are consistent with a rejection of those arguments.[5]

1.16 Because of the concerns that had been raised with this Committee, the Committee sought further advice from the Attorney-General's Department as to its reasons for reaching the conclusion that the detention would be held to be valid. In correspondence to the Committee dated 12 June 2002, the Department advised:

> The test for determining whether or not a warrant is punitive in nature is whether the power to detain is 'reasonably capable of being seen as necessary for a legitimate non-punitive objective'. Whether detention is punitive is a matter of substance and not form … The express purpose of the Bill and the process of detention specified in the Bill indicate that the detention is for a 'legitimate non-punitive objective'. The express purpose of the bill is to gather intelligence regarding serious terrorism offences … not to criminally punish those detained. In addition, there is a specific process which includes a number of safeguards that must be followed when seeking to detain a person under a warrant.

1.17 The Department noted that those safeguards included the short period of detention under the warrant; the need to obtain further warrants to extend the detention and the safeguards in that process; the rights and protections accorded to detained persons, such as the provision of an interpreter if necessary and the statutory obligation for humane treatment; and the obligation to desist action where the grounds for the issue of the warrant have ceased to exist.

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4 *Submission 167* to the PJC.

5 PJC *An advisory report on the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002*, May 2002, p. 19.

Is the issuing of questioning warrants by magistrates an exercise of executive power that is incompatible with their role as judicial officers?

1.18 The second concern raised by Professor Williams and Dr Carne was that if the issue of questioning warrants is an exercise of executive or administrative power, it may not be compatible with the role of judicial officers, that is, it may not be conferred on magistrates, even if they are acting in their personal capacity as specially designated officers.

1.19 This matter was considered by the High Court in *Grollo v Palmer* (1995) 184 CLR 348 in relation to the power in the *Telecommunications (Interception) Act 1979* to authorise specially designated judges to issue telecommunications interception warrants. In that case, the majority noted that the issue of telecommunications interception warrants was an administrative function. They also said that the power to confer non-judicial functions on a judge acting in his or her personal capacity (that is, as a designated person) was subject to the condition that no function could be conferred that was incompatible with either the performance of his or her judicial function or with the proper discharge by the judiciary of its responsibilities as an institution exercising judicial power. The court held that the function of issuing telecommunications warrants was not incompatible with the performance of those functions or the proper discharge of those responsibilities, so the Act was valid.

1.20 The Committee notes that the PJC's recommendation that only Federal magistrates and Federal Court judges should be able to issue warrants is consistent with the argument that the issue of questioning warrants is a judicial function, which cannot be exercised by the Executive. The matters discussed in *Grollo v Palmer* do not arise if that is the case. However, the PJC also recommended that the Bill be amended to include a provision to allow the Attorney-General to appoint, by way of regulation, another 'authority' which could issue warrants. The Committee notes that the recommendation does not specify that this authority should be judicial.

1.21 In summary, the Committee notes the concerns of Professor Williams and Dr Carne about some fundamental constitutional questions and the further response of the Attorney-General's Department to those matters. The Committee considers that if the PJC's recommendation that warrants for detention be issued only by federal magistrates and Federal Court judges is adopted by the Government, such amendments will go a considerable way towards addressing the concerns about the validity of the current Bill.

Powers proposed in the Bill

1.22 Under the Australian legal system, people can ordinarily only be detained if they are arrested on suspicion of an offence for which procedure by way of summons would not be practicable. Unless charged with an offence, they cannot be detained more than a few hours and must be allowed to communicate with a friend and/or lawyer. They cannot be compelled to answer questions.

1.23 The proposal in the Bill represents a significant departure from traditional arrangements:

- a person may be detained for purposes of questioning without the person being suspected of having committed or being involved in planning an offence;
- a person may be held for questioning for up to 48 hours;
- the period of detention may be extended if certain grounds are satisfied, with no maximum period of detention specified;
- there is no right to silence;
- the privilege of refusing to answer on the grounds of self-incrimination does not apply; and
- there is no right to legal representation.

1.24 In addition, ASIO for the first time would have the power to bring about detention.

1.25 Before the PJC, the Law Council of Australia argued that the abrogation of a right to silence and legal representation was unacceptable.[6] Mr Joo-Cheong Tham also criticised the lack of effective access to legal advice. The PJC recommended that there should be provision for representation of persons subject to warrants by persons listed on panels of security-cleared senior lawyers nominated by the Law Council of Australia. It also recommended provision for protection against self-incrimination.

1.26 Dr Carne pointed out to the PJC that the Bill separates the concepts of 'detention' and 'custody' so that a person might in fact be held for longer than the 48 hours permitted under a warrant because the 48 hours did not commence until the person was first interrogated. The PJC recommended that a person held under a warrant be 'immediately' brought before a prescribed authority.

1.27 Dr Carne also suggested to the PJC and to this Committee that the current Bill be replaced by the inclusion in the Criminal Code of new offences of knowingly failing to disclose information likely to assist in prevention of an imminent terrorist attack and of providing information to a terrorist, thereby alerting them of, or otherwise compromising, an investigation. Warrants for the offences could only be issued by a Federal Court judge on suspicion of an offence and if the person has previously declined an opportunity to provide the information in a non-custodial situation and if other legal means have been tried to obtain the intelligence.

1.28 Professor Williams submitted to the PJC that the detention powers available to police were accompanied by accountability and transparency provisions which prevented the abuse of those powers. He further noted that such provisions could not be readily applied to ASIO. He stated that 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 as would be necessary for it to exercise the powers set out in the ASIO Bill.

1.29 Professor Williams argued to this Committee in his letter of 6 June 2002 that the PJC's report left open the matter of whether ASIO is an appropriate body to be given the law

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6 Dr Carne argued that persons interrogated under the Bill would have fewer rights than those arrested for the most awful crimes, including terrorism itself. For instance, they would have no right to silence or to legal representation. He suggested that, as a result, warrants under the Bill might become the authorities' preferred method of detaining people suspected of committing terrorist offences.

enforcement function of questioning persons in detention and noted the problems in subjecting ASIO officers (whose identities are secret) to adequate scrutiny.

1.30 Similar evidence was given to this Committee during its recent inquiry into the provisions of the Criminal Code Amendment (Espionage and Related Offences) Bill 2002. The Hon. Justice Dowd, representing the International Commission of Jurists, stated:

> We as Australians … ought not lightly to give to people, since we do not give it to policemen, the power to detain, in effect, for questioning or because someone is a witness or may have information. […] There is no justification because of what happened on September 11 or because of the events since then to give a spy organisation powers such as this …[7]

1.31 The powers of initiating custody and controlling release from custody, are powers that police would expect to exercise under other forms of detention. The Committee therefore agrees that the Bill gives ASIO important police-like powers.

1.32 The Committee notes also the mechanisms for scrutiny of ASIO's actions contained in the Bill, as referred to by the Attorney-General in his second reading speech. They include the right of a detained person to communicate with the Inspector-General of Intelligence and Security in relation to the conduct of ASIO; the need for the Attorney-General's consent before ASIO may seek a warrant for detention and questioning; and the need for ASIO to report to the Attorney-General on all warrants issued under the provisions. In addition, the PJC has recommended the development of protocols governing custody, detention and interviews.[8]

Conclusion

1.33 The Committee agrees that the new powers proposed in the Bill represent a fundamental and serious change to the cultural approach to law enforcement. This change is viewed with concern by many in the community.

1.34 In its previous report on the Security Legislation Amendment (Terrorism) Bill 2002 [No. 2] and related Bills, the Committee noted the concerns about possible adverse effects on particular groups within the Australian community. As in the case of that package of bills, the Committee considers that there is no intention that the ASIO Bill should have any adverse impact on particular communities, but notes the concerns that have been expressed.

1.35 The Committee finds itself in agreement with the view expressed by the PJC:

> The Bill is one of the most controversial pieces of legislation considered by the Parliament in recent times…The Committee has been confronted with the challenging task of balancing the proposals in the Bill with the need to ensure that the civil liberties and rights under the law that Australia provides as a modern democracy are not compromised. The Bill, in its original form, would undermine

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7 Senate Legal and Constitutional Legislation Committee *Transcript of Evidence*, 8 April 2002, p.1.

8 PJC *An advisory report on the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002*, Chapter 3, Recommendations 6-8.

> key legal rights and erode the civil liberties that make Australia a leading democracy.[9]

1.36 The Committee notes that the PJC has dealt with the issue of the wider powers in the Bill by recommending the development before commencement of the Bill and in consultation with the Inspector-General of Intelligence and Security, the AFP and the AAT, of protocols governing custody, detention and the interview process.

1.37 The Committee notes that the Government is yet to respond to the PJC's report and recommendations.

1.38 In the event that the Government accepts all the PJC's recommendations, the Committee recommends that the Bill, as amended, proceed without further review by this Committee. In the event that the recommendations are not adopted, the Committee reserves the right to revisit its consideration of this Bill.

Senator Marise Payne

Chair

9 ibid, p. vii.

DISSENTING REPORT OF SENATOR GREIG ON BEHALF OF THE AUSTRALIAN DEMOCRATS

The Australian Democrats share the view that this Bill as introduced would erode key legal rights and undermine civil liberties. It is deeply flawed.

However, we do not share the Committee's view that the Bill should proceed if the Government accepts the PJC's recommendations. We do believe that the PJC's recommendations, if adopted, would significantly improve the Bill. The Report was critical and comprehensive.

However, the shortcomings of the PJC's recommendation have not been fully explored.

Under the PJC recommendations ASIO would still be empowered to detain a person incommunicado for seven days even if that person was not suspected of committing an offence. Empowering ASIO to 'disappear' a person for up to a week is an extraordinary departure from established legal principles.

Furthermore, it should be noted that the Government is yet to resolve problems in the Security Legislation Amendment (Terrorism) Bill [No. 2] and related bills. No amendments have been released for public scrutiny.

The ASIO Legislation Amendment (Terrorism) Bill rests on the shaky foundations provided by these security bills. In its current form, the definition of terrorist act is extremely broad and could cover a range of legitimate activities such as public protests. The powers in this Bill stem from ASIO's intelligence gathering role in relation to terrorism. Given the exceptionally wide definition of terrorism that is currently proposed, the mandate of ASIO and the circumstances in which it could exercise its powers under this legislation would be far too broad.

The Australian Democrats do not believe that the Government has offered any valid justification for the powers it is seeking under this legislation. We have recommended elsewhere that the Government redraft its package of counter-terrorism bills to strike an appropriate balance between the security imperative and the need to preserve civil liberties.

Senator Greig

REPORT BY SENATOR COONEY AND SENATOR BROWN

The Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 marks a sharp fall in the quality of our civil life and of our democratic system. Any present or potential danger it seeks to counter should be met in ways akin to those now operating within our current law enforcement regimen.

In proposing any new legislation the onus is on the proponents to justify why change is needed. This should always be the case, but especially when the proposed changes represents a fundamental change to our civil and democratic rights.

The main proposition in the Bill would be such a change. The bill proposes that people, not reasonably suspected of committing a crime, should be deprived of their liberty. This is a fundamental shift away from principles that in some respects date back to the *Magna Carta*. No one should be imprisoned or detained unless they have a committed a crime or a case can be shown on reasonable grounds that they might have.

There is a little evidence, at least of a public nature, to show the extreme measures provided for in the Bill are needed. There appears an unwillingness on the part of the government and authorities to advance hard and testable evidence which would enable us to assess the need for such a radical change. Nor do they meet the argument that for a community to be free and democratic it must take the risk that some within it will pervert that freedom and democracy.

Government is forever in search of more and more coercive powers. The promise of law and order has become the staple fare of political campaigns. This creates the danger of diminishing the rights and liberties appropriate to people living in the sort of society we all claim we want. The laws we introduce take from our society the very attributes we declare we most treasure.

There is little attempt in this legislation to accommodate the situation in which vulnerable people may be placed when taken into custody. For example there is no provision made for indigenous people in the way there is under Section 23 C (Period of arrest) of the Commonwealth Crimes Act 1914.

In October 1982 Mr Justice King, Chief Justice of South Australia told the Criminal Investigation Bureau of his State:

> "I emphasise the need for retaining a proper sense of perspective and proportion because anti-crime zeal can easily degenerate into hysteria and bring in its train greater evils than those which it aims to cure. Crime to a great extent is a by-product of liberty. Wherever men and women are free, a proportion of them will misuse their freedom. Probably the crime rate could be considerably reduced by curtailment of the citizen's freedom of expression and action. The price would surely be too high. Rules of law which protect the citizen against arbitrary arrest and detention, against unfair treatment while in police custody, and which protect his home against arbitrary invasion by persons in authority, must be maintained. Any reduction in the crime rate purchased at the cost of the loss or curtailment of genuine civil liberties would be purchased at too high a price."

On the 28th July 1983 Mr Frank Vincent QC, as he then was, made the following statement at the Crimes Commission Conference held in the Senate Chamber in the old Parliament House.

> "This and every other community have suffered from crime, organised and disorganised, throughout their entire histories. Yet, we are being subject at the present time to an amazing amount of propaganda which has been introduced in the media in the form of assertion, all of which are likely to engender considerable fear and apprehension in an already fearful community."

No law now operating in Australia enables the authorities to take people into custody solely to gather intelligence from them. Proposed section 34D of the Australian Security Intelligence Organisation Act 1979 is exceptional. The person is detained not because he or she has committed an offence, or, is under reasonable, or indeed any sort of suspicion, of having done so. He or she is confined because "the prescribed authority is satisfied that there are reasonable grounds for believing that a warrant will substantially assist the collections of intelligence….." . This prejudices the worth of our human rights.

This is radical legislation. It takes away a number of those attributes we have until now held as citizens. They include the ability to walk abroad, confident that we will not be taken into custody without having committed a crime or without having fallen under reasonable suspicion of having done so; the ability to have access to a lawyer of our own choosing when detained; the ability at all times to tell our family our friends our employers and our associates where we are and under what circumstances; our ability as parents to know where

the authorities hold our children; the ability for us to attend our own doctors and dentists whenever we are in urgent need of them.

The appropriate course to take with this legislation is to dispense with it.

Senator Cooney Senator Brown