



SENATE LEGAL AND CONSTITUTIONAL COMMITTEE

Inquiry into the provisions of the Anti-terrorism Bill 2004

The Senate Legal and Constitutional Legislation Committee (the Committee) has advised that it is inquiring into the provisions of the *Anti-terrorism Bill 2004* (the Bill).

2. The Anti-Terrorism Bill 2004 seeks to improve Australia's counter-terrorism legal framework by making amendments to:

- Part 1C of the *Crimes Act 1914* to extend the fixed investigation period applying to federal terrorism offences to a maximum of 20 hours if judicially authorised subject to all existing procedural safeguards in Part 1C, and to permit authorities to reasonably suspend or delay questioning of a person arrested for a terrorism offence to make inquiries in overseas locations that are in different time zones to obtain information relevant to that terrorism investigation;
- The *Crimes (Foreign Incursions and Recruitment) Act 1978* to enhance the foreign incursions offences, particularly in situations where terrorist organisations are operating as part of the armed forces of a state;
- The *Criminal Code Act 1995* to strengthen the counter-terrorism legislation relating to membership of terrorist organisations and the offence of providing training to or receiving training from a terrorist organisation; and
- The *Proceeds of Crime Act 2002* to improve restrictions on any commercial exploitation by a person who has committed foreign indictable offences.

Aim of this Submission

3. The AFP supports all the provisions of the Bill. In particular, the AFP Submission illustrates for the Committee the operational impediments surrounding the current investigation period available for terrorism offences. The Submission details that an appropriate investigation period with sufficient ‘dead time’ provisions for the investigation of terrorism offences is necessary in order to maintain a minimum effectiveness in terrorist investigations. The AFP analysis is based on its experience assisting the Indonesian National Police (INP) to investigate the Bali Bombings and other current matters.

4. A reasonable investigation period comprising up to 24 hours questioning time with adequate ‘dead time’ categories should be a minimum for the investigation of a terrorism offence in order that Australian law enforcement officers may:

- conduct thorough interviews with terrorist suspects in which all information is appropriately analysed and presented to a suspect; and
- secure evidence before it can be destroyed to support a successful prosecution; and
- prevent further possible attacks; and
- compile evidence which is sufficiently comprehensive to present all relevant and available facts as they relate to bail, or importantly, to eliminate persons from further inquiries.

5. It is essential that the Commonwealth provisions allow for appropriate ‘dead time’ provisions in order for the AFP to adequately:

- collate relevant information, including post bomb blast analysis, crime scene forensic information, overseas information regarding suspects, associates, information regarding other bombings (eg, to query instances where similar *modus operandi* was deployed);
- translate potentially voluminous information (and replies where required) from domestic and overseas inquiries;
- relay information to overseas jurisdictions;
- permit decryption of encoded messages;
- receive and analyse responses; and
- prepare the presentation of questions to suspects, or for follow-up inquiries.

Role of the Australian Federal Police

6. An enduring security environment in which the Australian government and its agencies seek to manage and mitigate the risk of terrorism in Australia and to Australian interests is a culmination of the events of September 11 and the Bali attack. The AFP plays an important role in identifying security threats, preventing terrorist related crime, responding to incidents of terrorism in the region and investigating terrorism and related offences in the *Criminal Code*.

7. The AFP is the primary Commonwealth law enforcement agency and the chief source of advice to the Commonwealth Government on policing issues in Australia. Its role is to enforce Commonwealth criminal law, protect Commonwealth and national interests from crime in Australia and overseas, and provide a secure and safe environment in the Australian Capital Territory (ACT) and external territories. The AFP is also Australia's international law enforcement and policing representative.

8. The AFP's functions are set out in section 8 of the *Australian Federal Police Act 1979*. The way in which these functions are pursued may be refined by Ministerial Directions, which essentially outline the Government's priorities and expectations for the AFP.

9. The current Direction states that the AFP will pursue (in part) the following outcomes:

- that criminal activity is deterred in areas impacting on the Commonwealth Government's interests;
- that those individuals and interests identified by the Commonwealth Government or the AFP as being at risk are kept safe and secure as a result of AFP protective services;
- that policing activity creates a safer and more secure environment in the ACT, Jervis Bay and Australia's external territories;
- that the Commonwealth Government contributes effectively to international law enforcement interests; and
- that community confidence in the honesty, effectiveness and accountability of the AFP is high.

10. Given this breadth of function, the AFP occupies a unique position in the Australian criminal justice environment as an agency with an international, national and community policing role.

Part IC *Crimes Act 1914* – extension of the investigation period

11. The AFP welcomes the opportunity to comment on the Bill and to provide the Committee with information regarding law enforcement and related issues relevant to the proposal to extend the questioning period available during the investigation of Commonwealth terrorism offences.

12. The proposed Commonwealth regime respects the existing framework set out in the *Crimes Act 1914* with its attendant safeguards and accountabilities, proposes to extend the questioning period available for terrorism offences for up to 24 hours, and to provide for additional categories of 'dead time' provisions to ensure that the necessary time and flexibility are available to deal with complex inquiries. Notably, it is proposed

that the Commonwealth regime be supervised by the judiciary who will be empowered to determine the period of extended questioning time on application by law enforcement.

13. Part IC of the *Crimes Act 1914* contains a number of important safeguards regulating police investigations of Commonwealth offences. Two key constraints frame law enforcement activities during the investigation of offences.

(i) Investigation period

The ‘investigation period’ prescribes a fixed time during which police may question arrested suspects in relation to all federal offences, including terrorism offences.

The ‘investigation period’ under section 23C of the *Crimes Act 1914* is prescribed by a fixed time of 4 hours, with possible extensions of up to 8 hours under section 23D (Total investigation period = 12 hours, plus dead time).

The AFP’s operational experience is that this strict ‘cap’ prevents sufficiently comprehensive terrorism investigations. The Bill proposes that the investigation period be extended for terrorism offences so that police officers may apply to a judicial officer for extensions of the questioning period up to an additional 20 hours. (Total investigation period = 4 hours, plus 20 hours maximum, plus dead time). An extended investigation period would enhance law enforcement capacity to respond appropriately and comprehensively to terrorism offences under investigation. Importantly, in some cases the extended period may lead to the acquisition of information that results in the early elimination of a suspect from further inquiries.

(ii) Dead time

‘Dead time’ categories exist under current provisions in the *Crimes Act 1914*. The categories are excluded from the calculation of the investigation period and are intended to ensure that important procedures are carried out. The effect is to guarantee that an interview is conducted effectively and that rights and protections are afforded to an interviewee.

A problem related to the inappropriately restrictive ‘cap’ for terrorism offences concerns the operation of the ‘dead time’ provisions for terrorism investigations.

AFP operational experience has resulted in serious concerns about the practicality of using only the existing ‘dead time’ provisions for terrorism investigations. It is likely that during terrorism investigations, halting the questioning of an arrested suspect will be necessary so that investigators can obtain relevant information from authorities overseas. It may be that because of the difference in time zones, authorities in foreign countries are not able to immediately assist Australian authorities with their inquiries. The Bill proposes a ‘dead time’ category to take account of the difference in time zones which the AFP supports. Other ‘dead

time' categories are required to ensure that the AFP can conduct effective interviews.

14. Terrorist organisations are transient and their membership and support networks (including communications) are spread throughout the world. The joint Indonesian National Police and AFP investigation into the Bali bombings demonstrated that effective investigations required a number of interviews with numerous suspects in various locations. Relevant information needed to be obtained through Australian-based and international inquiries.

15. The existing questioning period and current 'dead time' provisions provided under the *Crimes Act 1914* would have been inadequate had a terrorist incident occurred in Australia, or had Australian authorities located a suspect or suspects in the first couple of days following the Bali attack. This is largely due to the complexity and global nature of terrorist networking and the reliance on information from overseas sources to guide and influence the direction and outcomes of an investigation.

16. As mentioned above, a reasonable investigation period with appropriate 'dead time' categories would be a minimum requirement if investigators are to:

- conduct thorough interviews with terrorist suspects in which all information is appropriately analysed and presented to a suspect; and
- secure evidence before it can be destroyed to support a successful prosecution; and
- prevent further possible attacks; and
- compile evidence which is sufficiently comprehensive to present all relevant and available facts as they relate to bail, or importantly, to eliminate persons from further inquiries.

17. Law enforcement officers exercising powers in other Australian jurisdictions have access to questioning periods of longer duration than that which currently applies to investigations into Commonwealth offences. For example, under section 464A of the Victorian *Crimes Act 1958*, an investigating official may, within a reasonable time, question the person or carry out investigations in which the person participates in order to determine the involvement (if any) of the person in an offence. The Northern Territory and Tasmania have similar 'reasonable time' provisions.

18. The States and Territory have consistently advised the AFP that the 'reasonable time' model is more operationally effective and sufficiently flexible for the investigation of terrorism. The States and Territories have demonstrated that their questioning regimes ensure that police can make all the necessary inquiries and gather all the relevant information from sources such as crime scenes and other witnesses to inform the interview. The net effect is that investigators have an increased likelihood of a successful interview.

19. The period of time for the investigation period under a specific reasonable time provisions in the State and Territory jurisdictions is not definitive but is governed by what is reasonable in all the circumstances. This is guided by consideration of a number of factors based on the categories in Commonwealth ‘dead time’ provisions but more extensive so as to include:

- the number and complexity of offences to be investigated;
- any need to read and collate relevant material or to take any other steps that are reasonably necessary by way of preparation for the questioning or investigation;
- the number of other people who need to be questioned during the period of custody in respect of the offence for which the person is in custody;
- any need to visit the place where the offence is believed to have been committed or any other place reasonably connected with the investigation of the offence;
- any other matters reasonably connected with the investigation of the offence.

20. The ‘reasonable time’ model of Victoria, Northern Territory and Tasmania recognises the complexity and cross-jurisdictional nature of serious offences. The complexity and associated jurisdictional impediments experienced during a terrorism investigation are immeasurable. For this reason, the investigation framework under Commonwealth legislation for the investigation of terrorism offences must be reasonable in all the circumstances to allow investigators to conduct interviews thoroughly and effectively.

21. An investigation period of up to 24 hours with adequate ‘dead time’ categories would be analogous to the ‘reasonable time’ model of the other jurisdictions and should be a minimum for the investigation of a terrorism offence.

22. The proposed Commonwealth regime needs to be sufficiently flexible like that of the States and Territories, and similarly reasonable in all the circumstances. Models in the State and Territory jurisdictions achieve this balance through specific legislative provisions for reasonable time. The proposed Commonwealth regime will achieve this balance by respecting the existing framework set out in the *Crimes Act 1914* with its attendant safeguards and accountabilities, extending the questioning period available for terrorism offences, and providing ‘dead time’ provisions to ensure that the necessary time and flexibility are available.

23. The proposed Commonwealth interview period of up to 24 hours would comprise time for questions and answers and production of exhibits – all of which is exacerbated if an interpreter has to translate the information and the exhibits. It is appropriate that the Commonwealth regime be supervised by the judiciary who will be empowered to determine the period of extended questioning time on application by law enforcement.

24. It is essential that the Commonwealth provisions allow for appropriate ‘dead time’ provisions in order for the AFP to adequately:

- collate relevant information, including post bomb blast analysis, crime scene forensic information, overseas information regarding suspects, associates, information regarding other bombings (eg, to query instances where similar *modus operandi* was deployed);
- translate potentially voluminous information (and replies where required) from domestic and overseas inquiries;
- relay information to overseas jurisdictions;
- permit decryption of encoded messages;
- receive and analyse responses; and
- prepare the presentation of questions to suspects, or for follow-up inquiries.

25. The AFP may be starting from scratch should a terrorist incident occurs. AFP interviews of politically motivated criminals such as alleged terrorists generally rely less on the pre-obtained evidence trail (like fraud) and more on the admissions of offenders during interviews and the carefully explored and clarified issues of intent and motive. Possible defences raised during an interview are not easily discounted without access to lengthy inquiry processes often involving overseas inquiries and the need for cultural analysis.

26. Terrorism will almost always have an offshore reach. The vagaries experienced by the AFP in getting evidence that is obtained offshore in admissible form for the purpose of Australian proceedings means that investigators must ensure that any interviews conducted are well-informed, thorough and effective. Securing a prosecution of a terrorist suspect may hinge on the effectiveness of the interview.

27. Operational considerations (outlined in Annexure A) illustrate for the Committee the processes that the AFP may engage if a terrorist incident occurred in Australia, or overseas where Australians are involved or Australian assistance is required. The scenario illustrates the complexity and time consuming nature of a terrorism investigation.

Reasonable investigation period

28. Law enforcement's immediate objectives are to secure whatever information is available in order to prevent further possible attacks and to locate offenders and evidence. These are incentives for federal agents to expedite the information gathering and interviewing processes and ensure that there are no unnecessary delays.

29. Simultaneous to the interviewing of terrorist suspects, law enforcement and other authorities are driven to expedite the interview process in order to save lives and treat victims, eliminate the threat of other incidents, identify and prosecute suspects, and prevent terrorist incidents in future. This counters any misconceptions that police would delay the interview process because exhaustive 'dead time' provisions would give them no incentive to conduct the interview with speed.

30. Information obtained in the early stages of an investigation may be complex, require translation, or be voluminous (members of terrorist organisations may have been involved in planning, training and support activities for many years). It is important that the questioning period with appropriate 'dead time' provisions allow sufficient time for investigators to receive, translate, and analyse information for the purpose of presenting it to the interviewee for explanation and follow up inquiries where required.

31. Time zones pose challenges to effective interviews. 'Dead time' provisions are required to account for the time differences between relevant countries and Australia, and in the case of Australian inquiries, between Australian and the recipient country overseas. The AFP supports proposed 'dead time' provisions in the Bill to take account of the time zones involved with international inquiries.

32. If a terrorist incident were to occur in Australia, overseas authorities assisting the investigation may have to start inquiries from scratch when first presented a suspect's name. Australian legislation would require provisions that enable the receiving country to go through the initial identification process (see the points under inquiries in Annexure A).

33. Overseas inquiries to establish facts and the suspect's profile as well as identify links to the crime are likely to require as much time internationally as they do in Australia. Many hours may elapse before information from overseas authorities is received in Australia. This is a realistic estimate and would be problematic for the interview of a terrorist suspect if appropriate provisions for 'dead time' are not available.

34. Although the speed at which overseas inquiries are facilitated by foreign sources are generally out of the AFP's control, terrorism related inquiries are likely to be the highest priority for most foreign law enforcement agencies around the world. The AFP would use its International Liaison Officer Network, Interpol, and appropriate peak bodies to prioritise overseas inquiries and expedite the process wherever possible.

Safeguards

35. Potential criticism about the nature of extending the investigation period and categories for 'dead time' would be unfounded in practice because existing safeguards in Part IC of the *Crimes Act* would apply as well as the additional safeguards set out in the Australasian Police Ministers' Council (APMC) Standard Guidelines for Police Custodial Facilities.

36. It is proposed to apply the 'dead time' provisions that currently exist for the investigation of non-terrorism offences to extended investigation period for a terrorism offence. These 'dead time' provisions are intended to ensure that aspects of detention that relate to the suspect's well-being are adequately guaranteed and disregard the time taken for a suspect to (among other things): undergo a prescribed procedure (eg, x-ray to determine age) or a forensic procedure; rest and recuperate; exercise their rights (eg, contact a legal practitioner); and to receive medical attention.

37. The *Crimes Act 1914* sets out suspects' rights to communicate with a legal practitioner, friend or relative (section 23G), an interpreter (section 23N), and a consular office (section 23P). Suspects are also entitled to a copy of recorded interviews (section 23U). These rights will continue to be afforded to suspects under the proposed extended period of questioning and during 'dead time'.

38. The APMC Guidelines expand these safeguards further. The Guidelines have been in place since 1993 and impose minimum standards of care to be afforded to those in custody including but not limited to: transport, accommodation, rest, food and respect for religious practices. These safeguards would continue to apply during the duration of the extended investigation period and during application of 'dead time'.

39. Judicial discretion at the point of extending the investigation period offers further transparency and accountability at a number of points during the interview of a terrorist suspect. The AFP supports judicial involvement during the interview process (there is no limit on how many applications may be made to a Magistrate so long as the extended investigation period does not exceed 20 hours).

40. Judicial consideration of the fairness of the process in determining admissibility of the interview into evidence and possible exposure to disciplinary and criminal action would further deter abuse of this regime. Any complaints regarding process are also subject to Ombudsman review.

Conclusion

41. The AFP is aware from its operational experience to date that when a terrorist incident occurs, an effective law enforcement response is crucial for a number of reasons. It is important to assess if further attacks may be imminent and require immediate prevention. It is equally important to take urgent steps to obtain information that may assist forensic examination of the crime scene (eg, information relating to *modus operandi*), and to prevent the likelihood that criminal associates and suspects may flee or destroy evidence.

42. Securing a prosecution of a terrorist suspect will often hinge on the effectiveness of the interview. The proposed Commonwealth regime balances the need for investigators to conduct an interview effectively through access to an investigation period that is sufficiently flexible but reasonable in all the circumstances and which provides appropriate safeguards and accountabilities throughout the conduct of the interview.

Operational justification

- An effective interview is critical if the AFP is to compile a brief sufficiently comprehensive to prevent the release of a terrorist suspect on bail, when taken before a judicial officer within or at the end of the interview period. An effective interview is informed by inquiries with domestic and overseas authorities, as well as evidence gathered from other suspects, the crime scene and witnesses.
- If Australian authorities had located a suspect in Australia in the first couple of days following the Bali attack, the current investigation period would have been too short to allow a proper investigation before the person would have had to have been brought before a judicial officer, possibly resulting in their release.

Investigation often starting from scratch

- Unlike other complex offences, such as fraud, arrests for terrorism offences are likely to occur without there having been a long preliminary investigation leading to the arrest. Rather, arrests for terrorism offences are more likely to occur in the hours or days immediately after a terrorist incident. This means investigating officials may have very little information on a suspect who has been arrested and would be effectively starting from scratch in gathering information and evidence.
- Investigations that do not have the benefit of pre-obtained evidence rely more on the admissions of suspects during interviews. Any matters raised by a suspect in defence of their actions cannot be easily discounted without having to make further inquiries elsewhere, possibly overseas, about the person.

Multiple suspects being interviewed simultaneously

- Adding to the complexity of the investigation, simultaneous questioning of different suspects who have been found in different locations, possibly in different countries, may be required (the investigation into the Bali bombings demonstrated this to be the most effective way of conducting the investigation). Information from the respective interviews would need to be shared to inform the other interviews. This would eat up some of the time available for questioning during the investigation period.

Lag in gathering evidence

- Starting the process of gathering evidence from the crime scene may take a substantial period of time, because forensic examination of the crime scene is secondary to saving lives. Most forensic activity does not peak until after priority emergency activity is completed. Proper forensic examination of the crime scene and victims could realistically take a week or longer.
- Initial information may be sparse. Early assessments about the criminal activity and the identity of those responsible may not be developed until some hours (and

perhaps days) after the incident. Typically, initial information is collected at the crime scene and its vicinity. Law enforcement would require as much intelligence as possible from all relevant sources including overseas countries.

- Further, investigations into a particular person may rely on interviews of other suspects or victims injured at the crime scene who require medical treatment before being able to provide any information.

Relevant information required from overseas

- For investigations into terrorism offences, much of the information that would be required would come from overseas sources, because terrorist membership and support networks are spread throughout the world. It is also quite possible that the person arrested may not be Australian and Australian authorities may have no information to start with about the person.
- Overseas inquiries to establish facts and the suspect's profile as well as identify links to the crime are likely to require as much time internationally as they do in Australia.
- Gathering relevant information from overseas locations for the purpose of investigating a suspect's involvement in a particular offence carries a range of difficulties that affect the time available to question the suspect during the investigation period:
 - *Information is likely to be required from multiple locations*
This does not just involve the single step of one country putting out a request for information and then receiving information from those places to which it sent the requests. It may require continual communication between various locations, so that necessary information can be collected. For example, Country A may not know that particular information is relevant until it receives further information from Country B, and this link may only become apparent when the requesting country shares with Country A the information it has received from Country B.
 - *Mutual assistance*
Information obtained through mutual assistance processes assists in the admissibility of that information as evidence, but may involve further delays in obtaining that information.
 - *Large volumes of information received*
The AFP may be required to sift through and analyse large volumes of information received from overseas to be able to appropriately present it to a suspect being interviewed.
 - *Language translation*

Information received from overseas will often be in a variety of languages and require translation in compliance with translation certification thresholds. Many translators may be required and the translation of some rare dialects or language variations may pose particular challenges in terms of translator availability. Information obtained from overseas inquiries may need to be translated from the source language into English for analysis, and again into the suspect's language for questioning (where this is neither English nor the language of the country providing the information).

- *Confirmation or corroboration of information*
To meet evidentiary standards information provided by the suspect may require confirmation or corroboration through referral of the information to a particular country.
- *Time zones*
Time zones affect the time between sending a request to another country for information and the receipt of information. Overseas authorities may not know of the request until several hours after it was sent, because of differences in time zones.