

Chapter 10

CHILDREN

10.1 This chapter considers the application of the proposed detention and questioning regime to children.

The proposal

10.2 The original Bill had no age limits, meaning that children could be detained and questioned in the same way as adults. The only restriction was in relation to strip searches, which could not be carried out on children under the age of ten.

10.3 The PJCAAD described the inclusion of children in the Bill's regime as a 'major concern', particularly in that it allowed detention of a child without the parents' knowledge.¹ The PJCAAD recommended that the Bill be amended to ensure that it did not apply to people under the age of 18.²

10.4 The PJCAAD's recommendation was only partially accepted by the Government. Amendments subsequently passed by the House of Representatives mean that warrants cannot be issued in relation to a child who is under the age of 14. For those young people between 14 and 18 years of age, a higher threshold test and certain special conditions apply.

10.5 The key difference is that, unlike adults who may be detained without being suspected of involvement in any terrorism offence, a young person must be a suspect.

Grounds for issue of a warrant

10.6 The Bill provides that a warrant to detain or question a young person may be issued only if the Minister is satisfied on reasonable grounds that:

- the person is at least 14 and is likely to commit, is committing or has committed a terrorism offence (proposed subsection 34NA(4));
- the draft warrant permits the person to contact a parent or guardian, or another acceptable person (as set out in the Bill), and an approved lawyer; and
- the draft warrant authorises ASIO to question the person before a Prescribed Authority only in the presence of a parent or guardian or other approved person, and only for continuous periods of up to two hours (proposed subsections 34NA(4) and (6)). The general provisions on extension of warrants and the maximum limit of seven days' detention apply.

1 PJCAAD p. 51.

2 Recommendation 10.

10.7 A representative from the Attorney-General's Department explained that the lower limit of 14 years of age was considered appropriate because it corresponded to the age of criminal responsibility:

Children [of that age] can be charged with an offence and be considered to have sufficient maturity to know right from wrong and therefore be criminally culpable.³

10.8 The Committee notes that this age limit is reflected in the general principles of criminal responsibility in the *Criminal Code*.⁴

10.9 As noted above, a young person who is questioned must be a suspect in relation to a terrorism offence. A representative from the Attorney-General's Department explained that the Government had 'taken on board' the concerns expressed about children during the previous parliamentary committee inquiries. The aim of the provision was to impose a higher threshold for application of the regime without changing the purpose of detention and questioning:

The fundamental focus of the legislation has not changed with respect to [children]. It is still with the intention of seeking intelligence that they might have ... However, it was recognised that, given they were children, the threshold at which they would be asked to come in would be raised. So only if they were suspected of an offence or engaged in an offence would they be called in. Again, it would not be for the purpose of adducing evidence for a prosecution of them for offences; it would still be with the intention of getting the intelligence.⁵

10.10 However, Dr Carne suggested that the regime for young people:

... highlights the conceptual confusion underpinning the bill: it openly combines the disparate and irreconcilable objectives of intelligence gathering, preventative detention and criminal investigation.⁶

3 *Hansard*, 13 November 2002, p. 42. The Committee notes that no explanation for the age limit was included in the Revised Explanatory Memorandum for the Bill, or the Supplementary Explanatory Memorandum that accompanied the Schedule of Government Amendments.

4 Criminal Code, Division 7, ss 7.1 and 7.2, which specify that a child under 10 is not criminally responsible for an offence, while a child between 10 and 14 years of age can only be criminally responsible if the prosecution proves that the child knew his or her conduct was wrong. At age 14, the general principles of criminal responsibility apply.

5 *Hansard*, 13 November 2002, p. 39.

6 *Submission 24*, p. 19.

Presence of third parties

10.11 Like adults, young people have the right of access to legal advisers, as discussed in Chapter 6. However, the capacity to prohibit access to a lawyer in the first 48 hours of detention does not apply to young people.⁷

10.12 While a parent, guardian or other approved person must be present during questioning, proposed section 34V allows the Prescribed Authority to order the removal of that person if the Prescribed Authority considers that the third person's conduct is 'unduly disrupting questioning'. In such a case, the Prescribed Authority must tell the detained young person of his or her right to have another person present, and must direct that the questioning is not to proceed until a suitable person is present.

Evidence to the Committee

10.13 The Committee heard various concerns from a range of groups about the provisions relating to young people. The Public Interest Advocacy Centre argued that no justification had been offered for authorising the detention and questioning of children beyond what the current law allows (that is, the questioning of suspects prior to charge), nor did the proposed regime safeguard their interests while in detention.⁸ VCOSS⁹ and Australian Lawyers for Human Rights¹⁰ also expressed concern about detention of children and the Law Council of Australia,¹¹ the Law Institute of Victoria¹² and the Criminal Defence Lawyers Association (NSW)¹³ opposed the Bill's application to children under 18.

10.14 Mr Philip Boulten, Convenor of the Criminal Defence Lawyers Association (NSW) explained why the Association strongly opposed the application of the proposed regime to children:

Children suspected of criminal acts would normally be the subject of criminal investigations in any event. They would be given an interview by investigating police officers under normal police station conditions. If such interviews were preceded by long periods of questioning and/or detention under the provisions of the proposed bill, then the provisions that currently exist in order to protect vulnerable people, such as children, in the course of a criminal investigation would be seriously undermined ... The whole

7 The requirement that a warrant authorising a person to be taken into custody immediately must permit him or her to contact an approved lawyer at any time (proposed subsection 34C(3B)) may only not apply if the Minister is satisfied, amongst other things, that the person is at least 18 years of age (proposed subsection 34C(3C)).

8 *Submission 52*, pp. 8-9.

9 *Submission 81*, p. 5.

10 *Hansard*, 26 November 2002, p. 236.

11 *Submission 299*, p. 24.

12 *Hansard*, 22 November 2002, p. 211.

13 *Submission 236*, p. 4.

reason criminal investigations concerning children have special safeguards is to avoid them being broken down by the sometimes oppressive conditions that can exist even in normal criminal investigations. If children, even suspects were exposed to the provisions of the proposed legislation, then it would make a mockery of the provisions that are meant to protect children in the criminal justice system.¹⁴

10.15 Under the *Crimes Act* 1914, a child who is arrested in relation to a criminal offence may only be questioned for half the time that an adult may be held for questioning, that is, two hours for children compared with four hours for adults.¹⁵

10.16 The Public Interest Advocacy Centre argued that it was 'not evident' that the Bill had taken into account specific obligations under the Convention on the Rights of the Child (CROC).¹⁶ Article 37 of CROC provides that detention should only be used as a last resort and for the shortest appropriate period of time. Australian Lawyers for Human Rights¹⁷ and the Law Institute of Victoria¹⁸ also referred to a potential breach of Article 37 of CROC. Australian Lawyers for Human Rights argued that the Bill provided only for the presence of a parent or guardian during questioning, not during the period of detention.¹⁹

10.17 The Law Institute of Victoria also argued that the Bill was in potential breach of other articles of CROC, namely:

- Article 2.2 provides that a child must not be discriminated against on the basis of the expressed opinions of the parents;
- Article 3.1 provides that in all actions concerning children, the best interests of the child shall be a primary consideration;
- Article 19.1 provides that the State must take all appropriate measures to protect the child from all forms of injury or abuse;
- Article 36 provides that the State shall protect children against all forms of exploitation prejudicial to any aspect of the child's welfare; and
- Article 40 provides that a child is to be presumed innocent until proven guilty.²⁰

14 *Hansard*, 26 November 2002, pp. 229-230.

15 *Crimes Act* 1914, s.23C(4). The provisions refer to an 'investigation period', which disregards periods during which questioning is delayed or suspended for a range of reasons. Extension of the investigation period may be sought for a further period of two hours (s. 23D).

16 *Submission 52*, p. 8.

17 *Submission 177*, pp. 5-6.

18 *Submission 294*, p. 4.

19 *Submission 177*, pp. 6-7.

20 *Submission 294*, p. 4. Similar arguments were expressed by the Federation of Community Legal Centres (Vic) Inc *Submission 243*, p. 24.

10.18 In response, a representative from the Attorney-General's Department stated that the Department was satisfied that the Bill was consistent with Australia's international obligations.²¹

10.19 The Law Institute of Victoria commented that the Bill failed to provide guidance as to what account should be taken of a young person's age. For example, while a two hour limit on each questioning period was imposed, there was no limitation on the number of times a young person may be questioned.²² The Institute argued that the special vulnerability of children requires certain additional safeguards that the current Bill does not include:

- they should be allowed to speak with their lawyer in confidence;
- there should be an upper limit (less than 7 days) on their maximum period of detention, given that under the *Crimes Act* 1914 children may be detained for only half the time that an adult may be detained; and
- there should be additional safeguards on strip searches (discussed below).²³

10.20 The Law Institute of Victoria also argued that the reverse onus of proof (that the person being questioned does not have the information sought, as discussed in more detail in Chapter 6) will fall 'unduly harshly' on young people 'who generally are likely to have poorer communication skills and less experience in dealing with authority than adults in the same situation'.²⁴

10.21 Representatives from the Victorian Bar told the Committee that they were opposed to young people being detained for up to seven days for the purpose of gathering intelligence.²⁵ While if young people were not held in custody the proposed questioning regime would be 'less offensive', 'great care' would need to be taken if compulsory questioning were allowed, given the immaturity of young people.

10.22 Under the Bill the Prescribed Authority must be satisfied of particular grounds before detention can be extended (proposed subsection 34F(3)). Those grounds are that the person may alert another person involved in a terrorism offence that the offence is being investigated; that evidence may be destroyed; or that the person may not reappear for questioning. None of these reasons would seem to be particularly persuasive in the case of young people. If the purpose is to prevent alerting others, young people may not be held incommunicado under any circumstances: access to both a parent, guardian or approved person and a legal adviser must be given. If the purpose is to stop the destruction of evidence, then other powers, including the power to issue a search warrant, are already available. If the real purpose of extending detention is to overcome the person's reluctance to provide information, the danger of

21 *Hansard*, 12 November 2002, p. 8. No elaboration was given on this point.

22 *Submission 294*, p. 2.

23 *Submission 294*, pp. 1-3.

24 *Submission 294*, p. 2.

25 *Hansard*, 22 November 2002, pp. 166-167.

coercion is far greater for young people, and it is more likely that either the questioning would be stopped by the IGIS or Prescribed Authority, or that the evidence received in this way would be tainted. Consequently the arguments against detention for up to seven days appear stronger in the case of young people, given their acknowledged vulnerabilities.

10.23 Another concern arises about the desirability of targeting young people about the activities of their parents or other older family members. There is evidence that anti-terrorist laws that compel the disclosure of information in the United Kingdom have been used predominantly against family members. In the report, *Inquiry into Legislation Against Terrorism*, Lord Lloyd of Berwick identified criticisms of the general duty to give information about the commission or possible commission of terrorist offences under the Prevention of Terrorism (Temporary Provisions) Acts 1974–1989. He observed that 'prosecutions are most often used against members of the families of suspected terrorists, putting them in an impossible position of conflicting loyalties'.²⁶ The question must be raised whether the danger of coercing young people in such circumstances might taint the evidence that is extracted from them.

Searches

10.24 Like other detainees, a young person may be subjected to an ordinary search or strip search if a police officer suspects on reasonable grounds that the person has a seizable item on his or her person (proposed section 34L). However, there are some additional safeguards on strip searches of young people.

10.25 A young person may only be strip searched on the order of a Prescribed Authority. The search must be conducted in the presence of a parent, guardian or someone else who can represent the person's interests and is, as far as is practicable in the circumstances, acceptable to him or her (proposed paragraph 34M(1)(f)).

10.26 The Law Institute of Victoria noted that there were no guidelines as to what the Prescribed Authority must consider before ordering a strip search, and contrasted this silence with provisions under the *Crimes Act* 1914 concerning children who have been arrested for an offence.²⁷ In such cases, a magistrate who orders a strip search must have regard to the seriousness of the offence for which the child has been arrested, the child's age or any disability, and such other matters as the magistrate sees fit.²⁸

26 Lord Lloyd of Berwick, *Inquiry into Legislation Against Terrorism*, Cm 3420, October 1996, Vol. 1, p. 94.

27 *Submission 294*, p. 2. This point was also raised by the Federation of Community Legal Centres (Vic) Inc *Submission 243*, p. 24.

28 *Crimes Act* 1914, subsection 3ZI(2).

Summary

10.27 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 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.

10.28 The Committee is also 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.

10.29 The Committee notes that the PJCAAD recommended that the Bill not apply to anyone under the age of 18 years, and endorses its recommendation.

