CHAPTER 3

PREVENTATIVE DETENTION

Introduction

3.1 This chapter will outline the proposed regime for Commonwealth preventative detention orders and discuss the issues and concern raised during the inquiry in respect of that regime.

Outline of the preventative detention regime

3.2 Item 24 of Schedule 4 amends the Criminal Code to insert new Division 105. The new Division provides for a regime of preventative detention for up to 48 hours for the purpose of preventing an imminent terrorist act occurring and to prevent the destruction of evidence relating to a terrorist act.[1] These objectives are stated in proposed section 105.1 and reflected in the new subsections 105.4 (4) and (6). The latter subsections provide the grounds for two distinct types of detention: detention *before* a terrorist act occurs in order to prevent an act of terrorism; and detention *after* an act of terrorism occurs to preserve evidence.

3.3 The scheme provides that AFP members may apply for either type of preventative detention order.[2] The AFP member applying for an order must set out the facts and grounds upon which the application is based. The information must be sworn or affirmed if the application is for a continued preventative detention order.

3.4 Members of the AFP of the rank of superintendent or above may grant and extend *initial preventative detention* orders for a period up to 24 hours.[3]

3.5 A *continued preventative detention order* may be granted by a serving Federal Judge or Magistrate, a retired judge of a superior court, the President or Deputy President of the AAT in respect of a person already detained under an initial preventative detention.[4] A continuing preventative detention order may be granted, extended and further extended to bring the total period of continuous preventative detention to a maximum of 48 hours.[5] An order cannot be applied for or made for a person under the age of 16 years.[6]

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1 *Explanatory Memorandum* p. 36

2 Proposed section 105.4.

3 Proposed para. 100.1(1)(a), sections 105.8 and 105.10.

4 Proposed para..100.1(1)(b) and s. 105.12.

5 Proposed sections 105.12 and 105.14.

6 Proposed section 105.5.

3.6 To make or extend preventative detention orders to *prevent an imminent terrorist act*, the issuing authorities must be satisfied on the basis of information provided by the AFP that there are reasonable grounds to suspect that the person:

- will engage in a terrorist act; or
- possesses a thing that is connected with the preparation for, or the engagement of a person in, a terrorist act; or
- has done an act in preparation for, or planning, of a terrorist act.[7]

3.7 The issuing authority must also be satisfied that:

- the order would substantially assist in preventing an imminent terrorist act;[8]
- detaining the person for the period for which the person is to be detained under the order is reasonably necessary to achieve that purpose;[9] and
- the terrorist act is imminent and expected to occur within the next 14 days.[10]

3.8 Proposed subsection 105.4 (6) provides that a preventative detention order can also be made where the issuing authority is satisfied that:

- a terrorist act has occurred within the preceding 28 days; and
- it is necessary to detain the person to preserve evidence of or relating to the terrorist act; and
- detaining the subject for the specified period is reasonably necessary to preserve evidence of or relating to the terrorist act.

3.9 The person detained must be given a copy of the initial order and a summary of the grounds, excluding information which is 'likely to prejudice national security' (within the meaning of the *National Security Information (Criminal and Civil Proceedings) Act 2004)*.[11] The effect of an initial preventative detention order must be explained to the detainee, as soon as practicable, after the person has been taken into custody.[12] This obligation includes a requirement to inform the person of their right to seek a remedy in a federal court and their right to complain to the Commonwealth Ombudsman under the *Complaints (Australian Federal Police) Act 1981* or to an equivalent State or Territory body.[13]

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7 Proposed subsection 105.4(4).

8 Proposed para. 105.4(4)(b).

9 Proposed para. 105.4(4)(c).

10 Proposed subsection 105.4(5).

11 Proposed section 105.32.

12 Proposed section 105.28.

13 Proposed paras. 105.28(2)(e), (f) and (g).

3.10 A detainee may be held in police custody or at a prison or remand centre of a State or Territory during the period of the preventative detention order.[14] Proposed section 105.33 requires that a person taken into custody or detained under a preventative detention order must be treated with humanity, with respect for human dignity and must not be subjected to cruel, inhuman or degrading treatment.

3.11 Police interrogation of the detainee is prohibited except to: confirm the detainee's identity; ensure the detainee's safety and well being; or otherwise to allow the police to carry out their obligations under the Division.[15] However, it is apparent that preventative detention orders can operate in conjunction with:

- ASIO's compulsory questioning and detention powers under the Division 3 of Part III of the ASIO Act; and
- police investigation and questioning related to suspected criminal offences, including questioning governed by Part 1AA and Part IC of the Crimes Act.[16]

3.12 Proposed section 105.34 restricts a detainee's ability to contact other people. It provides that a detainee is prevented from contacting anyone, except where permitted by the Bill. The proposed section permits a detainee to have contact with certain classes of people by telephone, fax or email but 'solely' for the purpose of letting those persons know the detainee is *'safe but is not able to be contacted for the time being*'.

3.13 Special contact rules apply to a detainee who is under 18 years old or who are considered incapable of managing their affairs. These allow the detainees to disclose: the fact of the detention order; that the person is being held subject to the order; and the period of detention. A detained minor is entitled to a minimum of 2 hours contact with a parent, guardian etc per day or longer at the discretion of the AFP or as specified in the order. Contact may be made by visit as well as by telephone, fax or email.[17]

3.14 Proposed section 105.41 makes it an offence for a detainee to make an unauthorised disclosure. It also criminalises secondary disclosures by a person who has been contacted by the detainee (such as a lawyer or a family member or guardian of a person under 18 years).[18] The offence provisions also apply to interpreters and police officers who have assisted in the monitoring of contact with the detainee (see below).[19] The offences apply while the person is being detained under the preventative detention order and attract a maximum of five years imprisonment.

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14 Proposed section 105.27.

15 Proposed section 105.42.

16 See proposed sections 105.25 and 105.26, which refer to the provisions of the ASIO Act and the Crimes Act.

17 Proposed section 105.39.

18 Proposed subsections 105.41(1), (2), (3) and (6).

19 Proposed subsections 105.41(5) and (7).

3.15 The right to contact with other people is also subject to the discretion of the issuing authority. The issuing authority may issue a prohibited contact order to prevent communication by the detainee with another person where the issuing authority is satisfied that the exclusion *'would assist in achieving the objectives of the preventative detention order*'.[20]

3.16 A prohibited contact order may be applied to a particular lawyer.[21] However, in those circumstances, or where a person is unable to contact a lawyer of their choice, there is an obligation to provide reasonable assistance to the person to identify and contact another lawyer for the purpose of providing advice about rights in relation to a preventative detention order.[22] Proposed section 105.37 imposes restrictions on the scope of legal advice and representation that may be provided by a lawyer to the person while the person is in custody.

3.17 Proposed section 105.38 requires that all communication between the detainee and other people must done is such a way that the meaning and content of the communication can be subject to monitoring. The requirement to monitor communications includes, among others, all communications between the detainee and their lawyer.[23]

3.18 A senior AFP member, who is not involved in the making of the preventative detention order, must be nominated to oversee the exercise of powers and performance of obligations in relation to the preventative detention order.[24] It is the duty of this senior member to receive and consider representations from the detainee, their lawyer, parent, guardian or another person representing the detainee's interests.[25] Representations may be made in relation to the exercise of any powers or obligation, including the revocation of the preventative detention order and prohibited contact orders and the treatment of the person while in detention.[26]

3.19 A preventative detention order must be revoked on the application of the AFP, where the grounds on which the order was made cease to exist. As noted above, the detainee, their lawyer or other person representing their interests may make representations to nominated senior AFP member for revocation of the order.[27]

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20 Proposed sections 105.15 and s.105.16.

21 Proposed section 105.40.

22 Proposed subsection 105.37(3).

23 Proposed subsection 105.38(5).

24 Proposed subsections 105.19(5), (6) and (7).

25 Proposed subection 105.19(8).

26 Proposed section paras. 105.19(8)(d), (e) and (f).

27 Proposed section 105.17.

3.20 The Bill recognises the general right of detainees to access a court for a remedy in relation to a preventative detention order or their treatment while held in detention. The right to make an application to a federal court may be made at any time and a person must be informed of their right to do so.[28] However, proposed subsection 105.51(4) excludes the application of the *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act) to any decision made under Division 105.

3.21 The Bill provides detainees with a right to apply to the Security Appeals Division of the Administrative Appeals Tribunal for merits review of a decision to issue, extend or further extend an initial or continued Commonwealth preventative detention order.[29] The Tribunal may declare the order void and order compensation.[30] The application for review cannot be made while the order is in force.[31] Proposed subsection 105.51(9) provides that the *Administrative Appeals Tribunal Act 1975* (AAT Act) will apply to an application to the AAT to review**,** subject to any modifications specified in regulations to be made under that Act.

3.22 A State or Territory Court has no jurisdiction in proceedings for a remedy in relation to a Commonwealth preventative detention order or treatment of the person detained under a Commonwealth order while the order is in force.[32] If the person is also detained under a State order and brings proceedings for review of that order in a State or Territory Court, that court may review the Commonwealth order on the same grounds and grant the same remedies available under State or Territory law that would apply to the review of the State order.[33] Proposed subsections 105.52(3) and (4) provides that a State or Territory Court may order the AFP Commissioner to give the court and parties to the proceedings the information that was put before the person who issued the Commonwealth order - subject to the requirements of the *National Security Information (Criminal and Civil Proceedings) Act 2004.*

Comparison with overseas laws

3.23 The committee understands that the Bill's provisions were modelled in part on the counter terrorism laws enacted in the United Kingdom (UK). The following section summarises some of the key UK provisions as well as relevant Canadian law

Contrast with the Terrorism Act 2000 (UK).

3.24 The *Terrorism Act 2000* (UK) provides for arrest without warrant of a person reasonably suspected of being a 'terrorist' in the context of a terrorist investigation. A

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28 Proposed subsections 105.51(1) and para. 105.28(2)(g).

29 Proposed subsection 105.51(5).

30 Proposed subsection105.51(8).

31 Proposed subsection 105.51(5).

32 Proposed subsection 105.51(2).

33 Proposed section 105.52.

‘terrorist’ is defined by that Act as a person who has committed certain offences or is or has been concerned in the commission, preparation or instigation of acts of terrorism.[34]

3.25 It does not require reasonable suspicion of a specific criminal offence and may not necessarily result in a charge. However, the UK detention regime is not preventative detention *per se*, but is better described as pre-charge detention which is explicitly linked to the investigation of terrorist offences.

Police review (within 48 hours)

3.26 The police may detain terror suspects for up to 48 hours from the time of their arrest. The detention is subject to review by a reviewing officer, who is a senior police officer not involved in the investigation. An initial review must be conducted by an inspector as soon as practicable after arrest and at 12 hourly intervals. After 24 hours, the review must be conducted by a superintendent.[35] Before authorising a person's continued detention, a review officer must give the detained person or their solicitor an opportunity to make representations – either orally or in writing.[36]

3.27 Continued detention may be authorised by the reviewing officer only if the review officer is satisfied that it is necessary to: obtain relevant evidence whether by questioning him or otherwise; preserve relevant evidence; detain pending the making of a deportation notice by the Home Secretary; or detain pending a decision whether or not to charge the person. A review officer is subject to a duty not to authorise continued detention for the purpose of obtaining or preserving evidence, unless he is satisfied the investigation is being conducted diligently and expeditiously.[37]

Inter partes hearing to extend detention beyond 48 hours

3.28 The UK legislation provides that a warrant to extend the detention for 7 days may be sought from a judicial authority. The period of detention without charge was increased to 14 days in January 2004.[38] The grounds for extension are limited to the purpose of obtaining or preserving evidence relating to that person's commission of an offence. The judicial authority must be satisfied there are reasonable grounds for believing the further detention of the person is necessary to:

- obtain relevant evidence whether by questioning him or otherwise: or

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34 *Terrorism Act 2000* (UK), s. 40, s.41.

35 *Terrorism Act 2000* (UK), schedule 8, s.24.

36 *Terrorism Act 2000* (UK), schedule 8, s.26. A review officer may refuse to hear oral representations from the detainee if he considers that he is unfit to make representations because of his condition or behaviour.

37 *Terrorism Act 2000* (UK), schedule 8, s.22.

38 An amendment inserted by the *Criminal Justice Act 2003* increased the total possible period of detention without charge to 14 days from the time of arrest or detention. The amendment came into force on 20 January 2004.

- preserve relevant evidence; and
- the investigation is being conducted diligently and expeditiously.[39]

'Relevant evidence' means evidence relevant to a specific office or indicating he is a person that is or has been concerned in the commission, preparation or instigation of acts of terrorism.

3.29 An application for a warrant to extend the detention may not be heard unless the person has been given notice of:

- the fact that the application has been made;
- the time it was made; and
- the time at which it is to be heard and grounds upon which further detention is sought.[40]

3.30 The detainee must be given an opportunity to make oral or written submissions to the judicial authority. The detainee has a right to representation. A hearing may also be adjourned to enable the person to obtain legal representation. However, there is no absolute right of appearance and the judicial authority can exclude both the detainee and his representative.

Contrast with Canadian Criminal Code

3.31 The Canadian *Criminal Code* provides a preventative arrest power exercised by a judge. An exception is created for emergency circumstances in which a police officer can effect an arrest for a limited time and based on narrower criteria.[41] The person detained must be brought before a judge within 24 hours and an information laid before that judge. The use of preventative arrest power is regarded as exceptional and has never been exercised in the three reporting periods from December 2001 to December 2004.[42]

Key issues or concerns raised in respect of the Bill

3.32 Key concerns raised with the committee about the proposed preventative detention regime include the following:

- **The adequacy of the procedural safeguards**. Concerns were raised that the threshold for making, extending or further extending initial and continued preventative detention orders is lower that that which applies to the arrest or detention of criminal suspects. Moreover, the Bill allows detention for the purpose of preserving evidence in the 28 days following a terrorist act without

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39 *Terrorism Act 2000* (UK), schedule 8, s.32.

40 *Terrorism Act 2000* (UK), schedule 8, s.29, s.31.

41 *Criminal Code* (Canada), ss. 83.3(4) to (6).

42 Dr Carne, *Submission 8*, p. 15.

the necessity to establish any connection between the subject of the order and any terrorist related activity. Other concerns included: empowering police to take non-suspects into custody and detain them for 24 hours without prior judicial authorisation; the lack of an *inter partes* hearing at any stage when orders are authorised; and the lack of an opportunity to test police information. The lack of any mechanism to address the adverse impact of procedural unfairness was also a concern.

- **Access to the courts**: Concerns here included: detainees' lack of a right to be provided with detailed reasons and with the factual material upon which the order is based and which impedes access to a federal court for judicial review (due to limited information on which to base an appeal); decisions made under the proposed Division 105 being excluded from the ADJR Act; and the bar on access to the AAT and a State or Territory Court while a Commonwealth order remains in force.
- **Conditions of detention and standards of treatment**: A key concern here was the prohibition on police interrogation and the interaction of a preventative detention order with the compulsory questioning and detention regime under the ASIO Act. Another concern was the lack of an external ongoing oversight of the implementation of the preventative detention regime. The conditions governing detention of minors were also raised as a concern.
- **The broad discretion to prohibit contact with the outside world**. That is, the wide discretion available to the AFP and issuing authorities to prohibit contact with the outside world; detainees being prohibited from disclosing the fact of the preventative detention, the period of detention or their whereabouts except in strictly limited circumstances as well as the imposition of criminal liability for unauthorised contact with the outside world.
- **Lawyer/Client relationship:** Concerns here included: the restrictions imposed on detainees' lawyers and their discussions with their client during detention; the blanket authorisation to monitor and record all communications between a detainee and his or her lawyer; and scope to use otherwise privileged information and conversations in subsequent proceedings or investigations.

Effectiveness of procedural safeguards

3.33 It is apparent from submissions received by the committee that Division 105 of the Bill raises significant concerns with respect to the presumption of innocence, freedom from unlawful and arbitrary detention and the right to fair trial. Numerous submissions and witnesses argued that the procedures for Commonwealth orders envisaged by the Bill are not a sufficient protection against unjustified infringement on these fundamental principles. These arguments are based on constitutional, common law and international law grounds. The values of Australian democracy were also cited. The Law Council, for example, opposed both preventative detention and control order as the creation of a 'de facto new criminal law system'. Its President, Mr John North, advised the committee that:

> Australia's formal criminal justice system embraces critically important guarantees and safeguards, including the right of an accused to a fair trial, rules of evidence which are fair, the presumption of innocence and the requirement that guilt be established beyond reasonable doubt. These safeguards and minimum guarantees have been in place for centuries to try and punish those who can be convicted beyond reasonable doubt. It is unheard of in Australian law to have people held or detained for long periods under very strict conditions unless we follow these legal safeguards.[43]

3.34 Similarly, the ACT Human Rights Commissioner said:

> Preventative detention without charge or trial is inherently problematic in respecting the human rights of individuals given the fundamental significance of the right to liberty in a democracy. It should only be used in the most exceptional circumstances and in strict accordance with the principles of international human rights law. General Comments of the Human Rights Committee, which monitors compliance with the ICCPR, have clarified that use of preventive detention for public security reasons must still comply with the right to liberty in article 9; it must not be arbitrary, it must be based on grounds and procedures established by law (that is, sufficiently circumscribed by law and specifically authorised), information on the reasons must be given, and court control of the detention must be available.[44]

3.35 HREOC echoed the same view. Its President, Mr John Van Doussa QC, stressed that, if preventative detention is to be adopted on national security grounds, it must be according to law, must not be arbitrary (in the sense of being unjust, unreasonable or disproportionate, taking into account the facts of each case) and must represent the least restrictive means of achieving the purpose.[45] HREOC maintained that the issuing, extension, and revocation of a preventative detention order are all a determination of the rights and obligations of the individual and, as such, the right to a fair trial in this context requires procedural equality. This includes an effective opportunity to contest the information upon which an order is based.[46]

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43 Mr John North, *Committee Hansard,* 14 November 2005, p. 77.

44 Dr Helen Watchirs, ACT Discrimination and Human Rights Commissioner, *Submission 154*, p. 5. See also the Council of Europe Guidelines on Human Rights and the Fight Against Terrorism, adopted by the 45 member states. The UK Joint Committee on Human Rights considered it the appropriate framework within which to debate counter terrorism responses.

45 HREOC, *Submission 158*, p. 8; Article 9 of the ICCPR.

46 HREOC, Submission *158*, p. 13; Article 14.1 of the ICCPR.

Thresholds

3.36 The threshold for preventative detention orders to prevent a terrorist act was criticised as vague and overly broad.[47] The threshold of reasonable grounds to *suspect* is a lower than the test of *'reasonable belief'* required by police to arrest a person.[48] It is also lower than the threshold required at the committal stage of a criminal proceeding. While this is in keeping with the preventative purpose of the scheme, there is concern that only the most minimal disclosure of information to an issuing authority is required to meet the test.

3.37 Witnesses also criticised the threshold for the issuing of preventative detention orders for the purpose of preserving evidence. It was noted that proposed subsection 105.4(6) permits an application to be made for a preventative detention order even against persons who are not expected to engage in terrorist acts or who possess a thing connected with its preparation. The issuing authority only needs to be satisfied that:

- a terrorist act has occurred within the last 28 days; and
- it is necessary to detain the subject to preserve evidence of, or relating to a terrorist act; and
- detaining the subject for the period for which the person is to be detained under the order is reasonably necessary for the above-mentioned purpose.

3.38 In this regard, proposed subsection 105(6) appears significantly different to provisions which permit pre-charge detention under the UK's terrorism legislation (described above).

3.39 Proposed subsection 105.4(6) was criticised for being drafted so broadly that any person may be subject to an order whether or not he or she has any involvement with or connection in the act or people involved in the act itself.[49] Dr Carne argued, for example, that:

> The breadth 105.4(6)) is striking… This provision is drafted so broadly that any innocent person at the site or within proximity to a terrorist act – i.e. an innocent bystander, victim or person in the wrong place at the wrong time – could be subject to a preventative detention order on the grounds of evidence preservation with some nexus or connection – which need not be direct, immediate or specific – to the terrorist act. In relation to forensic

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47 Proposed subsection 104.4(4); Dr Carne, *Submission 8*, p. 13; Dr Mathew, *Submission 187*, p. 4; Dr Helen Watchirs, ACT Discrimination and Human Rights Commissioner, *Submission 154*, p. 4.

48 *Crimes Act 1914,*s.3W; suspicion does not imply that it is well founded or that the facts are or must be correct - see *Tucs v Manley* (1985) 62 CALR 460; *George v Rockett* (1990) 170 CLR 104 at 117.

49 *Committee Hansard*, 14 November 2005, pp.18 - 19.

> material, this section potentially applies detention to hundreds of innocent people.[50]

3.40 The Australian Broadcasting Corporation (ABC) argued that this provision is of particular concern because it does not contain the kind of safeguards against detention that are contained in equivalent or analogous legislation, such as the ASIO Act (which requires a warrant approved by an independent authority). The ABC noted that:

> While it is hoped that the power would not be used in such a way, there is nothing, it would seem, to prevent a journalist or other media personnel (such as producers, researchers, editors, camerapersons and sound recordists) from being detained in order to preserve evidence relating to a terrorist act. It would be open, therefore, for the AFP, without further authority, to detain media personnel on the basis of a judgement that it is necessary to ensure that a recording or transcript of an interview, for example, is preserved.

3.41 The committee notes that AFP Commissioner has explained that a primary purpose of preventative detention orders in the context of a bombing is to enable police to detain people who are at or near the site of the attack.[51] In response to questioning, the Department acknowledged that, if necessary, a preventative detention order could be sought for that purpose. However, the Department argued that it is unlikely that an order to preserve evidence would be applied to people who are mere witnesses to an event or, for example, a journalist who acquires certain materials, when that evidence can easily be obtained and without the use of coercion.[52]

3.42 The ABC argued that, rather than ensuring such evidence is preserved, the fear of possible detention is likely to encourage media personnel to divest themselves of such material before any preventative detention order can be made:

> As with the notice to produce provisions, it is of concern that no protection is afforded to information or material that may be the subject of legal professional privilege nor journalists' obligations to protect the identity of confidential sources**.**[53]

3.43 The Media, Entertainment and Arts Alliance expressed similar concern. It argued that the lack of protection in subsection 105.4(6) against requests for information will lead to demands for journalists to identify sources, turn over notes and documents received in confidence.[54] This, it argued, would conflict with their professional responsibilities, ethics and values.

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50 *Submission 8*, p.7.

51 Interview with Commissioner Mick Keelty, *Lateline*, ABC, 31 October 2005.

52 *Committee Hansard*, 14 November 2005, p. 19.

53 *Submission 196*, p. 2.

54 Wolpe Bruce, Fairfax Corporate Affairs Director, *The Australian*, 10 November 2005 referred to in *Submission 196*, pp 1-2.

3.44 In response to the above, the Committee notes that, in respect of both types of preventative detention orders, the Bill requires that the issuing authority be satisfied that the order is 'reasonably necessary' for the purpose for which it is sought[55] Dr Mathew generally welcomes this move, but argued that the key issue is whether the facts of the individual case justify the period of detention.[56]

3.45 HREOC also welcomed the introduction of an element of proportionality assessment but expressed concern that the current formula does not fully express the proportionality test. HREOC has recommended that proposed subsections 105.4(4) and (6) be amended to also require the issuing authority to be satisfied that the purpose for which the order is made cannot be achieved by a less restrictive means. This would make explicit the requirement to assess the proportionality of the restriction on liberty to achieve the purpose of preventing an imminent terrorist act occurring or to preserve evidence.[57]

Initial preventative detention orders

3.46 Particular concerns were expressed about the reliance on a senior AFP member to issue an initial order for preventative detention on the unsworn/unaffirmed application of a more junior AFP member. Dr Carne, for example, criticised this aspect of process for its failure to ensure independence and rigorous scrutiny.[58] Professors Charlesworth and Byrne also raised concerns about the potential for abuse and the 'clear apprehension of bias' where both the authority to apply and the power to issue a preventative detention order are vested in the same law enforcement agency.[59]

3.47 The Lauterpacht Centre for International Law argued that the Bill's reliance on a senior AFP member to issue an initial preventative detention order is an insufficient safeguard against arbitrary detention:

> While the order is limited in time to 24 hours, it still involves a substantial restriction on the right to liberty, and in the circumstances should involve a judge.[60]

3.48 This view was shared by Dr Watchirs, the ACT Human Rights Commissioner, who maintained that all preventative detention orders should be issued by an independent judicial officer.[61]

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55 Proposed para.104.4(4)(c).

56 Dr Mathew, *Submission 187*, pp. 4, 9; *A v Australia* UN Doc CCPR/C/59/D/560/1993.

57 HREOC, *Submission 158*, p. 3.

58 Dr Carne, *Submission 8*, p. 14.

59 Professor Charlesworth, Professor Byrne, Ms Mackinnon, *Submission 206*, pp 2, 6 and 7.

60 *Submission* 240, p. 5. The Cambridge based centre maintained that the exigencies of dealing with terrorism cannot justify arbitrary detention. In doing so, it cited the European Convention on Human Rights as applied in *Fox, Campbell & Hartley v UK* (1990) ECHR Application No. 12244/86 at 32.

3.49 Other witnesses and submitters were prepared for senior AFP officers to issue such orders, albeit in more limited circumstances. Dr Carne, for example, argued that:

> The issuing authority of a senior AFP member should be strictly confined to limited, exceptional, emergency circumstances, subject to review at the earliest possible opportunity by a Magistrate or judicial issuing authority.[62]

3.50 HREOC had a similar view. It argued that while an *ex parte* order may be warranted in some special circumstances where there are legitimate grounds for urgency, this should not be the norm.[63]

3.51 In this regard, the committee notes recent media comment that doubling of the size of ASIO over the next five years (with an influx of new staff and the consequential need to develop skills) increases the risk of a lack of objectivity and errors in identification.[64] The committee also note media reports about a civil proceedings being commenced against the Commonwealth in the NSW District Court following a reported mistaken raid by ASIO and the AFP on a Melbourne home in 2001.[65]

3.52 The committee also notes that differing approaches appear to have been taken on this issue at the State level. South Australia's proposed complementary legislation, for example, provides that a senior police officer may only authorise detention up to a maximum period of 24 hours if there is an urgent need to do so, and it is not reasonably practicable in the circumstances to have the application dealt with by a judge.[66] The committee understands that the proposed New South Wales legislation does not provide an equivalent power. Rather, interim (or urgent) preventative detention orders are to be issued by the New South Wales Supreme Court.[67]

Continued preventative detention order

3.53 Proposed section 105.2 provides that the Minister may appoint the following as an issuing authority for continued preventative detention orders:

- a serving judge of a State or Territory Supreme Court;
- a serving Federal Judge or Magistrate;
- a person who is a retired judge of a superior court with five years service;

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61 *Submission 154*, p. 4.

62 Dr. Carne, *Submission 8*, p. 14.

63 HREOC, *Submission 158*, p. 13; *Committee Hansard*, 17 November 2005, p.82.

64 Hogg B., 'Democracy muted by fear', *Canberra Times*, 20 October 2005, p.70.

65 Allard T., 'Read all about this ASIO bungle. Soon it'll be a crime', *Sydney Morning Herald,* 28 October, 2005, p. 1.

66 Terrorism (Preventative Detention) Bill 2005 (SA), s. 4 and s. 6.

67 Terrorism (Police Powers) Amendment (Preventative Detention) Bill 2005 (NSW), s. 26H.

- the President and Deputy President of the AAT.

3.54 An issuing authority exercises their power in a personal capacity. The Bill casts the process as an exercise of non-judicial power - an administrative process conducted *ex parte*. That is, without the interested parties present and therefore without the opportunity to test the information laid by the police. The constitutional issues arising from this aspect of the Bill are canvassed briefly in Chapter 2.

3.55 The involvement of serving and retired judicial officers injects a degree of impartiality and scrutiny into the preventative detention regime. However, many witnesses still regard the procedures as inadequate. Critics argued that:

- the issue of orders which intrude extensively on personal liberty should depend on a judicial determination based on evidence, rather than on untested information by law enforcement agencies;[68] and
- reliance on the AAT President and Deputy President may lack the required criminal justice expertise.[69]

3.56 Proposed section 105.11 requires the application for a continued preventative detention order to set out, among other things, the facts and grounds on which the AFP member considers the order should be made. The process is a fresh application and there is no requirement to set out the facts and grounds that were relied for the initial preventative detention order. It is therefore possible that the continued preventative detention order may be made on entirely different grounds.

3.57 Dr Carne argued that the Bill's requirement that the issuing authority consider afresh the merits of making the order is not a form of judicial review:

> There is no capacity for the issuing authority to have representations made, hear evidence, submission or cross examination from the subject of the … order or representative of that person … This omission is oddly inconsistent with the capacity of a person detained ... or their lawyer being able to make representations to the nominated senior AFP member during the course of (but not limited to) an initial … order, which has been issued by a senior AFP officer.[70]

3.58 Dr Carne also drew the committee's attention to the possibility of a conflict of interest arising if a person appointed as an issuing authority under proposed section 105.12 were also to be appointed as a Prescribed Authority under the ASIO Act. Section 34B of that Act provides that a retired judge of a superior court, a serving judge of a State or Territory Supreme Court and the President or Deputy President of the AAT may be appointed in their personal capacity as a Prescribed Authority

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68 PIAC, *Submission 142*, p. 33; Mr Beckett, *Committee Hansard*, 14 November 2005, p. 46.

69 Law Council of Australia, *Committee Hansard*, 14 November 2005, p. 81.

70 Dr Carne, *Submission 8*, p.17.

responsible for supervising the questioning by ASIO officials under a compulsory questioning or questioning and detention warrant (see below).[71]

3.59 The Casten Centre for Human Rights proposed that, if preventative detention is to be introduced in Australia, it be dealt with as a matter of State law. The Centre argued that this would: overcome the constitutional complexities; allow serving Judges to exercise the function of authorising orders; and provide greater scope for procedural fairness at the issuing stage and a wider basis for subsequent review of orders.[72]

Rules of evidence

3.60 An important difference of opinion emerged during the hearings at to whether the *Evidence Act 1995* (Cth) (the Evidence Act) will apply to procedures envisaged by the Bill, including the issuing procedure for a preventative detention order. The Department subsequently clarified that applications for preventative detention orders, including applications for extensions of order, are not proceedings before a court and therefore the Evidence Act will not apply. As such, all the material that supports the application can be properly placed before the issuing authority – not just the material that would be admissible under that Act.[73]

3.61 Many witnesses expressed concern about the reliability of information on which an application for, or a decision to issue, such an order might be based. For example, Mr Zagor expressed concern about the possible use of unreliable evidence, including hearsay and false accusation, which may result in severe restrictions on civil liberties, which cannot be effectively tested or challenged in Court.[74] Other witnesses noted the need to also prohibit expressly the use of information obtained through torture. Dr Watchirs, for example, noted that the Council of Europe *Guidelines on Human Rights and the Fight Against Terrorism* specify that national counterterrorism measures must respect the basic principles of a fair trial, be subject to proper judicial supervision, and must not use information or intelligence that is the product of torture.[75]

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71 Section 34D of the ASIO Act permits the issuing of a compulsory questioning or questioning and detention warrant where the issuing authority is satisfied there are reasonable grounds for believing the warrant will substantially assist the collection of intelligence that is important in relation to a terrorism offence.

72 Professor Joseph and Mr Abraham, Castan Centre for Human Rights, *Submission 114*, p. 15.

73 *Submission 290a*, Attachment A, p. 12. See also *L v Lyons* (2002) 137 ACrimR 93. The same is true for procedures governing the issue of a control order.

74 Mr Zagor, *Submission 260*, p. 10.

75 Dr Watchirs, *Submission 154*, p. 5.

A Public Interest Monitor

3.62 The Bill currently recognises the role of the Public Interest Monitor (PIM) in relation to proceedings to confirm a control order where the order has been made in Queensland or the person is resident in Queensland.[76] The Queensland Law Society proposed that if *ex parte* hearings for issuing a preventative detention orders are retained, provision should be made for a PIM to be present at the hearing.[77] In a similar vein, HREOC asked the committee to consider the value of a PIM or a Special Advocate (see below).

3.63 The Queensland PIM is a statutory appointment under the *Police Powers and Responsibility Act 2000 and Crime and Misconduct Act 2001*(Qld). Although independent, the office is appointed by the executive rather than the court. The role of the PIM is to monitor compliance by police officers with the laws concerning applications for surveillance warrants and covert search warrants and to appear at hearings to test the validity of such applications. The PIM or a lawyer representing the PIM may be present at the hearings.[78] It is understood that the role of the PIM includes:

- examination and cross examination of any witnesses;
- making submissions on the appropriateness of granting the application; and
- to gather statistical information about the use and effectiveness of warrants.

3.64 The Queensland PIM may at any time give the Police Commissioner a report on non-compliance and must provide an annual report to the Minister on the use of warrants.[79] The PIM's establishment was intended to safeguard the interests of the individual by ensuring that warrants comply with legal requirements.

3.65 The PIM does not have a statutory responsibility to represent the interests of the particular individual who is the subject of any warrant.[80] This in contrast to the role of the Special Advocate in the UK, which evolved in response to the particular problems of dealing with national security information in security sensitive proceedings.

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76 Proposed para. 104.14(1)(e).

77 Queensland Law Society, *Submission 222*, p. 4.

78 *Police Powers and Responsibilities Act 2000* (Qld), s.149: HREOC, *Submission* 158, p. 39.

79 *Police Powers and Responsibility Act 2000* (Qld), s. 159; *Crime and Misconduct Act 2001* (Qld), s. 326.

80 HREOC, *Submission 158*, p. 39.

Special Advocate

3.66 Witnesses and submitters recommended that provision should be made in the Bill for a court appointed and security cleared Special Advocate.[81]

3.67 The concept of a Special Advocate was examined exhaustively by the Australian Law Reform Commission in its 2004 report *Keeping Secrets: The Protection of Classified and Security Sensitive Information*.[82] In summary, a Special Advocate is an independent counsel from the independent bar appointed by the Court on an ongoing basis. The idea derives from the Special Immigration Appeals committee and the Proscribed Organisations Appeal Committee in the UK and is similar to counsel assisting a Royal Commission.[83] The role of the Special Advocate is to provide assistance to the issuing authority by: testing the intelligence and police information; scrutinising all the information and documentation which supports the application for a preventative detention order; and examining and cross examining witnesses. The Special Advocate has a statutory responsibility to represent the interests of the person to be subject to the order, but this role is in addition to any rights to legal representation that the person may have.[84]

3.68 The benefit of a Special Advocate was acknowledged by the UK Court of Appeal in a recent decision concerning the detention of a man under UK terrorism laws on evidence that the court considered 'was wholly unreliable and should not have been used to justify detention'.[85]

Judicial and merits review

Right to Reasons

3.69 Particular concerns were raised about detainees' lack of a statutory right to be provided with the reasons why the initial or continued preventative detention order was granted.[86]. As noted above, proposed section 105.28 requires that the effect of the

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81 HREOC, *Submission 158*, p. 16; Dr Carne, *Submission 8*, p. 9; Mr Zagor, *Submission 260*, p. 10.

82 ALRC, *Keeping Secrets: The protection of classified and security sensitive information*, (ALRC, Report No. 98). The report is available online at http://www.austlii.edu.au/au/other/alrc/publicatons/report/98.

83 Dr Carne, Submission *8*, p. 9.

84 Dr Carne, *Submission 8*, p. 9.

85 *The Secretary of State for the Home Department and M* [2004] Civ 324 [13], cited in ALRC, *Keeping Secrets: The protection of classified and security sensitive information*, (ALRC, Report No. 98), paragraph 10.87.

86 The Bill provides that review under the ADJR Act is excluded and, therefore, a detainee cannot rely on section 13 of that Act to obtain reasons. Nor is there a right under the AAT Act to a statement of reasons for a decision subject to review by the Security Appeals Division (see subsection 28(1AAA) of that Act).

preventative detention order be explained to the detainee. Proposed section 105.32 also requires that the detainee be provided with a copy of the order and a summary of the grounds on which the order is based as soon as practicable after the person is first taken into custody. He or she may also request that a copy be sent to his or her lawyer (unless the lawyer is a prohibited contact).[87]

3.70 While these measures provide some access to relevant information, they were criticised as falling short of what is necessary to ensure the person knows the case against them and is able to contest the order. Witnesses and submissions pointed to the need to expand the obligation to provide a summary of grounds into a full right to reasons, subject to redactions or omissions on national security grounds. This extended to provision of the material upon which the order is based.[88] It was argued that the lack of such a right would impede a detainee's ability to challenge a preventative detention order in a federal court or in the AAT.[89] As the Administrative Review Council (ARC) stated:

> The opportunity for someone to seek administrative review of a decision is contingent to a large degree on the extent to which information about the reasons for the decision is available to that person…the requirement that decision makers give reasons for their decisions may be the single most important reform in the Commonwealth administrative review package of the 1970s.[90]

3.71 Mr Walker SC advised the committee that a full statement of reasons was critical to exercising the right to challenge an order. He argued that the current provisions provided no guarantee that the summarised information would in fact be the authentic grounds upon which the issuing authority has granted the order. This argument is set out in more detail in relation to control orders (see Chapter 4).

3.72 The ARC also argued that detainees should be provided with a full statement of reasons, not just a summary, albeit subject to any necessary exclusions of information on security grounds. However, it argued that further consideration should be given to who will make the decision that information is 'likely to prejudice national security' and should not be disclosed.[91] The ARC also noted that the copy of the order and the *reasons* for detention should be given to the detainee:

> …at the time they are taken into custody, and, if that is not possible, as soon as practicable thereafter. This seems particularly important in view of the short duration of the period of detention.[92]

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87 Proposed subsection 105.32(6).

88 *Committee Hansard*, 14 November 2005, p. 71.

89 See for example, Law Council, *Submission 140*, p.11; Gilbert and Tobin Centre for Public Law, *Submission 80*, p.12; Professors Charlesworth and Bryne, Ms Mackinnon, *Submission 206*, p.3.

90 Administrative Review Council, *Submission 263*, p. 8.

91 *Submission 263*, p.8.

92 *Submission 263*, p. 7.

3.73 Dr Watchirs also recommended that proposed section 105.32(6) be amended to provide an automatic notification of the terms of the order to the detainee's nominated legal representative.

Access to a court

3.74 The lack of an express statutory right to appeal a preventative detention order means that a detainee must rely on common law principles of judicial review and prerogative writs. Access to the original jurisdiction of the Federal Court and the High Court of Australia is guaranteed by s. 75 (v) of the *Commonwealth Constitution* and section 39(B) *Judiciary Act 1903* (Cth). There has been some uncertainty concerning the scope and efficacy of remedies available under the latter. The Explanatory Memorandum merely indicates that:

> It may be possible to seek injunctive relief to stop the detention in the equitable jurisdiction of the Federal Court.[93]

3.75 Australian Lawyers for Human Rights criticised the scope for judicial review as too limited. That is, a person can only apply to the Federal Court or High Court for a writ of *habeas corpus* to challenge the legality of detention or on narrow procedural grounds.[94] Similarly, HREOC argued that judicial review on narrow questions of law is not sufficient to provide a detainee with an effective remedy because it fails to provide a sufficiently broad basis to investigate and evaluate the facts.[95] Witnesses also drew attention to the fact that the *National Security Information (Criminal and Civil Proceedings) Act 2004* will apply, allowing the Attorney General to issue a certificate to exclude security sensitive information or particular witnesses from those proceedings where disclosure is likely to prejudice national security.

3.76 Many witnesses acknowledged that revisions to the Bill prior to introduction into the House of Representatives, have improved the individual's right of access to the court. Access to State and Territory courts and to the Security Appeals Division of the Administrative Appeals Tribunal for merit review are now included in the Bill. However, it is apparent that some still question the rationale for excluding access to the State and Territory Courts and the AAT until the Commonwealth order has expired. The Explanatory Memorandum provides no assistance in this regard.

3.77 The ARC observed that this is a new jurisdiction for the AAT, which presently has jurisdiction in relation to review of adverse and qualified security assessments under the ASIO Act. Procedures have been developed by the AAT specifically in relation to the execution of that particular jurisdiction. The ARC proposed that:

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93 *Explanatory Memorandum*, p. 70.

94 See para. 33(f) of the *Judiciary Act 1903* (Cth); Australian Lawyers for Human Rights; *Submission 139*, p. 17; see also article 2(3) ICCPR and *Keenan v United Kingdom* (2001) 33 EHRR 913 for international human rights law perspective referred to in *Submission 158,* p. 11.

95 HREOC, *Submission 158*, p. 12.

> Rather than giving the Tribunal the power to declare a decision in relation to the issue of an order 'void' (s.105.51 (70(a)), the Council considers that it would be preferable simply to provide for the Tribunal to 'set aside' the decision if it would have taken that course when the order was in force.[96]

The ARC suggested that this would be more in keeping with the Tribunal's administrative rather than judicial function.[97]

3.78 The ARC noted that the Bill proposes that the AAT's procedures will be modified as necessary by way of regulation to accommodate the new jurisdiction:

> The Council assumes that decisions of the Tribunal are excluded like all other decisions under Division 105, from judicial review under the ADJR Act but notes the provision for review under the AAT Act as a means of affording protection to individual rights.[98]

3.79 Some submissions also criticised the Bill for creating different remedies depending upon the type of order. Proposed section 105.51 provides that persons detained under a Commonwealth order can apply to the federal courts for a remedy at any time, but, if the person is subsequently detained under a State or Territory law (that is, under state preventative detention orders), review of the Commonwealth order is effectively denied access until the order has expired.[99]

Preventative Detention and Minors

3.80 Witnesses and submitters raised concerns about the application of preventative detention orders to persons under 18 years old. It was argued that preventative detention orders may breach article 37(b) of the Convention on the Rights of the Child (CRC), which requires that the detention of a minor should be a measure of last resort and for the shortest possible time.[100] It was also claimed that current provisions fail to reflect the obligation of an issuing authority under article 3 of the CRC to give consideration to the best interests of the young person who is the subject of such an application.[101]

3.81 Submissions expressed concern that detainees who are not charged with any criminal offence may be held in prisons and remand centres contrary to article 10 (2)(a) of the ICCPR. There is no express exception in the Bill to prevent young people under 18 being held with adult prisoners. Submission noted that doing so may

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96 *Submission 262*, p. 9.

97 *Submission 262*, p. 9. See also *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245.

98 Proposed subsection 105.51(7); *Submission 262*, p. 9.

99 Professor Charlesworth, Professor Byrnes, Ms Mackinnon, *Submission 206*, p. 3.

100 See, for example, The Hon Alastair Nicholson and others, *Submission 237*, p. 31.

101 *Submission 237*, p. 31.

breach of article 10(2)(b) of the ICCPR and article 37 of the CRC.[102] The committee notes that, in contrast to the Bill, the proposed complementary NSW legislation requires a detainee who is under 18 years to be held in a juvenile facility.[103]

3.82 As noted above, the Department advised the committee that the Bill had been thoroughly vetted by the Department's Office of International Law, which confirmed that the Bill is consistent with Australia's obligations under the CRC.[104] The Department also noted that the age of criminal responsibility applies generally from the age of 14 years and that there is a real possibility of young people under 18 years being involved in terrorist related activity.[105]

3.83 The committee notes that ASIO warrants may be sought in respect of a minor between the ages of 16 to 18 years where the Minister and the issuing authority are satisfied on reasonable grounds that it is likely that the person will commit, is committing or has committed a terrorism offence.[106]

3.84 The Department noted that the AFP rely on police cells to detain young people as well as adults for federal crimes and expressed a belief that detention under a Commonwealth order, which is for a maximum of 48 hours, will most likely be in police cells.[107] The Department assured the committee that there is a commitment to comply with, and have practice and policies consistent with, internationally accepted standards that apply to people in detention. The Department explained that:

> some of the exact details of the detention under these orders are still being worked in the negotiations and discussion with the states….there is a consciousness of the need to keep them separate.[108]

3.85 However, there is currently no provision in the Bill which takes account of the particular vulnerability of minors in police custody, remand centres or adult prisons. Nor does the Bill expressly require that a juvenile be held in a juvenile facility.

3.86 The Committee notes that an ASIO Protocol has been developed to guide ASIO's practices when executing a compulsory questioning and detention warrant. In relation to juveniles, it provides that 'questioning and detention may only take place under conditions that take full account of the subject's particular needs and any special requirements having regard to their age.'[109] HREOC has proposed that a Protocol that

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102 Professor Charlesworth, Professor Byrnes, Ms Mackinnon, *Submission 206*, p. 3.

103 Terrorism (Police Powers) Amendment (Preventative Detention) Bill 2005, s. 26X.

104 *Committee Hansard*, 14 November 2005, p. 10.

105 *Committee Hansard,* 14 November 2005, p. 10.

106 ASIO Act, ss. 34NA(4).

107 *Committee Hansard*, 14 November 2005, p. 5.

108 *Committee Hansard*, 14 November, 2005, p.11.

109 See para. 6.1 of the Protocol made under subsection 34C(3A) of the ASIO Act.

address questions of the conditions of detention and treatment of detainees be developed to guide the practice of preventative detention.[110] (The Bill's special contact rules that apply to detained minors are discussed below.)

Preventative detention and criminal investigation

3.87 The Committee notes that the efficacy of preventative detention in assisting the police to investigate and prosecute suspected terrorists may be open question. Unlike the UK *Terrorism Act 2000,* which provides for pre-charge detention of terrorist suspects to assist a criminal investigation, the Bill introduces preventative detention for the express purpose of preventing an imminent act of terrorism and preserving relevant evidence. While preventative detention for these purposes may assist a criminal investigation, this is not an explicit purpose of the Bill.

Police questioning

3.88 Police interrogation of the detainee is prohibited except to: confirm their identity; ensure the safety and well being of the person; or otherwise allow the police to carry out their obligations under the Division.[111] The prohibition on police questioning is replicated in the complementary legislation introduced in South Australia and New South Wales.[112]

3.89 However, it is apparent that preventative detention orders will operate in conjunction with police questioning or arrest under the Crimes Act.[113] During hearings, the AFP explained that the powers are necessary to:

> allow police to detain suspected terrorists in order to protect the community while either ruling the detainees out of the investigation or forming the reasonable belief the detainees can be released from [preventative] detention, arrested and questioned under part 1C of the Crimes Act.[114]

3.90 It is unclear how this will be achieved without the ability to question a detainee, except that it provides an opportunity to collect evidence under separate search and seizure powers.

3.91 The prohibition on police questioning provides a safeguard in this respect. However, Dr Carne has suggested should be videotaped to ensure that questioning does not exceed the permitted purposes of proposed paragraphs 105.42(1)(a)(b) and (c), and preferably occur in the presence of the detainee's lawyer.[115] The

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110 *Committee Hansard*, 17 November, p. 51.

111 Proposed section 105.42.

112 Terrorism (Police Powers) (Preventative Detention) Bill 2005 (NSW), s. 26ZK. Terrorism (Preventative Detention) Bill 2005 (SA), s. 42.

113 Proposed sections 105.25 and s.105.26.

114 *Committee Hansard*, 17 November 2005, p. 55.

115 *Submission 8*, p. 23.

Commonwealth Ombudsman and Inspector General of Intelligence and Security have also recommended that a detainee be advised about the limitations on what that they can be questioned about while in detention.[116]

ASIO questioning

3.92 Preventative detention orders will also operate in conjunction with ASIO's compulsory questioning and detention powers under the ASIO Act.[117] Where an ASIO warrant for compulsory questioning or questioning and detention is in force, the AFP must release the person from preventative detention to be dealt with by ASIO.[118] ASIO are then permitted to question a person for up to 24 hours and 48 hours where an interpreter is used.[119] Release from preventative detention for questioning or detention under an ASIO warrant, or otherwise for arrest and charge under the Crimes Act, does not extend the period that the preventative detention order remains in force and a person cannot be re-detained under the order (if it has expired).[120]

3.93 The Committee notes that intelligence obtained (eg, anything said or thing produced) under an ASIO compulsory questioning warrant cannot be used in evidence against the person in criminal proceedings.[121] This protection against self incrimination does not extend derivative use immunity or to civil or administrative proceedings, such as a proceeding for a control order or an administrative process for the removal of a non national from Australia on national security grounds.[122]

Conditions of detention and treatment of detainees

Standards of treatment

3.94 Proposed section 105.33 expressly requires that a person detained under a preventative detention order must be treated with humanity and with respect for

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116 *Submission 163*, p. 6.

117 An ASIO 'questioning only' warrant may be issued where there are reasonable grounds for believing that issuing the warrant will substantially assist in collecting intelligence that is important in relation to terrorism related offence; ASIO Act, para. 34D(1)(b).

118 Proposed section 105.25.

119 ASIO Act, ss.34HB (6) and (11).

120 Proposed subsections 105.25(4) and 105.26(7).

121 Evidence obtained during questioning may not be used in a criminal proceeding against the individual however it may be used in a criminal prosecution for giving false or misleading information. ASIO Act, s. 34G(9).

122 There is 'no derivative use immunity' and questioning may therefore lead ASIO and the AFP to other sources of evidence which can be used in criminal prosecution: paragraph 116(1)(g), s.s. 116(3) *Migration Act 1958* and regulation 2.43(2)(a).

human dignity and must not be subject to cruel, inhuman or degrading treatment.[123] The provision incorporates Articles 7 and 10 of the ICCPR.[124]

3.95 It is clear that proposed section 105.33 is an important safeguard. However, it has been suggested that this alone provides little guidance to police officers or detainees without further elaboration or clarification as to the conditions and standards of treatment that apply.[125] For example, HREOC has raised a concern about the possible use of solitary confinement. It recommended that such matters be dealt with in a Protocol, which should generally address issues relating to conditions of detention.

3.96 Professor John McMillan, the Commonwealth Ombudsman and Mr Ian Carnell, the Inspector General of Intelligence and Security (IGIS) made a similar proposal and referred the Committee to the Protocol developed to guide the implementation of ASIO's compulsory questioning and detention warrants as a useful model. The ASIO Protocol is a publicly available document which covers matters such as facilities and accommodation, food, sleep, personal hygiene, health care, religion and so forth.[126]

3.97 Professor McMillan and Mr Carnell advised the Committee that:

> A detailed statement of this sort, of the guarantees that a reasonable person would expect to apply to detention in these circumstances, can be a useful document in establishing a framework for good administrative practice and the protection of individual rights. A second useful purpose of a statement of protocols, if the Bill either contained or required such a protocol to be developed, might be to further specify how preventative detention orders and questioning and detention warrants would operate together in a practical sense, if both applied to a given situation.[127]

Oversight of conditions of detention and treatment of detainees

3.98 The Bill requires a nominated senior AFP member to oversee the exercise of powers under, and the performance of obligations in relation to, the preventative detention order. That officer is also responsible for ensuring that provisions relating to

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123 Proposed section 105.33

124 It is noted that Australian correctional facilities where detainees may be held operate under the *Minimum Standards Guidelines for Australian Prisons based on the UN Minimum Standards for the Treatment of Prisoners*. See also Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment; UN GA Resolution 43/173, 9 December 1988.

125 *Committee Hansard*, p. 51.

126 Australian Security Intelligence Organisation Protocol available at http://www.aph.gov.au/house/committee/pjcaad/asio_ques_detention/index.htm

127 *Submission* 163, p. 6.

the revocation of preventative detention orders and the issuing and implementation of prohibited contact orders are complied with.[128]

3.99 It is unclear on the face of the legislation whether there is any intention that the role of the nominated officer will extend beyond supervision of the conduct of police officers. It seems unlikely the senior police officer will have any jurisdiction in relation to conditions of detention or standards of treatment in a State or Territory prison or remand centre, except in relation to police conduct. The role of the nominated senior officer will cease once the person is released from preventative detention.

3.100 Part 1C of the Crimes Act will apply a detainee is released from preventative detention in order to be arrested and dealt with under that Act. Detainees released for the purpose of an ASIO compulsory questioning warrant may be questioned in the same police station and in the presence of AFP officers. However, the supervision of that questioning is the responsibility of a Prescribed Authority under the ASIO Act. The IGIS may also be present to monitor the standards of treatment and receive any complaints.

3.101 The IGIS and the Commonwealth Ombudsman have extensive powers and play an important role in oversighting government activity, which has the potential to infringe liberty or otherwise lead to adverse outcomes for individuals. The combined submission of the Ombudsman and the IGIS sets out in some detail, the scope of those powers and the relevance of their respective offices to oversight of the powers proposed by the Bill.[129] It was noted that the Bill does not provide the Ombudsman with a clear right of entry to premises used for preventative detention.[130]

3.102 The Ombudsman and IGIS observed that consideration could be given to specifying in subsection 105.19(7) that the nominated senior AFP member's responsibilities include the requirement to ensure that the conditions of detention fully comply with proposed section 105.33 (and with any protocol, procedures or guidelines). Further, the Bill could require the nominated AFP member to advise the issuing authority and/or the Ombudsman where there is a breach of the statement of procedures.[131] It has also been suggested that the nominated senior AFP member should be required to provide the Ombudsman immediately with a copy of the detention and contact orders, and of the summary of reasons, in cases where a legal adviser is not available to the subject of the order or orders.[132]

128 Proposed section 105.19.

129 *Submission 163*, p. 6.

130 *Submission 163*, p. 6.

131 *Submission 163*, p. 7.

132 *Submission 163*, p. 7.

Information about rights

3.103 The effect of an initial and continued preventative detention order and any extension to those orders must be explained to the detainee as soon as practicable after the order has been made.[133] The information must include:

- the fact the order has been made;
- the period of detention;
- any restrictions which apply to contact with the outside world;
- the right to complain to the Commonwealth Ombudsman in relation to the AFP or equivalent State authority in relation to State police;
- the fact the person may seek a remedy from a federal court in relation to the order or their treatment under the order;
- the fact they are entitled to contact a lawyer; and
- the name and work number of supervising senior officer.[134]

3.104 The Ombudsman and IGIS have proposed that information concerning the above-mentioned right to apply to the AAT on expiration of the order should be included in the above. The right to apply to the Supreme Court for review of the Commonwealth order if the person is subsequently detained under a State order is also omitted from the above list. The Committee was advised that:

> The subject of the order should also be advised about the limitations in item 105.42 on what that person can be questioned about while in detention under the preventative detention order should also be included.[135]

3.105 The ARC also proposed that the information on the effect of the order should be provided to the detainee at the time the person is taken into custody, rather than 'as soon as practicable' thereafter.[136]

Limited contact with the outside world

3.106 Part IC of the *Crimes Act 1914* provides persons under arrest or being questioned by police with an express right to communicate with a friend, relative and legal practitioner before being questioned by police.[137] In contrast, proposed section 105.34 takes as its starting point that a detainee has no right to contact with any other person and is prevented from contacting anyone except where permitted by the Bill. (See the discussion on prohibited contact orders below.)

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133 Proposed section 105.29.

134 Proposed sections 105.29 and 105.30.

135 Professor John McMillan, Commonwealth Ombudsman and Mr Ian Carnel, Inspector General of Intelligence and Security, *Submission 163*, p. 6.

136 *Submission 262*, p. 2.

137 Crimes Act, s.23G.

3.107 Proposed section 105.35 permits, subject to a prohibited contact order, a detainee to contact: one of his or her family members;[138]and one person from each of the categories listed in that provision. These categories include: another person with whom he or she lives; an employer; an employee; a business partner or another person if the detaining police officer agrees.

3.108 Communications are strictly limited and the detainee must not disclose: the fact that a preventative detention order has been made; the fact that he or she is being detained; or the period of the detention.[139] It follows that a detainee must not disclose their whereabouts and there is no provision for visits. Contact may be made by telephone, fax or email, but is solely to let the person know that he or she is 'safe' but cannot be contacted for the 'time being'.[140] It is an offence carrying a penalty of up to 5 years imprisonment to breach the rules of disclosure (see below).

3.109 The Victorian Council for Civil Liberties expressed their concern that the limits on what can be said are disproportionate and will not achieve their objective:

> We are also concerned about the provision which places strict limits on what a person subject to the order may say to their family and other limited categories of person about their detention. Presumably the provision is designed to ensure that the fact of a person's detention is not capable of communication to others with whom the person may have been preparing to engage in terrorist activity. If this is so, the provision will not achieve its objective. It would be simple to have a pre-determined form of words, perhaps couched in the language of the statutory provision, which would indicate clearly to others what had actually occurred. The cost to others who had not reasonably have been detained would be substantial however. They would be cut off entirely from family, friends and associates who may be in a position to offer them some assistance even if only of an emotional kind.[141]

3.110 As explained above, special contact rules will apply to minors or people who lack capacity to manage their own affairs.[142] A minor is entitled to contact each of their parents or guardians or another person who is able to represent their interests. They are permitted to disclose the fact of the detention order and that the person is being held subject to the order and the period of detention.[143] These special contact provisions for minors remain subject to the issue of prohibited contact order and the criminal offences provisions concerning unauthorised disclosure (see below).

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138 Immediate family and grandparents and guardians and carers are included in the definition of family. De facto spouses or same sex partner, step parents and step children are also included.

139 Proposed subsection 105.35(2).

140 Proposed paras. 105.35(1)(a),(b)(I)(ii), (c), (d), (e) and (f).

141 *Submission 221*, p. 22.

142 Proposed section 105.39.

143 Proposed paras. 105.39(2)(a) and (b), and paras. 105.39 (3)(a) and (b).

3.111 Proposed section 105.37 preserves the right of a detainee to contact the Commonwealth Ombudsman under section 22 of the *Complaints (Australian Federal Police) Act 1981* and an equivalent State or Territory authority. There is no explicit provision in the Bill for the Ombudsman to visit a detainee in a police cell or State or Territory correctional facility. A right of access to a lawyer is also preserved under certain restrictions (see below).

3.112 The committee notes the concerns that the Bill, as currently drafted, will create practical difficulties for communications between detainees and their families and for the ability of detainees' family members to communicate with each other and others. It notes that an alternative approach might have been to regulate contact with family members through the use of prohibited contact orders rather than imposing a blanket ban on detainees' contact with others except where permitted by the Bill.

Prohibited contact orders

3.113 The limited provision for communication with the outside world may be further restricted by the operation of proposed new sections 105.15 and 105.16. These provisions confer a wide discretion on the AFP and other issuing authorities to issue a prohibited contact order to prevent communication by the detainee with ‘a person’ where the issuing authority is satisfied that the exclusion: 'would assist in achieving the objectives of the preventative detention order'.

3.114 The order may be issued by a senior AFP member on the unsworn information of a more junior officer when making or during an initial order; or by another issuing authority when the continued detention order is made or at another time while the continued detention order is in force.[144] The application must set out the terms of the order sought and the facts and grounds on which the AFP member considers the order should be made, and must be sworn or affirmed if the person is being detained under a continued preventative detention order.

3.115 The purpose of prohibited contact orders was explained in the EM in the following terms:

> This is designed to ensure the 'preventative' purpose of the order is not defeated by the person in detention being able to contact other persons, including co-conspirators or those who might be in custody of evidence relating to a terrorist act, and, for example, instructing such a person to further the terrorist act in the person's absence, or destroy evidence of a terrorist act.[145]

144 Proposed sections 105.15 and 105.16.

145 *Explanatory Memorandum*, p. 47.

3.116 The provision for prohibited contact orders are to be replicated in State and Territory complementary legislation.[146]

3.117 Many witnesses have argued that this aspect of the Bill is disproportionate; the discretion is too broad and lacks proper judicial supervision. Prohibited contact orders create the possibility of detention that is secretive and is very close to being detention *incommunicado,* which is prohibited as a protection against ill-treatment.[147]

3.118 Of particular concern to some was the low and generalised threshold for the grant of a prohibited contact order: that is, that 'making the prohibited contact order will assist in achieving the objectives of the preventative detention order'. Dr Carne advised:

> … this phrase could mean anything, and is wide open to abuse. If prohibited contact orders are to be retained, the threshold must be dramatically increased … the issuing authority of prohibited contact orders should be removed from senior AFP officers.[148]

3.119 HREOC also had concerns with the breadth of the nondisclosure requirements. It observed that:

> …. for example, why should an employer be prevented from giving instructions solely for the running of a legitimate business? Why should an employee be prevented from telling their employer what steps need to be taken on an urgent task? And who bears the financial consequences for any loss arising from these restrictions?[149]

3.120 Dr Carne also questioned the lack of protection against unfair dismissal by an employer and against possible penalties that could be applied to a person dependent upon a Centrelink payment. He suggested that it be an offence for an employer to dismiss or penalise a person subject to a detention order and that a similar protection from a Centrelink penalty should be provided.[150]

3.121 HREOC argued that the restrictions raise issues under article 10(1) of the ICCPR, which provides that all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person. In particular, HREOC pointed to internationally accepted minimum standards for the treatment of

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146 Proposed section 26N of the Terrorism (Police Powers) Amendment (Preventative Detention) Bill 2005 requires that all applications for a prohibited contact order be made to the Supreme Court.

147 HREOC, *Submission 158,* pp. 17, 19; Dr Mathews, *Submission 187*, p. 10; Dr Carne, *Submission 8*, p. 21.

148 *Submission 8*, p. 21.

149 *Submission 158*, p. 16.

150 *Submission 8,* p. 20.

detainees.[151] HREOC argued that the latter are designed to avoid 'incommunicado detention', which has been found to breach the right to be treated with humanity and dignity.

3.122 HREOC formed the view that the limited contact permitted under the Bill falls short of these minimum international standards:

> The Bill does not provide a right to receive visits from family members (rule 37 of the Standard Minimum Rules) – such contact is only guaranteed in the case of people aged between 16 and 18 years of age. The limits on what may be disclosed also fail to meet the requirements of Principle 16 of the Body of Principles. Some departure from those standards is permissible in exceptional circumstances. For example, the notification required under rule 37 may be delayed for a 'reasonable period' where the 'exceptional needs of the investigation so require'. The Commission doubts that such exceptions justify the approach taken in the Bill: a family member who is involved in a terrorist conspiracy would be likely to be alerted to the fact that the person is being preventatively detained by virtue of the somewhat odd communication envisaged under proposed s105.35(1). An 'innocent' family member is simply likely to be alarmed.

3.123 The Committee notes that, in contrast to the Bill, the UK *Terrorism Act 2000* provides for an express right to communicate with a friend, family or another person interested in their welfare and to let those people know when the detainee is moved to another police station.[152] As explained below, communications with others may be delayed, but there is no ban on informing family of the reasons for detention, the period of detention of the whereabouts of the detainee.

3.124 The UK legislation provides that a senior police officer of the rank of inspector or above, who has no connection with the investigation, may delay (but not preclude) contact between a detainee and their family, friend or solicitor. This may only occur if he has reasonable grounds to believe that any of the following specified grounds apply:

- interference with or harm to evidence of a serious arrestable offence;
- interference with or physical injury to any person;

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151 That is, the *Standard Minimum Rules for the Treatment of Prisoners* and the *Body of Principles for the Protection of all Persons under any form of Detention*. Rule 37 of the Standard Minimum Rules under the heading "Contact with the outside world", provides: Prisoners shall be allowed under necessary supervision to communicate with their family and reputable friends at regular intervals, both by correspondence and by receiving visits. Principle 16 of the Body of Principles states: Promptly after arrest and after each transfer from one place of detention or imprisonment to another, a detained or imprisoned person shall be entitled to notify or to require the competent authority to notify members of his family or other appropriate. See *Submission 158*, pp 17.

152 *Terrorism Act 2000* (UK), Schedule 8, ss. 6(3).

- alerting of persons suspected of an arrestable offence who have not been arrested;
- hindering recovery of property obtained as a result of a serious arrestable offence
- interference with gathering information about the commission, preparation or instigation of acts of terrorism;
- alerting a person making it more difficult to prevent an act of terrorism.[153]

Disclosure offences

3.125 As noted above, the Bill provides that a detainee commits a criminal offence with a penalty of up to 5 years imprisonment if he or she intentionally discloses:

- the fact of the detention order;
- that he or she is detained under an order;
- how long the person is being detained; or
- or any other information given during the contact.[154]

3.126 The offence provisions extend the non-disclosure obligation to anyone with whom the detainee has contact and are intended to strictly prohibit all secondary disclosures. The offences specifically include the lawyer and the family member or guardian contacted by the detainee. If any person receives improperly disclosed information, it is an offence to intentionally pass that information on to another person.[155]

3.127 The offences also apply to the interpreter and police officers monitoring the communication (although the maximum penalty in respect of these classes of people is 2 years as opposed to 5 years).[156]

3.128 There is a limited exception for lawyers, where the disclosure is for the purpose of proceedings in a federal court, a complaint to the Ombudsman or equivalent State authority or making representations to the nominated senior AFP member responsible for supervising the execution of the order.[157] The lawyer is unable to make any disclosure within his or her own practice, even for the purpose of preparing an application to a federal court. The Explanatory Memorandum states:

> There is no provision for the person's lawyer to disclose information he or she lawfully obtains from the person under new section 105.37 because if

153 *Terrorism Act 2000* (UK), Schedule 8, ss.8(3)and (4).

154 Proposed section 105.41.

155 Proposed subsection 105.41(6).

156 Proposed subsections 105.41(4) and (5).

157 Proposed subsection 105.41(2), para.105.41(2)(b) and subparas.105.41(2)(d)(i) to (iv).

> the lawyer wishes to seek advice from a barrister, for example, it should not be necessary to disclose the fact of the particular person's detention to that barrister.[158]

3.129 It has been pointed out that it would be a criminal offence for a lawyer to make representations on the person's behalf to their Member of Parliament unless the disclosure was for the purpose of a Parliamentary inquiry in which case it would attract parliamentary privilege.[159]

3.130 Where the detainee is under 18 years, it is not an offence for the family member or guardian to let another person know the detainee 'is safe but is not able to be contacted for the time being'.[160] However, it is an offence for the parent or guardian to disclose the fact the order has been made, that the person is being detained under the order and the period of detention if the detainee has not already had contact with that other parent under the special contact rules provided for in section 105.39.

3.131 In response to questioning, Dr Watchirs said:

> I think the five year penalty for breach of disclosure provisions and breach of control orders is grossly disproportionate. They are civil offences and a civil administrative process, particularly in preventative detention, and to have a criminal offence of five years is not proportionate.[161]

3.132 The Victorian Council for Civil Liberties agreed:

> We are disturbed by the disclosure offences and the severe penalties that attach to such unauthorized communications. As the proposed law stands, a family member who is either told or divines that the subject has been placed on a preventative detention order is prohibited from informing any other family member on pain of five years imprisonment. To provide that an intra-familial communication should attract such a draconian penalty goes far beyond what is proportionate in the circumstances. It is difficult to imagine that any one in the community would accept that a father’s communication to a mother that their son or daughter has been placed on a preventative detention order should attract a long-term sentence of imprisonment. In these circumstances, we recommend that the disclosure provisions of the Bill be removed and further reviewed if some other means of engendering a certain measure of secrecy is required.[162]

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158 *Explanatory Memorandum*, p. 64.

159 Similarly, it would be a criminal offence for any Parliamentarian who became aware of a preventative detention order to disclose that fact publicly, unless protected by parliamentary privilege. This would not protect the source of the information.

160 Proposed subsection 105.41(3).

161 *Committee Hansard*, p. 97.

162 *Submission 221*, p. 23.

3.133 The Media, Entertainment and Arts Alliance argued against the nondisclosure provisions and the threat of criminal penalty:

> Appropriately, section 105.33 of the Bill affords persons detained under the legislation the right 'to be treated with humanity and respect for human dignity' and states that such persons must not be subjected to cruel, inhuman or degrading treatment'. Yet, in the event the rights of such a person are violated, the Bill denies the opportunities for such a violation to be reported in the media. Just as astonishing is the fact that the penalty for an officer who commits an offence …is 2 years imprisonment, compared to the five years sentence a journalist could face or disclosing the fact of a preventative detention.

3.134 The Alliance noted that the ASIO Act contains secrecy provisions which are also of concern to them. However, unlike the Bill, that Act includes a provision which provides that it: 'does not apply to the extent (if any) that it would infringe any constitutional doctrine of implied freedom of political communication' [163]

3.135 The Committee notes equivalent ASIO provisions apply secrecy obligations to the compulsory questioning and detention warrant regime for 2 years.[164] The Bill provides that a commonwealth preventative detention order is limited to 48 hours and the disclosure offence provisions apply only for the period of detention. However, the committee understands that the combined effect of a Commonwealth and subsequent State order may mean that a person could be held in preventative detention for up to 16 days.

3.136 The committee notes that the States appear to have taken differing approaches on this issue. Proposed subsection 35(2) of the South Australian Terrorism (Preventative Detention) Bill 2005 replicates the Commonwealth provision and prohibits disclosure of the facts relating to the preventative detention order. However, proposed subsection 26ZE(2) of the New South Wales Terrorism (Police Powers) Amendment (Preventative Detention) Bill 2005 does permit a detainee to disclose: the fact that a preventative detention order has been made; the fact that the person is being detained and the period for which the person is being detained.

Lawyer/ Client Relationship

Restricted access to legal advice and monitoring lawyer client communications

3.137 Proposed section 105.37 indicates that a detainee may contact a lawyer for the specific purposes of:

- obtaining advice about their legal rights in relation to the preventative detention order or their treatment during their detention under the order;

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163 ASIO Act, s.34VAA (12); *Submission 193*, p. 3.

164 ASIO Act, s.34VAA.

- instructing their lawyer to act in proceedings in a federal court in relation to the order or their treatment while in detention; or
- instructing their lawyer to act in relation to making a complaint to the Ombudsman or to an equivalent State or Territory authority.

3.138 Where a prohibited contact order precludes contact with a particular lawyer, the police officer must 'give the person reasonable assistance' to choose another lawyer for the person to contact.[165]

3.139 Proposed section 105.38 requires that all communications between the lawyer and his or her client be monitored by the police.[166]

3.140 In respect of the Bill, numerous witnesses and submissions objected to: the restrictions on access to a lawyer; the breadth of the test to be applied for prohibiting contact with a lawyer of choice; and the monitoring of lawyer/client communications, which they regard as excessive and unjustified.[167] Witnesses also argued that a detainee's right to confidential communications with their lawyer is a fundamental human rights norm at the international level (such as under the UN Body of Principles for the Protection of All Persons under Any Form of Detention and the UN Basic Principles on the Role of Lawyers).[168]

3.141 The Law Council complained to the committee that:

- the Bill's restriction on the role of the lawyers is a very significant and unacceptable diminution of the right to legal advice;
- the monitoring of lawyer/client communications abandons the rules in relation to client/lawyer confidentiality and is an anathema to a system of justice which depends in significant part on the sacrosanct nature of client/lawyer communications; and
- access to a lawyer should be facilitated within a reasonable time of an initial preventative detention order being made.[169]

3.142 The Australian Council for Civil Liberties (ACCL) noted legal advice it had obtained was that the provisions for contacting a lawyer and monitoring a lawyer will allow police to tape record a lawyer talking to his or her client who is held in

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165 Proposed subsection 105.37(3).

166 Proposed subsection 105.38(1).

167 See, for example, Australian Council for Civil Liberties, *Submission 17*, pp. 9-10; Victorian Council of Civil Liberties, *Submission 221,* p. 22; NSW Council of Civil Liberties, *Submission 161*, p. 12; Queensland Council of Civil Liberties, *Submission 223*, p. 10.

168 See for example, Amnesty International, *Submission 141* p.26.

169 *Submission 140*, p.16. See also, for example, Women Lawyers Association of New South, *Submission 137*; Australian Council for Civil Liberties, *Submission 17*; Victorian Council for Civil Liberties, *Submission 221*.

preventative detention while that client is held in a police station, watch house or prison. The Department also agreed that monitoring of lawyer/client communications included the possibility of tape recording and that there are no provisions in the Bill to limit how long a record of the communication can be kept.[170] The ACCL argued that:

> It has been a central aspect of the law and practice relating to lawyer talking to their clients in police custody for hundred of years that that communication can not be listened to or eavesdropped on. The rationale for this longstanding provision is obvious and that is that if a preventatively detained person knows that his conversation with his lawyer is being monitored and tape recorded he simply will not be prepared to talk to his lawyer for fear that what he says will then be used to carry out further investigations and so result in the detained person being charged with a criminal offence and being further detained.[171]

3.143 Proposed subsection 105.38(5) provides that any lawyer /client communication is inadmissible against the person in any proceedings in a court. However, the Department confirmed that this use immunity extends only to communications which fall within the strict limits for which access to legal advice is allowed under the Bill.[172] It has no application to communication that falls outside the scope of those limits. It does not, for example, protect a detainee who discloses information that indicates his possible involvement in a criminal offence and seeks advice, for example, in relation to whether any admissions should be made or may implicate another person.

3.144 The Department noted that the disclosure offences which apply to police officer monitoring lawyer/client communication will provide a safeguard.[173] However, the Queensland Law Society and Queensland Bar Association noted that:

> There is no real protection afforded by the prohibition on disclosure by a police monitor (s.105.41 (7)) Other persons, including law enforcement officials, are not inhibited from accessing and making whatever use they care to of the contents of the recording (save for the limitation on admitting certain parts of it in evidence (s.105.38(5)).[174]

3.145 In assessing the overall impact of these measures, the Law Council concluded that:

> These measures hinder the administration of justice. Such measures will seriously impede a detained person in giving sensible instructions to his or her lawyer in which sensitive but innocent information is contained which could form, in part at least, the basis of an application challenging such an

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170 See discussion at *Committee Hansard*, 14 November 2005, p. 25.

171 ACCL, *Submission* 17, p. 11.

172 paras. 105.37(1)(a) to (e).

173 *Committee Hansard*, 14 November 2005, p. 25.

174 *Submission* 222, p. 8.

> order to be brought to the Federal Court, in circumstances where that information is fed directly to the State. It constitutes an unacceptable obstruction to lawyers performing their duty to the client.[175]

Comparable jurisdictions

3.146 The equivalent UK terrorism law expressly recognises the right of detainees to consult a solicitor as soon as is reasonably practicable, privately and at any time.[176] The UK law allow contact with a solicitor to be delayed on the authority of a Superintendent, but not precluded. Terrorism laws in the UK and the United States (US) also allow contact between 'detainees' and their lawyers to be monitored. However, the US and UK legislation contain a threshold test that must be met before communications between a solicitor and client can be monitored, which does not include the ability to tape record those communications.

3.147 The *Terrorism Act 2000* (UK) allows for a consultation between lawyer and detainee to be held "in the sight and hearing" of a police officer, if a senior police officer has reasonable grounds to believe that such consultation would lead to interference with the investigation on the basis of grounds elaborated in the Act (see above). Separate provisions, in relation to Scotland, similarly allow for an officer "to be present during a consultation".[177]

3.148 In the US, the Attorney General must certify that "reasonable suspicion exists to believe that an inmate may use communications with attorneys or their agents to further or facilitate acts of violence or terrorism". The rule relevantly provides:

> [I]n those cases where the Attorney General has certified that reasonable suspicion exists to believe that an inmate may use communications with attorneys or their agents to further or facilitate acts of violence or terrorism, this rule amends the existing regulations to provide that the Bureau is authorized to monitor mail or communications with attorneys in order to deter such acts, subject to specific procedural safeguards, to the extent permitted under the Constitution and laws of the United States.[178]

The committee's view

3.149 The committee received a significant amount of evidence in relation to the preventative detention provisions in the Bill. With the exception of the evidence from the Attorney-General's Department and the AFP, this evidence indicated significant opposition to the potential impact of these provisions.

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175 *Submission 140*, p.17.

176 *Terrorism Act 2000* UK, section 7, Schedule 8.

177 Schedule 8, Part I, section 9:http://www.opsi.gov.uk/acts/acts2000/00011--u.htm#sch8ptI

178 28 CFR Parts 500 and 501: National Security; Prevention of Acts of Violence and Terrorism; Final Rule [excerpt]: The full regulation (also cited as 66 Fed. Reg. 55,061, 55,063 [October 31, 2001]) can be viewed at: http://www.epic.org/privacy/terrorism/bop_rule.pdf .

3.150 At the same time, the committee is cognisant that the purpose of the proposed provisions is to protect the community. The committee also recognises that the preventative detention regime is intended to apply in exceptional circumstances and, while many witnesses are opposed to the scheme, the emphasis during this inquiry has been on possible amendments to strengthen procedural safeguards. The committee also notes the advice from the AFP that it did not oppose any such amendments which would not unduly undermine its operational capacity to respond in a time of emergency.[179]

3.151 In this context, the committee's view is that further amendments are required to the proposed preventative detention regime in order ensure that the regime will be both fair and effective. These recommended amendments are listed below. In making these recommendations, the committee had regard to precedent that existed in overseas jurisdictions, including those who had suffered terrorism attacks. The committee is satisfied that none of its recommended amendments will unduly impinge on effective law enforcement or the objectives of the preventative detention regime.

Recommendation 2

3.152 The committee recommends that proposed section 105.12 be amended, or a new provision inserted into the Bill, to provide a detainee with an express statutory right to present information to the independent issuing authority for a continued preventative detention order, to be legally represented and to obtain the published reasons for the issuing authority's decision.

Recommendation 3

3.153 The committee recommends that:

- **(i) the Bill be amended to expressly require that young people between the ages of 16 and 18 years of age must not be detained with adults while in police custody;**
- **(ii) proposed section 105.27 be amended to require the segregation of minors from adults in State and Territory facilities; and**
- **(iii) proposed section 105.33 be amended to expressly require that minors must be treated in a manner that is consistent with their status as minors who are not arrested on a criminal charge.**

Recommendation 4

3.154 The committee recommends that proposed section 105.28 be amended to place an obligation on police officers to ensure access to a detainee by a lawyer and an interpreter, as necessary, in cases where there are reasonable grounds to believe that the detainee is unable to understand fully the effect of the preventative detention order because of inadequate knowledge of the English language or a mental or physical disability.

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179 Deputy Commissioner Lawler, *Committee Hansard*, 17 November 2005, p. 72.

Recommendation 5

3.155 The committee recommends that proposed sections 105.28 and 105.29 be amended to expressly require that detainees be advised that they can make representations to the nominated senior AFP member concerning revocation of the preventative detention order.

Recommendation 6

3.156 The committee recommends that proposed section 105.28 be amended to expressly require that the detainee be advised that he or she can contact the family members referred to in proposed section 105.35.

Recommendation 7

3.157 The committee recommends that proposed section 105.32 be amended to provide that the detainee shall be provided with a copy of the order and the reasons for the decision, including the materials on which the order is based, subject to any redactions or omissions made by the issuing authority on the basis that disclosure of the information concerned is 'likely to prejudice on national security' (as defined in the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth)).

Recommendation 8

3.158 The committee recommends that proposed sections 105.15 and 105.16 be amended to elaborate the grounds for a prohibited contact order. The committee also recommends that these grounds be equivalent to those provided in the UK terrorism legislation, namely:

- **(i) interference with or harm to evidence of a terrorism related offence;**
- **(ii) interference with or physical injury to any person;**
- **(iii) alerting of persons suspected of a terrorism related offence who have not been arrested;**
- **(iv) hindering recovery of property obtained as a result of a terrorism related offence;**
- **(v) interference with gathering information about the commission, preparation or instigation of acts of terrorism; and**
- **(vi) alerting a person and thereby making it more difficult to prevent an act of terrorism.**

Recommendation 9

3.159 The committee recommends that the Bill be amended to:

- **(i) authorise oversight by the Commonwealth Ombudsman of the preventative detention regime, including conferral of a statutory right**

for the Ombudsman to enter any place used for detention under a preventative detention order; and

(ii) require the nominated senior AFP officer - in circumstances when a legal adviser is not available to the detainee - to notify the Ombudsman when a preventative detention order and a prohibited contact order is made and to provide the Ombudsman with a copy of any such order and reasons for those orders.

Recommendation 10

3.160 The committee recommends that the Bill be amended to require the Minister - in consultation with HREOC, the Ombudsman and the Inspector-General for Intelligence and Security – to develop a Protocol governing the minimum conditions of detention and standards of treatment applicable to any person who is the subject of a preventative detention order.

Recommendation 11

3.161 The committee recommends that proposed paragraph 105.41(3)(c) be amended to refer to the persons whom the detainee has a right to contact instead of persons with whom the detainee has had contact.

Recommendation 12

3.162 The committee recommends that proposed subsection 105.42(1) be amended to require that any questioning which takes place during the period of the preventative detention order be videotaped and generally occur in the presence of the detainee's lawyer.

Recommendation 13

3.163 The committee recommends that the Bill be amended to remove the restrictions on lawyer/client communications and to allow a legal representative to advise his/her client on any matter. The committee also recommends that proposed section 105.37 be amended to affirm the right of a detainee, subject to a prohibited contact order, to contact their lawyer of choice and to consult their lawyer at any time and in privately.

Recommendation 14

3.164 The committee recommends that proposed section 105.38 be amended to permit monitoring of detainees' consultation with their lawyers only where the nominated AFP officer has reasonable grounds to believe that the consultation will interfere with the purpose of the order.

Recommendation 15

3.165 The committee recommends that the Bill be amended to prohibit reliance on hearsay evidence in proceedings for the issue of a continued preventative detention order.

Recommendation 16

3.166 The committee recommends that proposed section 105.47 be amended to require the Attorney General to report on Commonwealth preventative detention orders on a six monthly basis and that, in addition to the matters currently set out in that provision, the information should include the number of orders voided or set aside by the AAT.

Recommendation 17

3.167 The committee recommends that the Bill be amended to include an express requirement for a public and independent five year review of the operation of Division 105 adopting the same mechanism and similar terms as that provided by section 4 of the *Security Legislation Amendment (Terrorism) Act 2002* (Cth), which established the Sheller Committee.

Recommendation 18

3.168 The committee recommends that proposed section 105.53 be amended to include a sunset clause of five years applicable to Schedule 4.