The counter-terrorism Bills

By Sarah Pritchard

The Bills: An overview

On 20 March 2002, the Senate Selection of Bills Committee referred the following Bills to the Senate Legal and Constitutional Legislation Committee for inquiry and report by 3 May 2002:

- Security Legislation Amendment (Terrorism) Bill 2002 [No. 2];
- Suppressing of the Financing of Terrorism Bill 2002;
- Criminal Code Amendment (Suppression of Terrorist Bombings) Bill 2002;
- Border Security Legislation Amendment Bill 2002; and
- Telecommunications Interception Legislation Amendment Bill 2002.

On 21 March 2002, the Senate Selection of Bills Committee referred the *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002* ('the ASIO Bill') to the Senate Legal and Constitutional Legislation Committee and the Parliamentary Joint Committee on ASIO, ASIS, and DSD for inquiry and report by 3 May 2002.[1]

The Bills propose to:

- amend the *Criminal Code Act 1995* to introduce new criminal offences of terrorism punishable by life imprisonment and a regime for the attorney-general to proscribe certain organisations, modelled on the recent *UK Terrorism Act 2000*;
- criminalize the financing of terrorism through amendments to the *Criminal Code Act 1995*, the *Financial Transactions Reports Act 1988*, the *Mutual Assistance in Criminal Matters Act 1987* and the *Charter of the United Nations Act 1945*, in order to give effect to Australia's obligations under United Nations Security Council resolution 1373 (2001) and the International Convention for the Suppression of the Financing of Terrorism (1999);
- create offences relating to international terrorist activities using explosive or legal devices in order to give effect to Australia's obligations under Security Council resolution 1373 (2001) and the International Convention for the Suppression of Terrorist Bombing (1998);
- amend the *Customs Act 1901*, the *Customs Administration Act 1985*, the *Fisheries Management Act 1991*, the *Migration Act 1968*, and the *Evidence Act 1995* to increase customs powers; and
- amend the *Telecommunications (Interception) Act 1979* to clarify the application of the Act to telecommunications services involving a delay between the initiation of the communication and its access by the recipient, such as email and short messaging services, include offences constituted by conduct involving acts of terrorism and child pornography related and serious arson offences as offences in relation to which a telecommunications interception warrant may be sought;
- amend the definition of 'politically motivated violence' in sec 4 of the *Australian Security Intelligence Organisation Act 1979* ('the ASIO Act') to include acts that are terrorism offences; and
- insert a new Division 3 at the end of Part II of the ASIO Act dealing with special powers relating to terrorism offences, including in relation to warrants requiring persons to appear for questioning and to be taken into custody and detained for questioning. The most controversial of the proposed powers include those which allow
  - i ASIO to request the incommunicado detention of persons not suspected of any criminal activity for an initial period of up to 48 hours, with the possibility of extension resulting in an unrestricted and indefinite period of continuous detention;
  - ii compulsory questioning without legal representation and under penalty of an offence; and (iii) the use of incriminating answers in subsequent proceedings for terrorist offences.

Assessment criteria

In assessing the proposals for new security legislation in Australia, it is useful to have regard to the following principles formulated by Lord Lloyd of Berwick for applying the rule of law to the challenge of terrorism:

- Legislation against terrorism should approximate as closely as possible to the ordinary criminal law and procedure.
- Additional statutory offences and powers may be justified, but only if they are necessary to meet the anticipated threat. They must then strike the right balance between the needs of security and the rights and liberties of the individual.
- The need for additional safeguards should be considered alongside any additional powers.
- The law should comply with the UK's obligations in international law.[2]

To these principles, one might add that in striking the right balance between the needs of security and the rights and liberties of the individual, the possibility of other means of combating the perceived security threat should always be considered.[3]

The fourth of the principles identified by Lord Lloyd of Berwick requires compliance between legislation against terrorism and relevant obligations in international law. International instruments concerned with terrorism include the Convention for the Suppression of Terrorist Bombings (1998) and the Convention for the Suppression of the Financing of Terrorism (1999). The principal relevant United Nations Security Council resolution is resolution 1373, adopted 28 September 2001, in which the Security Council decided that all States shall, amongst other things:

> 2. (e) ensure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorists act is brought to justice and ensure that, in addition to any other measures against them, such terrorist acts are established as serious criminal offences in domestic laws and regulations and that the punishment duly reflects the seriousness of such terrorist acts.

Further international obligations relevant to an assessment of the proposed legislation are found in international human rights

law and practice. In the wake of the events of 11 September 2001, numerous United Nations human rights bodies have made important statements in relation to proposed anti-terrorist laws.[4]

On 27 February 2002, the High Commissioner for Human Rights confirmed that ensuring that innocent people do not become the victims of counter-terrorism measures should be an important component of anti-terrorism strategies.[5] In order to assist States in complying with international human rights standards in implementing of Security Council resolution 1373, the High Commissioner proposed the following criteria: [6]

> …
> 2 Human rights law strikes a balance between the enjoyment of freedoms and legitimate concerns for national security. It allows some rights to be limited in specific and defined circumstances.
>
> 3 Where this is permitted, the laws authorizing restrictions:
>
> (a) Should use precise criteria;
>
> (b) May not confer unfettered discretion on those charged with their execution.
>
> 4 For limitations of rights to be lawful they must:
>
> (a) Be prescribed by law;
>
> (b) Be necessary for public safety or public order, i.e. the protection of public health or morals and for the protection of the rights and freedoms of others, and serve a legitimate purpose;
>
> (c) Not impair the essence of the right;
>
> (d) Be interpreted strictly in favour of the rights at issue;
>
> (e) Be necessary in a democratic society;
>
> (f) Conform to the principle of proportionality;
>
> (g) Be appropriate to achieve their protective function, and be the least intrusive instrument amongst those which might achieve that protective function;
>
> (h) Be compatible with the objects and purposes of human rights treaties;
>
> (i) Respect the principle of non-discrimination;
>
> (j) Not be arbitrarily applied.'

the imprecise and unnecessarily broad nature of the definition is likely to see political activity such as public demonstrations and unplanned industrial activity caught within sec 100.1(1).

Security Legislation Amendment (Terrorism) Bill 2002 [No.2]

The proposed definition of 'terrorist act'

The *Security Legislation Amendment (Terrorism) Bill 2002* proposes the following definition of 'terrorist act' in sec 100.1:

> '… *terrorist act* means action or threat of action where:
>
> (a) the action falls within subsection (2); and
>
> (b) the action is done or the threat is made with the intention of advancing a political, religious or ideological cause;
>
> but does not include:
>
> (c) lawful advocacy, protest or dissent; or
>
> (d) industrial action.
>
> (2) Action falls within this subsection if it:
>
> (a) involves serious harm to a person; or
>
> (b) involves serious damage to property; or
>
> (c) endangers a person's life, other than the life of the person taking the action; or
>
> (d) creates a serous risk to the health or safety of the public or a section of the public; or
>
> (e) seriously interferes with, seriously disrupts, or destroys, an electronic system …'

The most troubling aspect of this definition is the broad, imprecise and ambiguous formulation of the requisite intention, namely that the action is done or the threat is made 'with the intention of advancing a political, religious or ideological cause'. It is noteworthy that the definition of domestic terrorism in sec 802 of the *United States Code* (as amended by the so-called *Patriot Act* of 2001) does not extend to damage to property, focussing on 'activities that involve acts dangerous to human life'. In addition, the US definition requires an apparent intention 'to intimidate or coerce a civilian population, to influence a policy of a government by intimidation or coercion, or to affect the conduct of government by mass destruction'. The more mildly worded definition in sec 1(1) of the UK *Terrorism Act 2000* contains a requirement that the use or threat of action 'is designed to influence the government or to intimidate the public or a section of the public'. Section 50 of the Northern Territory *Criminal Code* requires an intention to procure the alteration of a matter or thing established by a law of a legally constituted government or other political body, including acts done for the purpose of putting the public or a section of the public in fear. The proposed Commonwealth definition contains no requirement of any similar intention or design, requiring only an intention to advance a political, religious or ideological cause. The effect of such a definition is to remove from the definition of terrorism any element of intentionality to terrorise the government or the public through intimidation, coercion or the evocation of extreme fear.

A related problematic aspect is the inclusion of action involving serious damage to property. Such action could include forms of damage to property caused by advocates of political, religious and ideological causes such as damage to walls and fences of embassies, immigration and other detention centres, military installations, birth control clinics and casinos, as well as to logging trucks, billboards and pavements. The participants in such forms of protest and dissent are frequently youthful, enthusiastic and sometimes zealous, but otherwise peaceful, law abiding and dutiful citizens. Such offences are surely not apt to be characterised as 'terrorist acts' and to be subject to a penalty of life imprisonment. Moreover, any notion of harm to property ought not to be free-standing but must, at the very least, require mass destruction, as well as be linked to a threat to human life or serious physical harm, and contain some element of intentionality to terrorise the government or the public.

The unqualified use of language of 'serious harm to a person' in sec 100.1(2)(a) is also disturbing. As drafted, this could include harm to a person's reputation or economic interests. At the very least, such action should be confined to action causing serious *physical* harm to a person, as well as containing some element of intentionality to terrorise the government or the public. Further, despite the exclusion of 'lawful advocacy, protest or dissent, or industrial action' from the definition of terrorist act, the imprecise and unnecessarily broad nature of the definition is likely to see political activity such as public demonstrations and unplanned industrial activity caught within sec 100.1(1). For example, an

urgent action alert issued by a non-governmental organisation such as Amnesty International calling on members and supporters to fax or e-mail a minister in an Australian or a foreign government could fall within sec 100.1(2)(e) as action which 'seriously interferes with, seriously disrupts, or destroys, an electronic system including: (i) an information system; or (ii) a telecommunications system'. A further example would be a strike by police officers, nurses, fire-persons or other emergency services personnel resulting in a reduction in the provision of relevant services to the public, and hence potentially falling foul of sec 101.1(2)(d) as action which 'creates a serious risk to the health or safety of the public or a section of the public'.

Offences connected with terrorist acts: Offences of absolute liability

Sections 101.2, 101.3, 101.4, 101.5 and 101.6 create offences of providing or receiving training connected with terrorist acts, directing organisations concerned with terrorist acts, possessing things connected with terrorist acts, collecting or making documents likely to facilitate terrorist acts, and other acts done in preparation for or planning terrorist acts. All these offences carry sentences of life imprisonment. An offence against each of these sections is committed even if the terrorist act does not occur.

The offences in secs 101.2, 101.4 and 101.5 are offences of absolute liability. This means that no mens rea is required, so that the offence is committed once it is shown that the accused voluntarily committed the acts which comprise the offence. It is no defence that the accused honestly and reasonably but mistakenly believed in a set of facts which if existed would have rendered his or her conduct innocent.[7] Each of secs 101.2(4), 101.4(4) and 101.5(4) provides for a defence where the person proves that he or she was not reckless in the circumstances. However, reversed onuses are potentially very oppressive. Elsewhere in the criminal law, absolute liability offences have grown out of relatively trivial regulatory offences. There are few, if any, other instances of a substantive offence involving serious criminality and a substantial penalty for which absolute liability exists.

The effect of the proposed proscription provisions is to deny affected persons any right to be heard, and to displace altogether long established rules of procedural fairness and natural justice.

The absence of any requirement of some degree of actual knowledge of circumstances indicating connection with a terrorist act, or of an intention to assist in an act of terrorism is surely a most objectionable aspect of the proposed treatment of terrorist acts. Thus, sec 101.4 would criminalise the possession of things connected with preparation for, the engagement of a person in, or assistance in a terrorist act, such as objects and documents, by persons such as scholars, researchers and journalists who have no intention of assisting in a terrorist act and whose scholarship, research or journalism may in fact be in opposition to or intended to expose terrorist acts. The defence in sec 101.4(4) would not save such scholars, researchers or journalists because that defence would apply only where such persons could prove on the balance of probabilities that they were not reckless with respect to the thing's connection with a terrorist act. Such persons would, notwithstanding the absence of any intention to assist in a terrorist act, be guilty of an offence and, potentially, liable to life imprisonment.

Many of the so-called terrorism offences sought to be elaborated in secs 101.2 to 101.6 are already adequately covered by existing principles of accessorial liability. For example, at the Commonwealth level, Part 24 of the *Criminal Code Act 1995* provides for an extension of criminal responsibility in circumstances of attempt, complicity and common purpose, innocent agency, incitement and conspiracy. In each of these cases, the person is taken to have committed an offence and is punishable accordingly. Of particular significance amongst these is conspiracy with another person to commit an offence punishable by imprisonment for more than twelve months, made a general Commonwealth offence in 1995.[8] The doctrine of common purpose is also available to extend joint criminal responsibility to an offence which was not that which was the object of the joint enterprise entered by the accused.[9]

Some may argue that little harm is done by the creation of terrorism offences, as ultimately charges of terrorism are unlikely to be laid in relation to other than the most serious of acts and against other than the most dangerous and threatening of organisations. However, the conferral on the prosecutorial authorities of such sweeping and arbitrary powers in the characterisation of offences and laying of charges is contrary to the prohibition of arbitrary arrest and detention in article 9 (a) of the International Convention of Civil and Political Rights ('ICCPR').[10] In 1990, the United Nations Human Rights Committee confirmed in the case of *Van Alphen v The Netherlands* that 'arbitrariness' must be interpreted broadly to include elements of inappropriateness, injustice and lack of predictability. This means that deprivation of liberty provided for by law must not be manifestly unproportional, unjust or unpredictable. An unacceptable element of arbitrariness and unpredictability arises in that determining whether or not a person is charged with a terrorist offence, with another offence or with any offence at all (a determination which has profound implications in terms of the onus of proof, available defences, stigma of conviction and penalties), is left to the prosecutorial authorities without any transparency or public scrutiny. The creation of such offences also has considerable implications in terms of the proposed enhanced powers of ASIO under the ASIO Bill 2002.

Proscribed organisations

Division 102 of the *Security Legislation Amendment (Terrorism) Bill 2002* proposes to provide the attorney-general with power to make a declaration that an organisation is a proscribed organisation and to create a series of offences in relation to proscribed organisations. In accordance with sec 102.2, the attorney-general may make a declaration that an organisation is a proscribed organisation where the attorney-general is satisfied on reasonable grounds that:

- the organisation has committed, or is committing, an offence against this Part;
- a member of the organisation has committed, or is committing, an offence against this Part on behalf of the organisation;
- the declaration is reasonably appropriate to give effect to a decision of the Security Council of the United Nations that the organisation is an international terrorist organisation; or
- the organisation has endangered, or is likely to endanger, the security or integrity of the Commonwealth or another

country.

In accordance with sec 102.4(1), a person commits an offence if the person:

(a) directs the activities of a proscribed organisation; or

(b) directly or indirectly receives funds from, or makes funds available to, a proscribed organisation; or

(c) is a member of a proscribed organisation; or

(d) provides training to, or trains with, a proscribed organisation; or

(e) assists a proscribed organisation.

The penalty for an offence against sec 102.4(1) is imprisonment for 25 years. In accordance with subsection 2, strict liability applies to the element of the offence against subsection 1 that the organisation is a proscribed organisation. Offences of strict liability are offences in relation to which no *mens rea* is required so that the offence is committed once it is shown that the accused voluntarily committed the acts which comprise the offence. It is a defence to an offence of strict liability that the accused honestly and reasonably but mistakenly believed in a set of facts which if existed would have rendered his or her conduct innocent.[11] However, the defence is a positive one in that the accused must be labouring under a mistake of fact, and it does not arise where the accused does not turn his or her mind to the question.[12] It is a defence to a prosecution of an offence against subsection 1 if the defendant proves that the defendant neither knew, nor was reckless as to (a) whether the organisation, or a member of the organisation had committed, or was committing, an offence against this Part; and (b) there was a relevant decision of the Security Council; and (c) the organisation had endangered, or was likely to endanger, the security or integrity of the Commonwealth or another country. Subsection 4 provides a further defence to a prosecution of an offence against paragraph (1)(c) if the defendant proves that the defendant took all reasonable steps to cease to be a member of the organisation as soon as practicable after the organisation became a proscribed organisation.

An organisation can be proscribed without proof of any proscribed conduct

The proscription provisions, natural justice and the role of the attorney-general

One aspect of the proposed proscription regime which raises particular concern is the power in the attorney-general to make a declaration that an organisation is a proscribed organisation without affected person being afforded any opportunity to be heard.[13] The effect of *Kioa v West* and other decisions[14] is to require that procedural fairness be afforded in relation to decisions of an administrative character which affect the rights, interests and legitimate expectations of an individual, subject only to a clear manifestation of a contrary statutory intention. It is also established that the content of procedural fairness, and the extent of the hearing and participation it requires, will increase in proportion to the seriousness of the consequences involved.[15] The effect of the proposed proscription provisions is to deny affected persons any right to be heard, and to displace altogether long established rules of procedural fairness and natural justice.

The vesting of a far-reaching power to proscribe an organisation solely in a member of the executive, without any safeguards whatsoever, is deeply disturbing. Surely, such sweeping power should be vested in the judicial branch of government. Instead, it is proposed that executive power resulting in the determination of legal status be exercised entirely shorn of procedural safeguards. A relevant precedent for such safeguards may be found in Part IIA of the *Crimes Act 1914* (Cth) concerning declarations as to unlawful associations which advocate or encourage the overthrow of the Constitution, the established government of the Commonwealth or of a State or any other civilised country, or the destruction or injury of property of the Commonwealth or of property used in trade or commerce with other countries or among the States. An application by the attorney-general to the Federal Court for an order declaring a body of persons to be an unlawful association is made by summons containing averments setting out the facts relied upon in support of the application, and any interested person may apply to the Full Court of the Federal Court of Australia for the setting aside of the order.

By contrast, the proposed proscription regime vests absolute power in the attorney-general to declare an organisation to be a proscribed organisation. There is no requirement that the attorney-general make a case against an organisation before a judge. An organisation can be proscribed without proof of any proscribed conduct and, as noted above, without any opportunity on the part of affected parties to be heard. Whilst the attorney-general can revoke a declaration if he or she is satisfied on reasonable grounds that none of the paragraphs in sec 101.2(1) apply, the offence against sec 102.4(1) that the organisation is a proscribed organisation is an offence of strict liability in relation to which the burden of proof is reversed.

No right of appeal against a proscription decision

Moreover, the proposed proscription regime provides for no right of appeal against a decision to proscribe an organisation under sec 102.2. Review of the attorney-general's decision under the *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act) would provide an inadequate safeguard because of the narrow grounds of review under that Act. In particular, there would be no scope for review of the merits of the decision. Nor would there be any scope for review on proportionality grounds. Whilst proportionality is well accepted as a basis upon which a purposive conferral of constitutional power, and legislative exercises of power may be impugned[16], proportionality has not been adopted as a separate ground of review in the context of judicial review of administrative action.[17] That is, it would not be possible to argue on review that the decision was unlawful because it was not 'reasonably appropriate and adapted to give effect to the relevant purpose or object'[18]. Retrospective judicial remedies would not provide an adequate or appropriate means of controlling the exercise of the attorney-general's power under sec 102.2.

The constitutionality of the proscription provisions

Further, there is real doubt as to the constitutional validity of the provisions of the Bill concerning the proscription of organisations. The *Communist Party Dissolution Act 1950* granted the governor-general an unfettered, and unreviewable, power to declare an organisation to be unlawful or a person to be a communist. That Act was struck down by the High Court in *Australian Communist Party v Commonwealth*[19], essentially on the ground that the Act granted the governor-general an unreviewable power and that it was beyond the power of the Federal Parliament to suppress an organisation under the defence power on the

opinion of the governor-general in a time of relative peace. It is by no means clear that the High Court would consider remedies under the ADJR Act, which provides for neither merits review nor review on proportionality grounds, as supplying a sufficient link between the power and the legal consequences of the attorney-general's opinion. Where, as here, draconian, penalising legislation with the potential to infringe upon individual liberties is involved, the Court is likely to be more astute to review constitutionality.[20]

Moreover, the external affairs power is likely to be a primary basis for anti-terrorism measures in Australia. In relation to both the defence and the external affairs power, it is important to recall the constitutional doctrine of proportionality which has traditionally been regarded as synonymous with the test for purposive characterisation, that is, whether the measure is 'appropriate and adapted' to achieving the valid federal purpose[21]. The High Court has recognised that the external affairs power is available to support a law purportedly enacted to give domestic effect to an international instrument where the means selected are 'reasonably capable of being considered appropriate and adapted to implementing the treaty'[22]. Real doubt must attach to the question of whether the proscription provisions are 'appropriate and adapted' to implementing Security Council resolution 1373.

Indeterminacy of the proscription provisions

Further concerns arise in relation to the vague and indeterminate concept of 'informal member' in sec 102.1. The equally indeterminate concept of 'assists a proscribed organisation' in sec 102.4(1)(e) would potentially render persons only remotely connected with an organisation liable to a term of imprisonment of up to 25 years. Concerns in relation to the use of the device of a reversed onus to disprove recklessness have been noted above. Moreover, the attorney-general may make a declaration proscribing an organisation that is 'likely to endanger the security or integrity of the Commonwealth or another country' (sec 102.2(1)(d)). In this respect, the concept of 'integrity' has no clearly understood legal or popular meaning. Arguably, use of the term 'integrity' is intended to encompass the concept of 'territorial integrity or political independence of any State', found in article 2(4) of the Charter of the United Nations. Article 2(4) prohibits the threat or use of force by members of the United Nations, in their international relations, against the territorial integrity or political independence of any State. Hence, the power in sec 102.2 could, conceivably, be used to proscribe organisations that campaign for or support pro-democracy and non-violent independence movements in other States.

Examples of organisations potentially susceptible to being proscribed pursuant to this power include organisations supporting independence for East Timor, the overthrow of the military dictatorship and the restoration of democracy in Burma (Myanmar), the end of the Apartheid regime in South Africa, and the removal of the Mugabe Government in Zimbabwe. Offences in relation to such proscribed organisations would be committed by persons directing the activity of the organisation, directly or indirectly receiving funds from or making funds available to the organisation, members of the organisation, providing training to the organisation or assisting the organisation. These might include persons contributing to fundraising drives, providing training in conflict resolution, international law, media skills or use of the internet, disseminating pamphlets and other literature, and otherwise providing material or moral support to the organisation.

Definition of treason

Proposed amendments to Part 5.1 of the *Criminal Code Act 1995* broaden the existing offence of treason in sec 24. Section 80.1(1)(f) includes as treason conduct 'that assists by any means whatever, with intent to assist' another country or an organisation that is engaged in armed hostilities against the Australian Defence Force. The penalty is imprisonment for life. Such treasonable conduct could include the provision of material and other forms of humanitarian aid such as disaster relief, medical assistance, water and sanitation programmes, agricultural rehabilitation and other means of economic support to enable conflict victims to restore their means of production. The criminalisation of the provision of such forms of assistance to an organisation engaged in armed hostilities against the ADF could, potentially, capture forms of humanitarian aid provided to groups such as the Bougainville Revolutionary Army. The potential for the criminalisation of many such acts of humanitarian assistance is particularly acute given the increased deployment of the ADF in peace keeping, border protection, disaster relief and other forms of non-military action.

Photo: Michael Jones / News Image Archive

The ASIO building - part of the Russell defence complex

The ASIO Bill

Definition of 'politically motivated violence'

The ASIO Bill proposes to amend the definition of 'politically motivated violence' in sec 4 of the ASIO Act to include '(ba) acts that are terrorism offences'. 'Terrorism offence' is defined to mean an offence against Part 5.3 of the Criminal Code. A Note is proposed for insertion at the end of the definition of terrorism offence in sec 4 to provide that a person can commit an offence against Part 5.3 of the Criminal Code even if no terrorist act occurs. Part 5.3 of the Criminal Code is proposed to be inserted in accordance with the *Security Legislation Amendment (Terrorism) Bill 2002* [No.2]. As a result of adopting the inexact and sweeping definition of 'terrorism offence' proposed for the *Security Legislation Amendment (Terrorism) Bill*, the ASIO Bill's anti-terrorism powers are available to enable an unacceptably vast range of persons, themselves not suspected of any criminal activities, to be required to appear for questioning and to be taken into custody and detained for questioning.

Prescribed authorities

At the end of Part II a new Division 3 is proposed for insertion dealing with special powers relating to terrorism offences. Pursuant to sec 34B, the minister may appoint as a prescribed authority a Federal Magistrate or a member of the Administrative Appeals Tribunal ('the AAT'). Particular concern arises in relation to the discretion which is proposed to be exercised by the minister

in the selection of those federal magistrates and AAT members considered suitable candidates for appointment as a prescribed authority. There are also cogent reasons for concluding that the powers proposed to be granted to ASIO pursuant to warrants issued by prescribed authorities are so far-reaching, including the power to request detention of persons for 48 hours and longer, that the issuing of warrants should only be capable of being authorised by a Chapter III judge. The common law has long recognised the role of the judiciary in the authorisation of the issuing of warrants. Such a role fits within the established principle of the performance of such function by judges as *personae designatae*.[23]

The separation of judicial power entrenched by the Constitution protects Australian citizens against the usurpation of judicial power in the form of the imposition of involuntary detention of a penal or punitive character by the legislature or executive. In *Chu Kheng Lim v The Minister for Immigration, Local Government and Ethnic Affairs* Brennan, Deane and Dawson JJ said that, with limited exception, 'the citizens of this country enjoy, at least in times of peace, a constitutional immunity from being imprisoned … except pursuant to an order by a court in the exercise of the judicial power of the Commonwealth'.[24] In the absence of judicial power, the Constitution only permits administrative detention which is connected with a legislative power, and is reasonably necessary for the purpose of its exercise. In *Chu Kheng Lim*, the mandatory detention of boat people in custody was held to be a valid exercise of the aliens power provided it is not punitive and is 'limited to what is reasonably capable of being seen as necessary for the purposes of deportation or necessary to enable an application for an entry permit to be made and considered."[25] Such limited authority to detain an alien could be conferred on the Executive without infringement of the exclusive vesting by Chapter III of the Constitution of the judicial power of the Commonwealth in the courts. In *Chu Kheng Lim* Justices Brennan, Deane and Dawson JJ noted that committal to custody pending trial of persons accused of crimes pursuant to executive warrant was not seen by the law as punitive or as appertaining exclusively to judicial power, because even where exercisable by the Executive the power to detain a person in custody pending trial is ordinarily subject to the supervisory jurisdiction of the courts, including the 'ancient common law' jurisdiction to order that a person be admitted to bail. The proposed ASIO Bill, by contrast, excludes any such supervisory jurisdiction of the courts.

The proposed test – namely whether or not the minister is satisfied that there are 'reasonable grounds' for believing that the issue of the warrant will substantially assist the collection of intelligence – is unacceptably broad.

The possibility that a warrant authorising detention of persons for 48 hours and longer would be capable of being issued other than by a Chapter III judge also raises human rights concerns. UK anti-terrorism legislation[26] providing for detention without authorisation or monitoring by judicial authority gave rise to a successful argument before the European Court of Human Rights concerning a breach of the European Convention on Human Rights and Fundamental Freedoms[27] in *Brogan v United Kingdom* ('the European Convention')[28].

Requesting a warrant for questioning and detention

Pursuant to sec 34C, the director-general of ASIO may seek the minister's consent to request the issue of a warrant for questioning under sec 34D, which consent the minister may provide where the minster is satisfied: (a) that there are reasonable grounds for believing that issuing the warrant will substantially assist the collection of intelligence that is important in relation to a terrorism offence; and (b) that relying on other methods of collecting that intelligence would be ineffective; and (c) if the warrant is to authorise the person to be immediately taken into custody and detained, that there are reasonable grounds for believing that if the person is not immediately taken into custody and detained, the person (i) may alert a person involved in a terrorism offence that the offence is being investigated; or (ii) may not appear before the prescribed authority; or (iii) may destroy, damage or alter a record or thing the person may be requested in accordance with the warrant to produce. The warrant may specify persons by reference to a class.

The fundamental importance attached by the common law to the right to silence before and during trial requires extraordinary circumspection in circumscribing the circumstances in which a person can be compelled to answer questions. [29] The effect of sec 34C is to allow the director-general of ASIO to request and the minister to consent to the compulsory questioning of persons who are not suspected of the commission of any crime, let alone any terrorism offence, however broadly defined. The proposed test – namely whether or not the minister is satisfied that there are 'reasonable grounds' for believing that the issue of the warrant will substantially assist the collection of intelligence – is unacceptably broad.[30]

Detention of persons

At any time when a person is before the prescribed authority for questioning under a warrant, the authority may give a direction pursuant to sec 34F(1), *inter alia*, to detain the person, for the further detention of the person, permitting the person to contact a specified person or any person, or for the release of the person. The authority is only to give a direction that is consistent with the warrant, or has been approved in writing by the minister: sec 34F(2), and is only to be given where he or she is satisfied that there are reasonable grounds for believing that if the person is not detained, the person (i) may alert a person involved in a terrorism offence that the offence is being investigated; or (ii) may not continue to appear or appear again before the prescribed authority; or (iii) may destroy, damage or alter a record or thing that the person has been may be requested or may be requested, in accordance with the warrant, to produce. A direction under sec 34F(1) must not result in a person being detained for more than 48 hours after the person first appears before the prescribed authority for questioning under the warrant: sec 34F(4). A person who does not appear before the prescribed authority as required by a direction under sec 34F is subject to a penalty of imprisonment for 5 years: sec 34G(1).

The capacity proposed to be conferred by sec 34F(4) to detain, incommunicado, persons not themselves suspected of any criminal offence for a period of 48 hours is surely problematic, and any capacity to seek an extension of the 48 hour period pursuant to sec 34F(7) completely objectionable. The proposed powers of detention and compulsion are inconsistent with the principles of the rule of law applied to terrorism, in particular those requiring

close as possible approximation between ordinary criminal law and procedure and terrorism offences, and justification of additional powers by reference to the necessity to meet actual and anticipated threats. Australian criminal law does not presently permit the detention of persons not suspected themselves of any criminal activity, but only of having intelligence in relation to a criminal offence.

Nor have any material or other circumstances which suggest the existence in Australia of real or anticipated threats justifying the conferral of such extraordinary powers been identified. Under the proposed warrant system, ASIO obtains for the first time coercive interrogation powers, not restricted to situations in which there are a clear and imminent risk of terrorist acts. This represents a significant change in the traditional role of ASIO as an intelligence gathering and analysis agency. The onus is on the Government to demonstrate the insufficiency of existing powers of intelligence and security agencies and police. That onus is a heavy one, given the extent of fundamental liberties which are proposed to be infringed, namely deprivation of liberty without a charge, the denial of the right of a person detained to contact family and to legal counsel, and the abrogation of the right not to incriminate oneself by refusing to answer questions.

Critical aspects of the proposed legislation are inconsistent with fundamental aspects of the rule of law and with core international human rights obligations.

In particular, the proposed detention provisions raise concerns in relation to the prohibition of arbitrary detention in article 9 of the ICCPR. In its General Comment on article 9, General Comment No 8 'Right to liberty and security of persons', the United Nations Human Rights Committee has stated:

> Paragraph 3 of article 9 requires that in criminal cases any person arrested or detained has to be brought 'promptly' before a judge or other officer authorized by law to exercise judicial power. More precise time-limits are fixed by law in most States parties and, in the view of the Committee, delays *must not exceed a few days*.
>
> The important guarantee laid down in paragraph 4, i.e. the right to control by a court of the legality of the detention, applies to all persons deprived of their liberty by arrest or detention. …
>
> Also if so-called preventive detention is used, for reasons of public security, it must be controlled by these same provisions, i.e. it must not be arbitrary, and must be based on grounds and procedures established by law (para. 1), information of the reasons must be given (para. 2) and court control of the detention must be available (para. 4) as well as compensation in the case of a breach (para. 5). And if, in addition, criminal charges are brought in such cases, the full protection of article 9 (2) and (3), as well as article 14, must also be granted.'[31]

The proposed authorisation by a non-judicial authority of a person's detention for a period of 48 hours, capable of being extended for a further 48 hours on an unlimited number of occasions, and without any access to legal counsel, involves arbitrariness in the protection of the liberty and security of the person.[32] In particular, as stated in the Human Rights Committee's General Comment on article 9, the requirement of prompt appearance before a judicial officer requires that the period before appearance must not exceed several days. In one case, the Human Rights Committee has found a violation where the person was held for five days without being brought before a judge.[33] In *Brogan v the United Kingdom*, the European Court of Human Rights found that four days and six hours was too long to satisfy the requirement of promptness.[34] Of utmost concern is that the Bill envisages that second and subsequent warrants each for up to 48 hours may be obtained. There is no restriction whatsoever on the number of such warrants which may be obtained and hence the overall period of continuous detention, except that where warrants will result in a continuous period of more than 96 hours, warrant authority must be sought from the deputy president of the AAT.

Communications whilst in custody or detention

In accordance with secs 34F(8) & (9), a person is not permitted to contact and may be prevented from contacting anyone at any time while in custody or detention, other than any person named in the warrant, the inspector-general of intelligence and security and the ombudsman. Thus, a person detained under a warrant for questioning would only be entitled to legal advice where the warrant allowed it. This is a most objectionable aspect of the Bill. Any person compelled to answer questions pursuant to a warrant must be entitled to access to a legal adviser. Without access to independent legal counsel, the guarantee in sec 34J of treatment with humanity and respect for human dignity, and freedom from cruel, inhuman or degrading treatment, is meaningless. Unless information about ill-treatment under questioning or in detention can reach the outside world, there is no practical means to challenge such treatment. The right to communicate with the inspector-general of intelligence and security and the ombudsman, whilst a laudable supplementary safeguard, is inadequate to ensure that detained persons, or persons on behalf of detained persons, are able to bring proceedings challenging the lawfulness of, and treatment under questioning or detention.

The United Nations Human Rights Committee's General Comment on article 7 concerning the prohibition of torture and cruel inhuman or degrading treatment or punishment provides relevantly[35]:

> '11. … To guarantee the effective protection of detained persons … [p]rovisions should … be made against incommunicado detention. … The protection of the detainee also requires that prompt and regular access be given to doctors and lawyers and, under appropriate supervision when the investigation so requires, to family members.'

Use of information, records or things in criminal proceedings

Proposed new subsection 34G(9) limits the use which can be made in criminal proceedings of information, records or things obtained as a result of warrant for the purposes of criminal prosecution. The information, records or things provided by a person while before a prescribed authority for questioning under a warrant may only be used in criminal prosecutions for an offence against section 34G or a terrorism offence. Grave concerns arise in relation to the use which can be made of incriminating answers. Ordinarily, persons being questioned have the right to refuse to answer on the basis that an answer might tend to incriminate them. Most bodies with the power to compel answers provide an opportunity for the person to object to answering, with a consequent safeguard that the answer cannot be used against that person in subsequent proceedings. As drafted, the Bill allows incriminating answers to be used against the person in subsequent proceedings for terrorist offences. This represents an unacceptable

extension of well-established safeguards in relation to use immunity.

Article 14(3) of the ICCPR provides: 'In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: … (g) Not to be compelled to testify against himself or to confess guilt.' In its General Comment on article 14, General Comment No 13, 'Equality before the courts and the right to a fair and public hearing by an independent court established by law', the Human Rights Committee has stated[36]:

> Subparagraph 3(g) [of article 14] provides that the accused may not be compelled to testify against himself or to confess guilt. In considering this safeguard the provisions of article 7 and article 10, paragraph 1, should be borne in mind. In order to compel the accused to confess or to testify against himself, frequently methods which violate these provisions are used. The law should require that evidence provided by means of such methods or any other form of compulsion is wholly unacceptable.

In *Saunders v United Kingdom*[37], the European Court of Human Rights held that it was a violation of article 6 of the *European Convention on Human Rights and Fundamental Freedoms* (right to a fair hearing) to admit evidence during a criminal trial which had been obtained at an earlier administrative hearing during which the accused had been compelled by statute to answer questions and adduce evidence of a self-incriminatory nature.[38]

Conclusions

In the foregoing commentary, it has been sought to demonstrate that critical aspects of the proposed legislation are inconsistent with fundamental aspects of the rule of law and with core international human rights obligations. The following warning given by Justice Kirby on 11 October 2001 against potential excess in the adoption of anti-terrorism laws (referring to the rejection by the Australian people of a proposal by way of referendum on 22 September 1951 to add a new sec 51A to the Constitution to legislate with respect to communists and communism) is, as so often, apposite:

> Given the chance to vote on the proposal to change the constitution, the people of Australia, fifty years ago, refused. When the issues were explained, they rejected the enlargement of Federal power. History accepts the wisdom of our response in Australia and the error of the overreaction of the United States. Keeping proportion. Adhering to the ways of democracies. Upholding constitutionalism in the rule of law. Defending, even under assault, the legal rights of suspects. These are the way to maintain the love and confidence of the people over the long haul. We should never forget these lessons…every erosion of liberty must be thoroughly justified. Sometimes it is wise to pause. Always it is wise to keep our sense of proportion and to remember our civic traditions as the High Court Justices did in the Communist Party Case of 1951.[39]

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1 This commentary draws upon material contributed by the New South Wales Bar Association to the Law Council of Australia's submissions to the two inquiries.

2 See also Tony Abbott, President, Law Council of Australia, 'The World since September 11: Can democracy limited by the rule of law combat terrorism effectively?', address to the First Plenary Session of the Australian Academy of Forensic Sciences, 13 February 2002, at p15.

3 Lord Lloyd of Berwick was requested in December 1995 by the House of Commons to consider whether there would be a need for specific counter terrorism legislation in the United Kingdom in the event of a lasting peace in Northern Ireland. His report, published in October 1996, was entitled 'Inquiry into legislation against terrorism' Cmd. 3420 (1996).

4 'Message by 17 independent experts of the Commission on Human Rights on the occasion of Human Rights Day, 10 December 2001', UN Doc E/CN.4/2002/137, Annex 1.

5 UN Doc E/C/N.4/2002/18 (27 February 2002), para 2.

6 ibid, Annex.

7 *He Kaw Teh v The Queen* (1985) 157 CLR 523; *Jiminez v The Queen* (1992) 173 CLR 572. 'Absolute liability' is defined in sec 6.2 of the *Criminal Code Act 1995*.

8 By the insertion of sec 86(1) into the *Crimes Act 1914*: see *Crimes Amendment Act No. 11 1995*, sec 8. Conspiracy is now dealt with in sec 11.5 of the *Criminal Code Act 1995*.

9 *McAuliffe v R* (1995) 183 CLR 108

10 Article 9 (a) of the ICCPR provides that: 'Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.'

11 *Proudman v Dayman* (1941) 67 CLR 536 at 540; Hardgrave v R (1906) 4 CLR 232. 'Strict liability' is defined in sec 6.1 of the *Criminal Code Act 1995*.

12 *Proudman v Dayman; State Rail Authority of New South Wales v Hunter Water Board* (1992) 28 NSWLR 721.

13 *Kioa v West* (1985) 159 CLR 550, in particular Mason J at 584.

14 For example, *attorney-general (NSW) v Quin* (1990) 170 CLR 1 at 57-58; *Annetts v McCann* (1990) 170 CLR 596 at 598.

15 2 ed, at p397.

16 For example, *Commonwealth v Tasmania* (1983) 158 CLR 1: *Richardson v Forestry Commission* (1988) 164 CLR 261, *Williams v City of Melbourne* (1933) 49 CLR 142.

17 *Bruce v Cole* (1998) 45 NSWLR 163 at 185.

18 See M Aronson and B Dyer, Judicial Review of Administrative Action, 2nd ed 2000, at pp.289-292.

19 (1951) 83 CLR 1.

20 *R v Hughes* (2000) 202 CLR 535.

21 See discussion in J Kirk, 'Proportionality' in T Blackshield, M Coper & G Williams (eds), *The Oxford Companion to the High Court of Australia,* 2001, at pp568-570.

22 *Victoria v Commonwealth* (1996) 187 CLR 416 at 487, 488.

23 *Hilton v Wells* (1985) 157 CLR 57; *Grollo v Palmer, Commission of the Australian Federal Police* (1995) 184 CLR 348; cf *Wilson v Minister for Aboriginal & Torres Strait Islander Affairs* (1996) 189 CLR 1 where the function proposed to be conferred on the judge was to provide policy advice to the Minister.

24 (1992) 176 CLR 1 at 28-29, per Brennan, Deane and Dawson JJ

25 (1992) 176 CLR 1 at 33. See also *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51

26 *Prevention of Terrorism (Temporary Provisions) Act 1989*, sec 14(1)(b)

27 Article 5(3) of the European Convention provides that 'Everyone arrested or detained in accordance with the provisions of paragraph 1(c) shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial.' Article 5(3) of the European Convention is relevantly identical to article 9 of the ICCPR.

28 (1989) 11 EHRR 117. Subsequently, the UK availed itself of the right of derogation conferred by article 15(1) of the European Convention based on the public emergency in Northern Ireland. The derogation was held by the European Court to be effective in *Brannigan & McBride v United Kingdom* (1994) 17 EHRR 539.

29 See discussion of the origins of the privilege and its human rights rationale by Mason CJ and Toohey J in *Environmental Protection Authority v Caltex* (1993) 178 CLR 477 at 497-500.

30 A more appropriate test would require the Minister to be satisfied that there are compelling grounds to consider that the issue of the warrant is necessary, for example to prevent flight, destruction of or interference with evidence, the commission of further terrorist acts.

31 See also views of the Human Rights Committee in *van Alphen v The Netherlands* UN Doc CCPR/C/39/D/305/1988, 15 August 1990, para 5.8; also M Nowak, *UN Covenant on Civil and Political Rights – CCPR Commentary*, Kehl 1993, p172.

32 See N Rodley, ' Rights and Responses to Terrorism in Northern Ireland', in D Harris and S Joseph (eds), *The International Covenant on Civil and Political Rights and United Kingdom Law*, Clarendon Press Oxford, 1995, p126.

33 *Jijon v Ecuador* 277/1988, para 5.3.

34 para 61

35 Forty-fourth session, 1992

36 Twenty-first session, 1984

37 (1996) 23 EHRR 313

38 See generally S Bronitt and M Ayers, ' Criminal Law and Human Rights' in D Kinley (ed), *Human Rights in Australian Law*, Federation Press 1998, p 120, at pp124-129

39 Justice Michael Kirby, 'Australian Law After September 11, 2001', speech to the Law Council of Australia, 32nd Australian Legal Convention, Canberra, 11 October 2001