SUBMISSION TO INQUIRY INTO THE ASIO LEGISLATION AMENDMENT (TERRORISM) BILL 2002 (CTH)

Senate Legal and Constitutional References Committee

Dr Greg Carne

Faculty of Law
University of Tasmania

INDEX

A. INTRODUCTION 1

B. INCOMMUNICADO DETENTION UNDER THE BILL: BREACHES OF INTERNATIONAL CIVIL AND POLITICAL RIGHTS 2

Incommunicado detention: an overview of the bill 2

Incommunicado detention and other issues: breaches of the
International Covenant of Civil and Political Rights 2

C. CONSTITUTIONALITY OF THE BILL 6

Relevant constitutional powers: Purposive or purposive aspect, with the application of a proportionality test 6

Chapter III Commonwealth Constitution immunity on constitutional power 6

The argument as to Chapter III constitutional invalidity 8

Referral of power from the states under s.51 (xxxvii) Commonwealth Constitution 9

D. DEVELOPING AN ALTERNATIVE MODEL 10

Alternatives to incommunicado detention 10

Recent overseas legislation: obtaining information from persons not suspected of terrorism offences 10

Canadian legislation: Anti-terrorism Act 2001 (Canada) 10

A suggested Australian model based on the Canadian legislation 11
United Kingdom legislation: *Terrorism Act 2000* (UK), as amended by the *Anti-Terrorism, Crime and Security Act 2001* (UK) 12

A suggested Australian model based on the United Kingdom legislation 12

**E. FURTHER ADVERSE IMPLICATIONS FOR CIVIL AND POLITICAL RIGHTS IN THE AMENDED BILL** 14

New and persistent problems with the amended bill 14

Approved lawyers: 34A and 34AA 14

Issuing authorities: 34A and 34AB 15

Prescribed authorities: 34A and 34B: use of untenured AAT members 15

Adopting acts in relation to a written statement of procedures to be followed in exercise of authority under warrants: 34C (3)(ba) and 34C (3A) 16

Ability to contact approved lawyer: 34C (3B) and (3C) 16

Concept of “contact” with an approved lawyer when in custody or detention: no specificity of right to presence during interrogation: 34C (3B) and (3C) and 34U 16

Non-custodial warrant for questioning: 34D (2)(a): access to legal adviser and/or approved lawyer 17

Exercise of right to seek remedy before federal court relating to warrant or treatment of person in connection with the warrant: 34E (3) 17

Prohibition on contact and prevention from contact by detainee of anyone at any time whilst in custody or detention: 34F(8) 17

Retention of evidential burdens: 34G 18

Presence of Inspector General of Intelligence and Security during interrogation: 34HA 18

Humane treatment of persons specified in the warrant: 34J 18

Rules for persons who are 14 but under 18: “likely that the person will commit, is committing or has committed a terrorism offence”: 34 NA (4)(a) 19

Offences of contravening safeguards: 34NB requirement of knowledge, but not recklessness or negligence 19

Offences of contravening safeguards: identity of alleged offenders: 34NB 19
Status of prescribed authority and immunity in performance of duties: 34SA 20

Involvement of lawyers: monitoring of contact: 34U (2) 20

Involvement of lawyers: prohibitions on intervening in questioning, addressing the prescribed authority: 34U (4) 21

CONCLUSION 22

APPENDICES: 22

1. United Nations Human Rights Committee *International Covenant of Civil and Political Rights* General Comment 20 on Art 7, General Comment 21 on Art 10, General Comment 8 on Art 9

2. Relevant sections of *Anti-Terrorism Act 2001* (Canada)

3. Relevant sections of *Terrorism Act 2000* (UK)