

Introduction

- 1.1 On 21 March 2002 the House of Representatives referred the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 to the Parliamentary Joint Committee on ASIO, ASIS and DSD (the Committee) for an advisory report. The House resolution requested the Committee to report by 3 May 2002.
- 1.2 The ASIO Terrorism Bill is part of suite of legislation introduced by the Government to counter the threat of terrorism. The Senate Legal and Constitutional Legislation Committee reviewed the associated Bills. In particular, the Suppression of the Financing of Terrorism Bill 2002 and the Security Legislation Amendment (Terrorism) Bill 2002 contain the definition of a 'terrorism offence' which is critical to the operation of the ASIO Terrorism Bill.
- 1.3 The ASIO Terrorism Bill is the most controversial piece of legislation ever reviewed by the Committee. Over 150 submissions were received most of which were opposed to the provisions in the Bill. In view of the public concern about the measures in the Bill and the need to consider the findings of the Senate Committee, the Committee did not produce a final report on 3 May 2002. Instead, the Committee tabled an 'unfinished inquiry report' which outlined the reasons for not completing the inquiry and foreshadowed that the Committee would request the House to provide an extension to the reporting date. A copy of the Committee's interim report is at Appendix A.
- 1.4 On 14 May 2002 the House granted the Committee's request and resolved that the Committee should report by 11 June 2002.
- 1.5 This chapter provides background information and describes the key provisions in the Bill. The final section of the chapter discusses the scope, objectives and conduct of the inquiry.

Background

- 1.6 On 2 October 2001, in the aftermath of the terrorist attacks on the World Trade Centre and the Pentagon, Attorney General the Hon Daryl Williams, QC, MP announced that Cabinet had approved the preparation of legislation to assist in dealing with international terrorist threats.¹ Among the various measures foreshadowed in the announcement was a major expansion of the warranting regime under which the Australian Security Intelligence Organisation (ASIO) exercises special powers.²
- 1.7 In February and March 2002 the Government introduced a suite of anti-terrorist legislation which are currently before the Parliament. The Bills include the:
- Security Legislation Amendment (Terrorism) Bill 2002 [No.2];
 - Suppression of the Financing of Terrorism Bill 2002;
 - Border Security Legislation Amendment 2002;
 - Criminal Code Amendment (Anti-hoax and Other Measures) Bill 2002;
 - Criminal Code Amendment (Suppression of Terrorist Bombing) Bill 2002; and
 - Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002.
- 1.8 The Government also introduced a Telecommunications Interception Legislation Amendment Bill 2002 which enables interception warrants to be granted to investigate 'an offence constituted by conduct involving an act or acts of terrorism'.³ The Anti-Hoax Bill was passed by both Houses on 21 March 2002 and received Royal Assent on 4 April.⁴

1 The Hon Daryl Williams, MP, Attorney-General, *New Counter-Terrorism Measures, Media Release*, 2 October 2001.

2 The Hon Daryl Williams, MP, Attorney-General, *New Counter-Terrorism Measures, Media Release*, 2 October 2001.

3 See item 7, Schedule 1, *Telecommunications Interception Legislation Amendment Bill 2002*.

4 *Criminal Code Amendment (Anti-hoax and Other Measures) Act 2002*, No 9 of 2002.

Purpose of the ASIO Legislation Amendment (Terrorism) Bill 2002

- 1.9 The Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 amends the *Australian Security Intelligence Organisation Act 1979 (ASIO Act)* from which ASIO derives its authority.
- 1.10 ASIO is the Commonwealth's domestic security intelligence organisation. It is responsible for protecting Australia and its people from espionage, sabotage, politically motivated violence, the promotion of communal violence, attacks on our defence system and acts of foreign interference.
- 1.11 The purpose of the Bill is to amend the ASIO Act 1979 by expanding the special powers available to ASIO to deal with terrorism.
- 1.12 Specifically, the Bill proposes:
- including the definition of a 'terrorism offence' in the ASIO Act;
 - providing a power to detain, search and question persons before a prescribed authority; and
 - permitting personal searches to be authorised in conjunction with detention warrants.
- 1.13 The Attorney-General, in his second reading speech, stated:
- Importantly, we have introduced a range of new terrorism offences. In order to ensure that any perpetrators of these serious offences are discovered and prosecuted, preferably before they perpetrate their crimes, it is necessary to enhance the powers of ASIO to investigate terrorism offences.⁵
- 1.14 The amendments contained in the Bill will empower ASIO to seek a warrant from a prescribed authority (PA). A PA can either be a Federal Magistrate, a Deputy President or a legally qualified member of the Administrative Appeals Tribunal. The warrant provides for the detention and questioning before the PA of persons who may have information that may assist in preventing terrorist attacks or in prosecuting those who have committed terrorism offences.
- 1.15 The warrants may provide for:

⁵ The Hon Daryl Williams, MP, Attorney-General, *ASIO Legislation Amendment (Terrorism) Bill 2002, Second Reading, House of Representatives, Hansard, 21 March 2002, p. 1930.*

- a person to be immediately taken into custody by a police officer and brought before a PA for questioning and detained under arrangements made by a police officer.
 - detention for a period up to 48 hours. Proposed subsection 34D(2) empowers the Director-General of ASIO to seek a warrant which allows for the detention and questioning of persons who may have information that may assist in preventing terrorist attacks or prosecuting those who have committed terrorist offences.⁶ Successive warrants can be issued, subject to the limits proposed in subsection 34C(5), which require warrants allowing detention beyond 96 hours to be issued by a Deputy President of the AAT.
 - detention incommunicado. Proposed subsection 34F(8) states that a 'person who has been taken into custody, or detained, under this Division is not permitted to contact, and may be prevented from contacting, anyone at any time while in custody or detention'. This prohibition may be qualified by the terms of the warrant or a direction issued by a PA.
 - a person not being able to decline to give information or produce a document. Proposed subsection 34G(3) states that a person who is before a prescribed authority for questioning under a warrant must not fail to give any information requested in accordance with the warrant (penalty: imprisonment for 5 years).
- 1.16 ASIO may not seek a warrant without the Attorney-General's consent. In consenting to such a request, the Attorney-General must be satisfied that:
- there are 'reasonable grounds for believing that the warrant will substantially assist the collection of intelligence that is important in relation to a terrorist offence' (proposed paragraph 34C(3)(a));
 - 'relying on other methods of collecting intelligence would be ineffective' (proposed paragraph 34C(3)(b)), and,
 - 'if the warrant involves detention,' there are reasonable grounds for believing that, if the person is not immediately taken into custody and detained' he or she may alert a person involved in a terrorist offence, may fail to appear before the prescribed authority or may destroy, damage or alter evidence described in the warrant (proposed paragraph 34C(3)(c)).

⁶ The Hon Daryl Williams, MP, Attorney-General, ASIO Legislation Amendment (Terrorism) Bill 2002, Second Reading, House of Representatives, 21 March 2002, *Hansard*, p. 1930.

Accountability measures

- 1.17 The Attorney-General, in his second reading speech, indicated that the Bill 'contains a number of safeguards to ensure that a person is treated fairly whilst in custody or detention.' For example, when a person appears before a prescribed authority, that authority must explain what the warrant authorises ASIO to do and the period the warrant is in force. In addition, the person will be advised that they can make a complaint to the Inspector-General of Intelligence and Security (IGIS) or the Ombudsman.
- 1.18 The IGIS will be provided with a copy of all warrants issued and a statement containing details of any detention that has taken place.
- 1.19 The Bill, however, does not appear to contain penalty clauses for officers who do not administer parts of the Bill correctly. In addition, there is no provision in the Bill for redress or compensation in the event that a person is wrongfully detained.
- 1.20 The second reading speech indicates that the Parliamentary Joint Committee on ASIO, ASIS and DSD will be asked to review the new powers and provide a report on their operation twelve months after their commencement. However, this proposal is not included in the Bill.

Definitions of a terrorist act

- 1.21 There was considerable debate regarding the proposed definition of a 'terrorism offence'.
- 1.22 The Security Legislation Amendment (Terrorism) Bill 2002 and Suppression of the Financing of Terrorism Bill 2002 both include the following definition of a terrorist act:

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 serious 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 including, but not limited to:*
 - (i) *an information system; or*
 - (ii) *a telecommunications system; or*
 - (iii) *a financial system; or*
 - (iv) *a system used for the delivery of essential government services; or*
 - (v) *a system used for, or by, an essential public utility; or*
 - (vi) *a system used for, or by, a transport system.*
- (3) *In this Division:*
- (a) *a reference to any person or property is a reference to any person or property wherever situated, within or outside Australia; and*
 - (b) *a reference to the public includes a reference to the public of a country other than Australia.*

1.23 The Attorney-General, in his second reading speech, stated:

'Terrorist act' is defined to mean a politically, religiously or ideologically motivated act that involves serious harm to a person, serious damage to property, endangering a persons life, creating a serious health or public safety risk or seriously interfering with an electronic system.⁷

This definition is intended to capture such acts as suicide bombings, chemical or biological attacks, threats of violence and attacks on infrastructure.⁸

7 The Hon Daryl Williams, MP, Security Legislation Amendment (Terrorism) Bill 2002, Second Reading, House of Representatives, *Hansard*, 12 March 2002, p. 1040.

8 The Hon Daryl Williams, MP, Security Legislation Amendment (Terrorism) Bill 2002, Second Reading, House of Representatives, *Hansard*, 12 March 2002, p. 1040.

To reflect the severity of these offences, they will attract a maximum penalty of life imprisonment.⁹

- 1.24 The broad definition of terrorism contained in the Security Legislation Amendment (Terrorism) Bill 2002 is designed to cover a number of possible forms of terrorist activity. However this definition may also potentially cover other activities including cases of largely conventional but unlawful political protest such as the recent actions at the Woomera detention centre where property was damaged.
- 1.25 The proposed definition has already come under strong criticism from the Law Council of Australia and a range of legal and civil liberties groups in evidence presented in the current examination of the Security Legislation Amendment (Terrorism) Bill 2002 by the Senate Legal and Constitutional Legislation Committee. For example Justice John Dowd of the International Commission of Jurists stated:

The creation of the offence of terrorism is at the heart of the whole of this legislation and is the danger of the whole legislation. The definition brings in subsection 100.1(2) and sets out a series of categories which are alternatives to the other. But, in the definition itself, the words 'political, religious, or ideological cause' in their generality are extremely dangerous for offences which carry not only life imprisonment but absolute liability in some cases.¹⁰

- 1.26 In relation to the ASIO Legislation Amendment (Terrorism) Bill 2002, the broad definition of terrorism would seemingly allow for the detention and questioning of individuals without legal representation who may not know anything about a terrorist activity, but could belong to or support various protest groups and organisations, or could merely be relatives or associates of persons suspected of engaging in activities within the scope of the broad definition of 'terrorism'.

International comparisons

- 1.27 Australia is not alone in adopting a legislative response to the terrorist attacks of 11 September. Both the United Kingdom and the United States of America responded to 11 September by extending their pre-existing anti-terrorism laws.

9 The Hon Daryl Williams, MP, Security Legislation Amendment (Terrorism) Bill 2002, Second Reading, House of Representatives, *Hansard*, 12 March 2002, p. 1040.

10 The Hon Daryl Williams, MP, Security Legislation Amendment (Terrorism) Bill 2002, Second Reading, House of Representatives, *Hansard*, 12 March 2002, p. 3.

- 1.28 Unlike Australia, however, which has not implemented anti-terrorist legislation previously, both the United Kingdom and the United States have had a long history of terrorist violence. The United Kingdom has had anti-terrorism legislation for over four decades while the United States of America has had such legislation for approximately two decades.

United Kingdom Prevention of Terrorism Acts

- 1.29 The *Terrorism Act 2000* is the main piece of terrorism legislation in the United Kingdom. Other Acts deal with issues associated with terrorism such as hoax offences, explosives, internationally protected persons, aviation safety and security, hostages and nuclear weapons.¹¹
- 1.30 The United Kingdom's first terrorist legislation came into being with the introduction of the *Provision of Violence (Temporary Provisions) Act 1939*. The Act was created in response to a series of Irish Republican Army (IRA) bombings in the United Kingdom. The legislation was intended to last only two years but, due to a number of extensions, lasted up until 1954.
- 1.31 The next piece of anti-terrorist legislation, the *Prevention of Terrorism (Temporary Provisions) Act 1974*, which was modelled on the *Prevention of Violence (Temporary Provisions) Act 1939* came into being in response to a prolonged period of terrorist activity in the United Kingdom. This Act, was intended to expire within 6 months but it lasted until 2000.
- 1.32 The key elements of the *Prevention of Terrorism (Temporary Provisions) Act 1974* were:
- the Act proscribed the IRA and made support for it illegal;
 - the legislation allowed the exclusion of persons involved in terrorism from the United Kingdom; and,
 - the Act permitted the arrest and detention of any person whom the police reasonably suspected was subject to an exclusion order, guilty of a related offence, or 'concerned in the commission, preparation or instigation of acts of terrorism'. These persons could be detained for 48 hours and the Secretary of State could extend this by a further 5 days. The Act also permitted the Secretary of State to issue orders allowing

11 Mr Nathan Hancock, *Terrorism and the Law in Australia: Supporting Materials, Law and Bills Digest Group, Research Paper*, 19 March 2002, p. 11.

police and immigration officers to stop and search persons at ports or boarders.¹²

- 1.33 Detention was reviewable by a writ of habeas corpus (a legal action which compels authorities to bring someone in custody before a court.) However, despite the large number of detentions under these provisions, such writs were rare. Moreover, given the short duration of detention, such action was practically unavailable in most cases.
- 1.34 The *Terrorism Act 2000* largely reincorporated these provisions but also made some significant changes. The power to extend detention was transferred from the Secretary of State to the judiciary as a safeguard measure.
- 1.35 Only a judicial authority therefore could extend detention if satisfied that doing so was reasonably necessary to obtain or preserve relevant evidence and that the relevant investigation is being conducted diligently and expeditiously.

Legislation in the United States

- 1.36 The *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act of 2001)* focuses on proscribed organisations, associated offences and law enforcement powers.
- 1.37 The Act provides for the mandatory detention of any alien whom the Attorney-General has reasonable grounds to believe is an 'inadmissible alien'. This was defined to include persons who have incited or engaged in terrorist activity and members or representatives of foreign terrorist organisations. The Act does not apply to US persons.
- 1.38 The Act extends the definitions to cover persons who use a position of prominence to endorse or espouse terrorism, or belong to a group that endorses terrorism, in a way that 'undermines United States efforts to reduce or eliminate terrorist activities.' It also broadens the definition of 'engaging in terrorist activity' to include incitement, preparation, information gathering, planning and soliciting funds or members for terrorist activities or organisations.
- 1.39 The Act provides that decisions by the Attorney-General may be reviewed by writ of habeas corpus. Thus, there is no administrative review,

12 Mr Nathan Hancock, *Terrorism and the Law in Australia: Supporting Materials, Law and Bills Digest Group, Research Paper*, 19 March 2002, p. 11.

although it is claimed that the habeas corpus review grounds closely parallel some of the judicial review grounds.¹³

Objectives and scope of the inquiry

1.40 The majority of evidence to the inquiry has called for the Bill to be abandoned in total or key provisions removed. The Committee heard these calls but also sought to seek solutions which would ameliorate the major concerns that were raised. Witnesses were tested along these lines about a range of possible measures which would improve the Bill. The key areas of the Bill on which the Committee focused its attention includes:

- the status of the prescribed authority;
- access to legal representation;
- the maximum duration of the detention period;
- the need for protocols governing the detention of persons;
- application of the Bill to persons under 18;
- the issue of self-incrimination;
- access to judicial review; and
- a range of accountability measures including adequate reporting of the number of warrants issued and the use of a sunset clause to strengthen public confidence.

1.41 Each of these matters has been addressed in the report. The Committee's conclusions and recommendations seek to make improvements on each of these matters and improve the overall quality of this Bill. While the Committee examined the problems surrounding the definition of a 'terrorism offence' it has not made conclusions or recommendations about this matter.

1.42 The Senate Legal and Constitutional Affairs Legislation Committee reviewed and has reported on the definition of terrorism. The Senate Committee noted that the definition does not include mention of the 'intent' to intimidate or coerce. Therefore, the Senate Committee recommended that the definition of 'terrorist act' 'be amended to include a third element, namely that the action or threat of action is designed to

¹³ Mr Nathan Hancock, *Terrorism and the Law in Australia: Supporting Materials, Law and Bills Digest Group, Research Paper*, 19 March 2002, p. 11.

influence government by undue coercion, or to unduly intimidate the public or a section of the public.¹⁴

- 1.43 The Committee examined the findings of the Senate Committee in relation to a terrorist act and concurs with its findings.

Conduct of the review

- 1.44 Information about the inquiry was advertised in the *Australian* on 28 March 2002. The Chairman issued a Media Release on 26 March 2002 outlining the objectives of the review and encouraging public comment.
- 1.45 In addition, submissions were sought from a range of government agencies, non-government organisation and individuals. Information about the inquiry was also posted on the Committee internet homepage at <http://www.aph.gov.au/house/committee/pjcaad/index.htm>
- 1.46 Over 150 submissions were received which are listed at Appendix B. Eight exhibits were received which are listed at Appendix C.
- 1.47 During the inquiry, the Committee received a private briefing from ASIO.
- 1.48 Evidence was taken at public hearings held in Canberra on 30 April, Sydney on 1 May and in Melbourne on 2 May 2002. A list of witnesses appearing at the hearings can be found at Appendix D.
- 1.49 Copies of the transcripts of evidence from the public hearings and the volume of submissions are available from the Committee secretariat and for inspection at the National Library of Australia. The transcripts of evidence are also available from the Hansard website at: <http://www.aph.gov.au/hansard/index.htm>
- 1.50 The Committee appreciates the technical assistance of the Law and Bills Digest Research Group, Parliamentary Library.

Report structure

- 1.51 The report structure reflects the key parts of the ASIO Bill. Chapter 2 examines proposed sections 34B to 34E which focus on the warrant process.

14 Senate Legal and Constitutional Legislation Committee, *Consideration of Legislation Referred to the Committee*, May, 2002, p. 39.

- 1.52 Chapter 3 examines those sections which relate to the detention of persons. For example, proposed section 34F sets out provisions for the detention of persons including the power to detain a person incommunicado. Proposed section 34G sets out the requirements by which a person will give information and produce 'things'.
- 1.53 The final chapter examines the adequacy of the accountability measures that exist in the Bill and proposes a range of additional measures which seek to raise the level of accountability.