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The Parliament of the Commonwealth of Australia

**An Advisory Report on the  
Australian Security  
Intelligence Organisation  
Legislation Amendment  
(Terrorism) Bill 2002**

Parliamentary Joint Committee on ASIO, ASIS and DSD

May 2002  
Canberra

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## **Chairman's Foreword**

The Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 is part of the Government's legislative response to the tragic events of 11 September. The Bill is seeking to 'strengthen Australia's counter terrorism capabilities by expanding ASIO's investigative powers.'

The Bill is one of the most controversial pieces of legislation considered by the Parliament in recent times. The Bill, in its original form, will provide for a person to be detained for up to 48 hours incommunicado, without legal representation and the right to silence removed. If further warrants were issued, a person could be detained indefinitely.

The Committee has been confronted with the challenging task of balancing the proposals in the Bill with the need to ensure that the civil liberties and rights under the law that Australia provides as a modern democracy are not compromised. The Bill, in its original form, would undermine key legal rights and erode the civil liberties that make Australia a leading democracy.

Under the Committee's proposals, persons detained under the Bill will have access to legal representation, and, because a person will not have the right to silence, they will be protected against self incrimination. The main objective of the Bill is the collection of intelligence that could assist ASIO in preventing a terrorist attack. The lesser objective is the collection of evidence for the purpose of prosecution. The Committee believes that protection against self-incrimination will assist in the collection of intelligence. The other major findings and recommendations include:

- the need for all warrants to be issued by a Federal Magistrate and, in those cases where detention will exceed 96 hours, then by a Federal Court Judge;
- a maximum period of detention of seven days, at the expiry of which a person will need to be charged or released;

- the establishment of a panel of senior lawyers, recommended by the Law Council of Australia, who could represent persons detained under the Bill. The lawyers on the panel may have to be security cleared so as to be eligible to represent people in detention. Under proposed section 34E, the prescribed authority will need to advise the person, when they first appear, that they have access to a legal representative from a list that will be given to the person;
- the development of protocols governing custody, detention and the interview process provided for under the Bill;
- the addition of penalty clauses in the Bill which will apply to officials who fail to comply with the provisions of the Bill. In particular, a penalty clause must apply to the requirement to provide humane treatment to a person specified in a warrant; and
- the granting of power to the Inspector-General of Intelligence and Security to suspend an interview on the basis of non-compliance with the law or an impropriety occurring. The Inspector would immediately report such cases to the Committee.

In addition, the Committee believes that the accountability and review provisions applying to the Bill are inadequate. Therefore, the Committee has developed a range of accountability measures that will provide greater reassurance and confidence to the Australian public. In particular, a sunset clause, of three years duration, must apply to the Bill. That is, at the end of three years, the Act will terminate. The Government would need to introduce a replacement Bill and argue the need for the continuation of the laws. This is the most powerful accountability mechanism that the Committee can recommend. In addition, the Committee would conduct a review of the Act 24 months into its operation. The Committee's findings, therefore, would feature in any discussion if the Government sought to introduce a replacement Bill.

The Bill does not provide for judicial review for a person who claims that they are wrongfully detained. The Committee recommends that a person must have the right to judicial review after 24 hours of detention and at every time a subsequent warrant is sought. This process would place a discipline on ASIO and ensure that the reason for detention was not frivolous, because at a later stage ASIO may need to defend its decision in court.



Finally, the Bill provides for the detention and questioning of children. For example, a child aged 12 could be detained, strip searched and questioned incommunicado for up to 48 hours and longer if a subsequent warrant was sought. The Committee proposes that the power to detain a person under 18 be struck from the Bill.

These recommendations will enhance the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 and provide greater confidence to the Australian public.

In conclusion, and on behalf of the Committee, I would like to thank all those who have contributed to this inquiry.

**DAVID JULL, MP**  
Chairman



## **Membership of the Committee**

**Chair**            Hon David Jull MP

**Members**        Hon Kim Beazley MP

Mr Stewart McArthur MP

Hon Leo McLeay MP

Senator Paul Calvert

Senator Sandy Macdonald

Senator the Hon Robert Ray

## **Committee Secretariat**

**Secretary**            Ms Margaret Swieringa

**Inquiry Secretary**    Mr Stephen Boyd

**Research Officer**    Ms Sonya Fladun

**Administrative Officers** Ms Tiana Gray  
Mr Richard Haureliuk



## **Terms of reference**

On 21 March 2002 the House of Representatives resolved that the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 be referred to the Parliamentary Joint Committee on ASIO, ASIS and DSD for consideration and an advisory report by 3 May 2002.

On 14 May 2002 the House of Representatives resolved that the time for the Parliamentary Joint Committee on ASIO, ASIS and DSD to present its advisory report on the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 be extended to 11 June 2002.



## List of abbreviations

AAT	Administrative Appeals Tribunal
AFP	Australian Federal Police
AG's	Attorney-General's Department
ASIO	Australian Security Intelligence Organisation
Bill	Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002
Committee	Parliamentary Joint Committee on ASIO, ASIS and DSD
FCLC	Federation of Community Legal Centres
IGIS	Inspector-General of Intelligence and Security
LCA	Law Council of Australia
NSW CCL	New South Wales Council for Civil Liberties
PA	Prescribed Authority



## List of recommendations

### 2 Warrants

#### Recommendation 1

Proposed section 34B, and consequential parts, of the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 be amended to provide for:

- Federal magistrates to issue all warrants;
- Federal Judges to issue all warrants where detention will exceed 96 hours; and
- members of the AAT, as set out in proposed subsection 34B(1), to undertake all other duties of the prescribed authority excluding the power to issue warrants.

#### Recommendation 2

The Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 be amended to include a provision giving the Attorney-General the power, by way of regulation, to nominate an authority that can issue a warrant under the Bill.

#### Recommendation 3

The Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 be amended so that the maximum period of detention of a person is no more than 7 days (168 hours), and at the expiry of that period a person must be either charged or released.

**Recommendation 4**

The Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 be amended to ensure that the Director-General in seeking a further warrant from a person must first seek the Minister's consent prior to requesting a further warrant from a Federal Magistrate or Federal Court Judge.

**Recommendation 5**

The Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 be amended so that the word immediately is inserted into subsection 34D(2)(b)(i) so that a person is 'immediately' bought before a prescribed authority.

**3 Detention****Recommendation 6**

The Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 be amended to provide for legal representation for persons who are the subject of a warrant. The following framework should apply:

- a panel of senior lawyers recommended by the Law Council of Australia to be formed who could represent persons being held in detention;
- the Bill should be amended to allow these lawyers to sit in on the entire proceeding of the prescribed authority, and represent a person at any further hearings which seek to extend detention; and
- the lawyers on the panel may have to be security cleared so as to be eligible to represent people in detention.

Proposed section 34E should be amended to ensure that the prescribed authority must advise the person, when they first appear before the prescribed authority, that they have access to a legal representative from a list that will be given to the person.

**Recommendation 7**

The Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 be amended to include a proposed section which requires the development of protocols governing custody, detention and the interview process provided for under the Bill.

- ASIO should develop the protocols in consultation with the Inspector-General of Intelligence and Security, the Australian Federal Police, and the Administrative Appeals Tribunal. The protocols should be approved by the Attorney-General;
- the Committee should be briefed on the protocols which should then be tabled in the Parliament; and
- the Bill should not commence until the protocols are developed and in place.

**Recommendation 8**

Proposed section 34G of the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 be amended to provide protection against self incrimination for the provision of information relating to a terrorism offence.

**Recommendation 9**

The Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 be amended to include penalty clauses which will apply to officials who do not comply with the provisions of the Bill. In particular, a penalty clause must apply to the operation of proposed section 34J.

**Recommendation 10**

The Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 be amended to ensure that no person under the age of eighteen years may be questioned or detained under the legislation.

## 4 Accountability Measures

### Recommendation 11

The Australian Security Intelligence Organisation must include in its declassified Annual Report the total number of warrants issued under proposed section 34C of the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002.

The Annual Report should show the total number of warrants sought, the total number of warrants issued for questioning and the total number of warrants issued for questioning and detainment.

### Recommendation 12

The Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 be amended to include a sunset clause which will terminate the legislation three years from the date of commencement.

### Recommendation 13

The Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 be amended to ensure that when the Director-General seeks the Minister's consent to request a warrant, under proposed section 34C(1), the Director-General must immediately provide details of the warrant to the Inspector-General of Intelligence and Security.

### Recommendation 14

The *Inspector-General of Intelligence and Security Act 1986* be amended to provide the Inspector-General of Intelligence and Security with the power to suspend, on the basis of non-compliance with the law or an impropriety occurring, an interview being conducted under the warrant procedures in the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002.

■ The Inspector-General of Intelligence and Security should immediately report the nature of such cases to the Committee.

### Recommendation 15

That proposed section 34E of the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 be amended to include a requirement that the prescribed authority must advise the person that they have the right to seek judicial review after 24 hours of detention and at every time a subsequent warrant is sought.



