

The Senate

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Legal and Constitutional  
References Committee

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Australian Security Intelligence Organisation  
Legislation Amendment (Terrorism) Bill 2002  
and related matters

December 2002

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# TABLE OF CONTENTS

<b>MEMBERS OF THE REFERENCES COMMITTEE .....</b>	<b>III</b>
<b>TERMS OF REFERENCE .....</b>	<b>IX</b>
<b>RECOMMENDATIONS.....</b>	<b>XI</b>
<b>ABBREVIATIONS .....</b>	<b>XVII</b>
<b>FOREWORD.....</b>	<b>XIX</b>
<b>CHAPTER 1 .....</b>	<b>1</b>
<b>INTRODUCTION .....</b>	<b>1</b>
Background.....	2
Conduct of the inquiry.....	3
Scope of the report.....	3
Acknowledgements .....	4
Note on references .....	4
<b>CHAPTER 2 .....</b>	<b>5</b>
<b>THE BILL .....</b>	<b>5</b>
Introduction .....	5
Warrants for questioning .....	5
Powers and duties of the prescribed authority.....	6
Search of people detained.....	7
Extension of detention.....	7
Offences.....	7
Safeguards and accountability measures .....	8
Amendments to the Bill following the PJCAAD's report .....	10
<b>CHAPTER 3 .....</b>	<b>11</b>
<b>EXTENSION OF ASIO'S POWERS.....</b>	<b>11</b>
Introduction .....	11
Overview .....	11
Intelligence .....	14
Terrorism .....	15

Intelligence v prosecution.....	18
<b>CHAPTER 4 .....</b>	<b>23</b>
<b>CONSTITUTIONAL BASES.....</b>	<b>23</b>
Introduction .....	23
The defence power.....	25
The external affairs power.....	27
The implied incidental power.....	29
The implied self-protection power .....	29
Observations .....	30
The referral of powers from the States to the Commonwealth .....	31
Conclusion.....	32
<b>CHAPTER 5 .....</b>	<b>33</b>
<b>WARRANTS.....</b>	<b>33</b>
The Bill.....	33
<b>CHAPTER 6 .....</b>	<b>47</b>
<b>QUESTIONING.....</b>	<b>47</b>
The role of the prescribed authority .....	47
Legal representation .....	50
Periods of questioning .....	56
The right to silence and privilege against self-incrimination .....	58
Possible exemptions from the duty to disclose.....	66
<b>CHAPTER 7 .....</b>	<b>71</b>
<b>DETENTION .....</b>	<b>71</b>
A central issue .....	71
Purpose .....	72
Constitutional issues .....	73
Referral of powers from the States .....	79
International law issues .....	79
Application of these issues .....	80
Alternative model .....	86
Practical issues.....	89
<b>CHAPTER 8 .....</b>	<b>91</b>
<b>ALTERNATIVE MODELS.....</b>	<b>91</b>
The questioning agency .....	91

The Prescribed Authority.....	99
<b>CHAPTER 9 .....</b>	<b>109</b>
<b>PROTOCOLS AND SAFEGUARDS .....</b>	<b>109</b>
Written protocols .....	109
Current safeguards in the Bill.....	111
Enforcement of safeguards .....	115
Judicial review .....	121
Annual reporting.....	126
A sunset clause .....	127
<b>CHAPTER 10 .....</b>	<b>129</b>
<b>CHILDREN.....</b>	<b>129</b>
The proposal .....	129
Evidence to the Committee .....	131
Searches .....	134
Summary.....	135
<b>CHAPTER 11 .....</b>	<b>137</b>
<b>THE COMMITTEE'S CONCLUSIONS .....</b>	<b>137</b>
Prescribed Authority .....	137
The issue of warrants.....	138
Questioning.....	139
Time limits for questioning .....	139
Legal representation .....	141
Use of evidence .....	145
Protocols and safeguards .....	146
Written protocols .....	148
Children .....	151
<b>ADDITIONAL COMMENTS AND POINTS OF DISSENT BY SENATOR BRIAN GREIG ON BEHALF OF THE AUSTRALIAN DEMOCRATS.....</b>	<b>153</b>
The Right to Silence and Privilege Against Self-Incrimination:.....	154
Legal Representation: .....	154
Detention of Non-Suspects:.....	156
Children: .....	157
Constitutionality: .....	157
Absence of a Bill of Rights: .....	158



Accountability of ASIO:.....	159
Sunset Clause:.....	160
Conclusion:.....	160
<b>AUSTRALIAN GREENS MINORITY REPORT .....</b>	<b>161</b>
<b>APPENDIX 1 .....</b>	<b>165</b>
<b>ORGANISATIONS AND INDIVIDUALS THAT PROVIDED THE COMMITTEE WITH SUBMISSIONS.....</b>	<b>165</b>
<b>APPENDIX 2 .....</b>	<b>183</b>
<b>WITNESSES WHO APPEARED BEFORE THE COMMITTEE .....</b>	<b>183</b>
Canberra, Tuesday 12 November 2002 .....	183
Canberra, Wednesday 13 November 2002 .....	183
Canberra, Thursday 14 November 2002 .....	183
Canberra, Monday 18 November 2002 .....	183
Melbourne, Friday 22 November 2002 .....	184
Sydney, Tuesday 26 November 2002.....	184



# TERMS OF REFERENCE

On 21 October 2002, the Senate referred the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002, together with the following matters, to the Senate Legal and Constitutional References Committee for inquiry and report by 3 December 2002:

- i. the development of an alternative regime in which questioning to obtain intelligence relating to terrorism is conducted not by ASIO but by the Australian Federal Police (AFP), including appropriate arrangements for detention of terrorist suspects, and questioning of persons not suspected of any offence;
- ii. the relationship between ASIO and the AFP in the investigation of terrorist activities or offences;
- iii. the adequacy of Australia's current information and intelligence gathering methods to investigate potential terrorist activities or offences;
- iv. recent overseas legislation dealing with the investigation of potential terrorist activities or offences;
- v. whether the bill in its current or amended form is constitutionally sound; and
- vi. the implications for civil and political rights of the bill and any proposed alternatives.

# RECOMMENDATIONS

## Recommendation 1

The Committee recommends that proposed section 34B should be amended to provide for the appointment by the Attorney-General as a Prescribed Authority of a number of retired federal or state judges, with at least 10 years' experience on a superior court, and that the appointments should be for a maximum period of three years.

## Recommendation 2

The Committee recommends that the definition of Issuing Authority in proposed section 34AB should be amended to refer to a retired federal or state judge appointed by the Minister, as for the Prescribed Authority. The Attorney-General should not be able to appoint persons as 'members of a class prescribed by regulations'.

## Recommendation 3

The Committee recommends that a Prescribed Authority that has issued a warrant should not be permitted to supervise questioning under the same warrant.

## Recommendation 4

The Committee recommends that the maximum time allowable for questioning under the warrant should be modelled on the questioning periods and down-time set out in sections 23C and 23D of the *Crimes Act 1914*. The provisions relating to maximum times allowable are to be provided for in legislation.

## Recommendation 5

The Committee recommends that an extension of time for questioning under the original warrant should be given by the Prescribed Authority where it is satisfied that there are reasonable grounds to believe further questioning is likely to yield relevant intelligence, with the questioning regime modelled on the provisions of the *Crimes Act 1914*.

## Recommendation 6

The Committee further recommends that, in exceptional circumstances, where the Attorney-General and the Issuing Authority are satisfied there is substantial new information relating to an imminent terrorist act justifying the further questioning of a person, a second warrant can be issued for that person, for questioning for a maximum period modelled on the provisions of the *Crimes Act 1914*.

## Recommendation 7

The Committee recommends that where a person has been the subject of two consecutive warrants, no further warrants are permitted for the next seven days after the completion of questioning, and then only if the threshold test and processes that apply to the second warrant are met. The Bill must also include a provision ensuring once questioning has finished a person is free to leave.

## Recommendation 8

The majority of the Committee recommends that the Bill include a provision ensuring that once questioning has finished, a person is free to leave.

Government Senators support this recommendation subject to the proviso that it would not apply where the Prescribed Authority otherwise directs, in accordance with proposed section 34F(3) (that the Prescribed Authority is satisfied that there are reasonable grounds for believing that, if the person is not detained, the person may alert a person involved in a terrorism offence that the offence is being investigated, or may destroy, damage or alter a thing the person has been requested to provide under the warrant) and it is likely that a terrorism offence that may have serious consequences is being committed, or is about to be committed.

## Recommendation 9

The majority of the Committee recommends that proposed subsection 34U(2) should be amended to recognise that, while visual monitoring of a person's contact with his or her legal adviser may be permissible, the communications between a person and his or her legal adviser must be confidential.

Government Senators support the recommendation subject to an exception where the Prescribed Authority is satisfied based on advice from ASIO that confidential communication may prejudice public safety.

### **Recommendation 10**

**The Committee recommends that the Bill should expressly provide that legal professional privilege is not affected.**

### **Recommendation 11**

**The majority of the Committee recommends that proposed section 34AA concerning approved lawyers should not proceed. Instead, the Prescribed Authority should be given the power to refuse to permit a particular legal adviser to be present on the application of ASIO if the Prescribed Authority believes on reasonable grounds that the particular person represents a security risk and that to allow representation by that person may prejudice public safety.**

**Government Senators support this recommendation insofar as it allows for a person to choose his or her own lawyer. However, in cases where the person's first nominated legal adviser has been refused permission to be present, Government Senators consider that the person being questioned should have access to an approved lawyer if he or she wishes.**

### **Recommendation 12**

**The Committee recommends that where the Prescribed Authority has refused to permit a particular legal adviser to be present, the person being questioned or detained should be able to choose another legal adviser.**

### **Recommendation 13**

**The Committee recommends that access to a legal adviser should not be barred under the terms of a warrant, but that if the Prescribed Authority is satisfied on the application of ASIO that there is a real and immediate threat to public safety, the Prescribed Authority should be empowered to order that questioning commence without waiting for the attendance of a legal adviser. Once a legal adviser arrives, he or she should have immediate access to the person being questioned. The Prescribed Authority should also have the power to order that questioning should proceed where he or she is satisfied that consecutive nominations of legal advisers constitute an attempt to frustrate the questioning process.**

#### **Recommendation 14**

**The Committee recommends that denial of access to a legal adviser who has arrived after questioning has commenced should be listed as an offence in the Bill.**

#### **Recommendation 15**

**The majority of the Committee recommends that proposed section 34G should be amended to remove the evidential burden placed on the person who is appearing for questioning under a warrant to show that he or she does not have the information sought or possession or control of the relevant record or thing.**

**Senator Scullion dissents from this recommendation.**

#### **Recommendation 16**

**The Committee recommends that the Prescribed Authority be required to inform the person being questioned of the function of all parties who are present during questioning.**

#### **Recommendation 17**

**The Committee recommends that information required to be given under proposed section 34E, as well as the person's right to request an interpreter, should be given both orally and in writing, with translation into the person's first language where appropriate.**

#### **Recommendation 18**

**The Committee recommends that proposed section 34H be amended to provide that an interpreter is also to be provided on request by the person being questioned.**

#### **Recommendation 19**

**The Committee recommends that a person being questioned should have access to legal aid funding as appropriate.**

### **Recommendation 20**

**The Committee recommends that the Bill should make explicit the IGIS's right to attend during the questioning process.**

### **Recommendation 21**

**The Committee recommends that the Bill should include a requirement that ordinary searches and frisk searches, as far as practicable, should be conducted by an officer of the same gender as the person being searched.**

### **Recommendation 22**

**The Committee recommends that:**

- (i) reference to adoption of a written statement of procedures in proposed paragraph 34C(3)(ba) and proposed subsection 34(3A) should be amended to require such procedures to be included in regulations;**
- (ii) those regulations must be made prior to the Minister giving consent to a request for a warrant; and**
- (iii) powers under the warrants must be exercised in accordance with those regulations.**

### **Recommendation 23**

**The Committee recommends that the regulations should include but not be limited to specifying the place and conditions of custody and detention, including overnight detention, security arrangements, the time limits on questioning, including required breaks in questioning, and further guidelines on searches, consistent with current policing protocols.**

### **Recommendation 24**

**The Committee recommends that ASIO develop and implement separate disciplinary procedures in relation to officers who conduct questioning.**



### **Recommendation 25**

**The Committee recommends that proposed subsection 94(1A) should be amended to require the report to include information about the total number of hours of questioning under warrants, the hours of questioning and length of detention in respect of each person questioned, and number of warrants for questioning heard before each Prescribed Authority.**

### **Recommendation 26**

**The majority of the Committee recommends the insertion of a sunset clause of three years from the date of commencement of the legislation.**

**Senator Scullion dissents from this recommendation.**

### **Recommendation 27**

**The majority of the Committee recommends that the Bill not apply to anyone under the age of 18 years.**

**Senator Scullion dissents from this recommendation and supports the existing provisions in the Bill as they apply to young people.**

## ABBREVIATIONS

AAT	Administrative Appeals Tribunal
ABCI	Australian Bureau of Criminal Intelligence
ACC	Australian Crime Commission (proposed)
AFP	Australian Federal Police
AFPA	Australian Federal Police Association
ASIO	Australian Security Intelligence Organisation
ASIO Act	<i>Australian Security Intelligence Organisation Act 1979</i>
ASIC	Australian Securities and Investments Commission
ASIS	Australian Secret Intelligence Service
CROC	Convention on the Rights of the Child
DIGO	Defence Imagery and Geospatial Organisation
DSD	Defence Signals Directorate
FCLC (Victoria)	Federation of Community Legal Centres (Victoria)
HREOC	Human Rights and Equal Opportunity Commission
ICCPR	International Covenant on Civil and Political Rights
ICJ (Australia)	International Commission of Jurists (Australian Section)
IGIS	Inspector-General of Intelligence and Security
NCA	National Crime Authority
NSWCCL	New South Wales Council for Civil Liberties Inc.
PIAC	Public Interest Advocacy Centre
PJCAAD	Parliamentary Joint Committee on ASIO, ASIS and DSD
VCOSS	Victorian Council of Social Service



# FOREWORD

*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.<sup>1</sup>*

...

*In order to prevent potential perpetrators of terrorism offences from carrying out their crimes, we must enhance the powers of ASIO to gather relevant intelligence in relation to terrorism offences. Although ASIO can seek other types of search warrants, it is not presently empowered to obtain a warrant to question a person. In order to prevent terrorist attacks, it is crucial that we are able to question would-be perpetrators of terrorist offences or those who may have knowledge of planned terrorist attacks.<sup>2</sup>*

In the introduction to its Advisory Report on the Australian Security Intelligence Organisation Amendment (Terrorism) Bill 2002, tabled In June 2002, the Parliamentary Joint Committee on ASIO, DSD and ASIS, commented that the Bill was the 'most controversial piece of legislation ever reviewed by the Committee'.<sup>3</sup>

Despite substantial Government amendments following the Joint Committee report, the Bill remains highly controversial. Of the four hundred and five submissions received during this very brief inquiry, almost all either objected to parts of the Bill, some raising legal issues, or expressed outright opposition to the Bill as a whole.

The proposed detention provisions provoked the most critical comment. In particular, the concept that a person who is not suspected of having committed an offence may be detained incommunicado for questioning and held without charge for up to a week is seen by almost all as incompatible with the rights and freedoms enjoyed in this country.

Other provisions also attracted much comment, including the proposed questioning regime which, for the first time, would allow ASIO officers to question suspects and non-suspects who are to be compelled to cooperate through measures such the loss of the common law right to silence; the loss of the privilege against self-incrimination, (replaced with a use immunity). The restricted access to legal advice also attracted criticism.

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1 International Covenant on Civil and Political Rights, Article 9 (1).

2 The Hon. Daryl Williams AM QC MP, Attorney-General, *House of Representatives Hansard*, 23 September 2002, p7038.

3 Parliamentary Joint Committee on ASIO, ASIS and DSD, *An Advisory Report on the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002*, 5 June 2002, p. 1.

The submissions also exposed a number of misconceptions about the legislation. For example, the Bill does not give ASIO powers to detain people at whim - a warrant must be obtained in accordance with the conditions described above; and the Australian Federal Police execute the detention warrant, not ASIO officers.

It should be acknowledged that there are a number of safeguards built into the Bill. Some of the more important include:

- a requirement that the Director-General of ASIO satisfy the Attorney-General there are 'reasonable grounds for believing that issuing the warrant will substantially assist in the collection of intelligence that is important in relation to a terrorism offence';
- a requirement that questioning be conducted in front of a prescribed authority (a member of the Administrative Appeals Tribunal with legal qualifications);
- a requirement that the prescribed authority explain that the person has a right to complain to the Inspector-General of Intelligence and Security in relation to the conduct of ASIO, and to the Commonwealth Ombudsman in relation to the Australian Federal Police;
- a requirement that questioning must be videotaped and a copy provided to the Inspector-General of Intelligence and Security;
- limits on the period a person may be held incommunicado; and
- limits on the period of detention.

Safeguards and limitations notwithstanding, it cannot be denied that this legislation is extraordinary, a fact which the Government does not dispute. But so too are the circumstances that have arisen since September 11 2000. As the Attorney General noted in the second reading debate:

These measures are extraordinary, but so too is the evil at which they are directed. The measures are transparent and subject to considerable safeguards. I am confident that the limits placed on these new powers will ensure that they are appropriately used.

Both of the major parties acknowledge the need for greater powers for the intelligence services to combat the terrorism threat. But to what extent is it necessary to sacrifice individual rights and liberties in order combat this threat? This is the fundamental question faced by this Committee and which must be faced by the Parliament in concluding the debate on this Bill.

In this report, the Committee has given careful consideration as to how the Government's requirements to improve capabilities to respond to the changed security environment might be best reconciled with the objective of maintaining, to the maximum extent possible, individual rights and freedoms. These are difficult objectives.

The Committee proposes a model that borrows from a number of different models contained in other legislation both in Australia and overseas. At its heart is the

establishment of a panel of retired judges, independent from the executive but not part of the judiciary, whose task it would be to issue warrants under this legislation and closely supervise the questioning process. The proposal in the Bill, that the warrant process be initiated by the Director-General of ASIO, and require the approval of the Attorney-General, is retained.

The Committee believes that this model has a number of advantages. It will add to public confidence in the intelligence gathering process, ensure questioning is fair and minimise the constitutional difficulties that may have arisen under the model proposed in the Bill. It also maintains the executive's power to initiate a warrants process where the circumstances demand this to happen.

While there is some opposition to allowing ASIO to question people directly, including among senior ALP figures, the model proposed by the Committee recognises the utility of allowing this proposal to proceed, with safeguards.

The Committee was particularly perturbed about the length of detention and the time limits on questioning that would be possible under the Bill. These provisions are greatly out of step with the provisions that would apply had the person been charged with an offence. The Committee seeks to ameliorate their effect.

The Committee also recognises and accepts that there may well be circumstances where there should be no right to silence during questioning. Legal advice is another matter. While an enhanced prescribed authority will improve the protections available to those undergoing questioning, the Committee considers that legal advisers should be available throughout the process.

Committee members were concerned about the possibility that persons under the age of 18 might be subject to the provisions of this Bill. Undeniably, it is possible that persons legally classified as children might be involved in terrorist activities, but it remains true that young people are particularly vulnerable to the type of coercive regime proposed. The Committee therefore believes that the dangers of seeking intelligence information from this age group are such that they should be excluded from the scope of the legislation, and dealt with, where appropriate, under the ordinary criminal justice provisions.

The Committee recognises that this report will be met with disappointment by many who have made submissions and who would prefer that it not be further considered by Parliament. For its part, the Government may also consider that the Committee's proposals would unnecessarily restrict ASIO's operations.

Nonetheless, the Committee believes that the report provides a basis for improving and progressing the legislation, while keeping its provisions within acceptable bounds and respecting the rights and freedoms that are fundamental to the Australian community.