

Chapter 1

INTRODUCTION

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

1.2 The motion establishing the inquiry was as follows:

The Senate:

(a) notes with concern that:

- (i) the Government's response to the Parliamentary Joint Committee on ASIO, ASIS and DSD is inadequate;
- (ii) the Government proposes that, for the first time, Australians not suspected of any offence could be detained by ASIO for questioning;
- (iii) the Government proposes those detained by ASIO do not have the right to legal advice for the first 48 hours of their detention;
- (iv) the Government proposes children can be detained by ASIO for questioning; and
- (v) the Government's proposals will significantly change the role of ASIO by giving it powers of coercion and detention; and

(b) therefore refers the ASIO 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.

Background

1.3 The Bill was introduced in the House of Representatives on 21 March 2002 and was subsequently referred to two parliamentary committees:

- The House of Representatives referred the Bill to the Parliamentary Joint Committee on ASIO, ASIS and DSD (the PJCAAD) on 21 March 2002 for an advisory report.
- On the same day, the Senate referred the provisions of the Bill to the Senate Legal and Constitutional Legislation Committee.

The Parliamentary Joint Committee on ASIO, ASIS and DSD

1.4 On 5 June 2002 the PJCAAD tabled its report, making 15 recommendations to the Government. The recommendations addressed three main areas of concern: the issue of warrants; the detention regime, including legal representation and protection against self-incrimination; and accountability measures.

1.5 These recommendations and the Government's response to them are discussed in more detail in Chapter 2.

The Senate Legal and Constitutional Legislation Committee

1.6 Having agreed to complete its inquiry after the PJCAAD had tabled its report,¹ the Senate Committee tabled its report on 18 June 2002.² The Senate Committee noted that the two Committees have different roles: the PJCAAD was concerned with security operations, particularly the activities of security agencies such as ASIO, and the Senate Committee had a role in considering legal and constitutional issues. The Senate Committee stated that it had decided not to adjudicate on the PJCAAD's report, but made some additional observations on certain issues in light of the information it had received.³

1.7 The Senate Committee's report briefly addressed three issues:

- whether it is constitutionally valid for the executive to authorise the detention of a person who is not a suspect;
- whether the issue by magistrates of warrants for questioning is an exercise of executive power that is incompatible with their role as judicial officers; and
- the powers of detention and questioning included in the Bill.

1 Senate Legal and Constitutional Legislation Committee, *Inquiry into the Provisions of the Australian Security Intelligence Organisation Legislation amendment (Terrorism) Bill 2002 - Interim Report*, May 2002.

2 Senate Legal and Constitutional Legislation Committee, *Provisions of the Australian Security Intelligence Organisation Legislation amendment (Terrorism) Bill 2002*, June 2002.

3 Ibid, p. 1.

1.8 Noting that the Government had not yet responded to the PJCAAD's report, the Senate Committee recommended that, if the Government accepted all the PJCAAD's recommendations, the Bill as amended should proceed without further review by that Committee.⁴

The Government's response

1.9 The Government subsequently introduced a range of amendments which addressed most of the PJCAAD's recommendations. Further details are in Chapter 2.

1.10 The amended Bill was passed by the House of Representatives on 24 September 2002.

Conduct of the inquiry

1.11 The Committee advertised the inquiry in *The Australian* newspaper of 23 October 2002 and wrote to over one hundred and thirty organisations and individuals, inviting submissions by 7 November 2002.

1.12 The Committee received 435 submissions and these are listed at Appendix 1. Submissions were placed on the Committee's website for ease of access by the public.

1.13 The Committee held hearings in Canberra on 12, 13, 14 and 18 November 2002, in Melbourne on 22 November and in Sydney on 26 November 2002. Proof transcripts of these hearings were placed on the Hansard website as they became available. A list of witnesses who appeared at the hearings is at Appendix 2.

Scope of the report

1.14 Chapter 2 outlines the main provisions of the Bill and discusses the amendments recommended by the PJCAAD and the Government's response to them.

1.15 Chapter 3 considers the purposes of the Bill and the need for the proposed questioning and detention powers.

1.16 Chapter 4 discusses the issue of the heads of constitutional power supporting the Bill.

1.17 Chapter 5 considers various issues arising in connection with warrants, particularly whether they can appropriately be issued by judicial officers in the light of the constitutional separation of powers doctrine.

1.18 Chapter 6 deals with the matter of questioning, including the role of the Prescribed Authority, legal representation for the person against whom the warrant was issued and the obligation to answer the questions.

4 Ibid, p. 7.

1.19 Chapter 7 focuses on detention, its possible purposes and their constitutional validity.

1.20 Chapter 8 considers models other than that contained in the Bill.

1.21 Chapter 9 discusses written procedural protocols and other safeguards.

1.22 Chapter 10 deals with the application of the proposed questioning and detention regime to children.

1.23 Chapter 11 sets out the Committee's conclusions.

Acknowledgements

1.24 The Committee thanks all those organisations and individuals who made submissions and gave evidence at public hearings.

Note on references

1.25 References in this report are to individual submissions as received by the Committee, not to a bound volume. References to the Hansard transcript are to the proof Hansard. Page numbers may vary between the proof and the official Hansard transcript.