

**Senate Standing Committee
for the
Scrutiny of Bills**



Alert Digest

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Members of the Committee

Senator J McLucas (Chair)
Senator B Mason (Deputy Chairman)
Senator G Barnett
Senator T Crossin
Senator D Johnston
Senator A Murray

Terms of Reference

Extract from **Standing Order 24**

- (1) (a) At the commencement of each parliament, a Standing Committee for the Scrutiny of Bills shall be appointed to report, in respect of the clauses of bills introduced into the Senate, and in respect of Acts of the Parliament, whether such bills or Acts, by express words or otherwise:
- (i) trespass unduly on personal rights and liberties;
 - (ii) make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers;
 - (iii) make rights, liberties or obligations unduly dependent upon non-reviewable decisions;
 - (iv) inappropriately delegate legislative powers; or
 - (v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.
- (b) The committee, for the purpose of reporting upon the clauses of a bill when the bill has been introduced into the Senate, may consider any proposed law or other document or information available to it, notwithstanding that such proposed law, document or information has not been presented to the Senate.

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- **The Committee has commented on this bill**

This Digest is circulated to all Honourable Senators.
Any Senator who wishes to draw matters to the attention of the
Committee under its terms of reference is invited to do so.

Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 [No. 2]

This bill was introduced into the House of Representatives on 20 March 2003 by the Attorney-General. [Portfolio responsibility: Attorney-General]

The bill proposes to amend the *Australian Security Intelligence Organisation Act 1979* to strengthen the counter-terrorism capacity of the Australian Security Intelligence Organisation (ASIO). In particular, the bill gives ASIO the ability to seek a warrant to detain and question persons for a period of up to 48 hours for the purposes of investigating terrorism offences. The bill also provides for safeguards in relation to these new powers and contains a 3 year sunset clause.

The bill also proposes to amend the:

- *Telecommunications (Interception) Act 1979* in relation to the authorisation of communication of intelligence by persons other than ASIO officers; and the
- *Intelligence Services Act 2001* to provide for a review by the Parliamentary Joint Committee on ASIO, ASIS and DSD of the operation of the legislation 3 years after its commencement.

The bill proposes a criminal sanction for failure to provide information, as noted in the entry on page 11.

The bill is similar to the bill of the same title introduced into the Parliament on 21 March 2002, amended by both Houses and subsequently laid aside by the House of Representatives on 13 December 2002. This bill includes fourteen amendments made by the Senate and agreed to by the House of Representatives, and three amendments made by the Senate but not agreed to by the House of Representatives in December 2002.

Warrants in relation to possible terrorism Proposed new subsections 34C(3) and (5)

The Committee commented on proposed subsections 34C(3) and (5) in *Alert Digest No. 4 of 2002*, noting that:

This provision will enable the Director-General of Security to seek the Attorney-General's consent to the issue of a warrant for the detention and questioning of a person on the grounds that the Attorney-General is satisfied:

- that the issue of the warrant “will substantially assist the collection of intelligence that is important in relation to a terrorism offence”, and
- that relying on other methods of collecting that intelligence would be ineffective; and
- (where the warrant authorises the detention of a person) that there are reasonable grounds for believing that, if the person is not detained, he or she may alert a person involved in a terrorism offence to the investigation of that offence, or may not appear before the prescribed authority or may destroy or damage something required to be produced under the warrant...

These provisions seem to suggest that there is no need for anyone involved in seeking or issuing such a warrant to form a reasonable belief that the relevant person has committed any offence. Indeed that person is to be detained for the purpose of collecting intelligence, not for the purpose of having an offence investigated...

In his Second Reading Speech, the Attorney-General justifies these provisions on the basis that it is “necessary to enhance the powers of ASIO to investigate terrorism offences.” While terrorism provides obvious law enforcement challenges, these provisions allow what is, in effect, a new basis for detaining people who need not themselves be suspects and, in any event, are being detained for intelligence gathering rather than investigatory purposes...

The Committee wrote to the Attorney-General about these matters and reported on the bill in its *Twelfth Report of 2002*, thanking the Attorney-General for his response and for advising the Committee that he would provide a response to its comments before the bill was considered in the Senate.

The Attorney-General's reply included advice of amendments to the bill in the House of Representatives implementing the Government's response to recommendations of the Senate Legal and Constitutional Legislation Committee and the Parliamentary Joint Committee on ASIO, ASIS and the DSD, which improved safeguards in relation to the issue of warrants for detention and questioning. The Attorney-General explained the effect of these provisions as amended and responded to specific questions posed by the Committee.

The Committee noted the Attorney-General's advice, but concluded that the provisions, even after amendment, may continue to be seen to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the Committee's terms of reference. The Committee noted that the Senate must therefore decide whether such breaches are acceptable when weighed against the policy objectives of the bill.

The Committee notes that proposed section 34C in the present bill is similar to that provision in the previous bill as amended by the House of Representatives and as reported on by the Committee. The Committee therefore reiterates its comments in relation to these provisions.

The Committee draws Senators' attention to the provisions, as they may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the Committee's terms of reference.

Rights of persons in detention

Proposed new subsections 34F(8) and (9)

The Committee commented on proposed subsections 34F(8) and (9) in *Alert Digest No. 4 of 2002*, noting that:

Proposed new subsection 34F(8) provides that a person who has been taken into custody or detained is not permitted to contact, and may be prevented from contacting, anyone at any time while in custody or detention. However, proposed new subsection 34F(9) preserves the right of a detainee to communicate with the Inspector-General of Intelligence and Security (if the person wishes to make a complaint about ASIO) and the Ombudsman (if the person wishes to complain about the Australian Federal Police).

Proposed new subsection 34D(4) states that a warrant may specify someone whom the detainee is permitted to contact by reference to the fact that he or she is the person's legal adviser, but this does not limit the ways in which the warrant may specify persons whom the detainee is permitted to contact. In addition, proposed new paragraph 34F(1)(d) states that a prescribed authority may make a direction permitting the detainee to contact a specified person (emphasis added).

The Explanatory Memorandum states that these provisions have been included because the person detained “may have critical information concerning terrorism offences and contact could alert other persons involved in such activities ... the security of the community, rather than the ordinary rights of the individual ... are paramount”.

Clearly, under these provisions, it is possible that a person may be detained, with no right to seek legal advice or communicate with anyone else, under a series of consecutive warrants, even though there is no suggestion that they themselves have committed any offence...

The protection of the community from terrorism is obviously a vital concern. However a community that fails to accord its citizens due process, and to protect their rights, even in extreme circumstances, runs the risk of becoming a community different in nature from that which currently exists.

While the Attorney-General expresses his confidence that this bill “recognises the need to maintain the balance between the security of the community and individual rights and to avoid the potential for abuse,” the Committee remains concerned about the potential for unintended consequences in such ‘exceptional’ legislation...

The Committee wrote to the Attorney-General about these matters and reported on the bill in its *Twelfth Report of 2002*.

As with the other matters raised by the Committee in its scrutiny of this earlier bill, the Committee took the step of asking a number of specific questions, rather than seeking generalised advice. Again, in a similar way to his responses to these other questions by the Committee, the Attorney-General advised of the effect of amendments of the original provisions.

The Committee accepted that the amendments increased protection for persons in detention, when compared to the earlier provisions. Also, the Attorney-General provided lengthy and thorough replies to the Committee’s questions. Nevertheless, the Committee concluded that the provisions, after amendment, might still be seen to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the Committee’s terms of reference. Therefore, it was for the Senate to decide whether, on balance, the breaches were acceptable in light of the policy intentions of the bill.

The Committee notes that proposed subsections 34F(8) and (9) in the present bill are similar to those provisions in the previous bill as amended by the House of Representatives and reported on by the Committee. The Committee confirms its comments in relation to these provisions.

The Committee draws Senators' attention to the provisions, as they may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the Committee's terms of reference.

Abrogation of the privilege against self-incrimination Proposed new subsections 34G(8) and (9)

The Committee also commented on subsections 34G(8) and (9) in *Alert Digest No. 4 of 2002*, noting:

Proposed new subsection 34G(8) of this bill will abrogate the privilege against self-incrimination for a person from whom a "prescribed authority" has sought information under proposed new subsection 34G(3).

In addition, proposed new subsection 34G(9) does not impose the usual limits on the circumstances in which information so provided is admissible in evidence in proceedings against the person who has been compelled to provide it. In general terms, any such information, or any document or thing produced, is not admissible in criminal proceedings other than proceedings for an offence against section 34G, or a terrorism offence. The section also permits any information acquired indirectly from the information gained by the operation of subsection (8) to be used for any purpose whatever.

The Committee wrote to the Attorney-General about these issues and reported on the bill in its *Twelfth Report of 2002*.

The Committee noted that the original provision had been amended to restrict the circumstances in which self-incriminating evidence is admissible in proceedings against the person who has been compelled to provide it.

However, the Committee also noted that the bill still did not provide for derivative use immunity, which may appear to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the Committee's terms of reference. As with the other apparent breaches of the Committee's principles in this bill, it was for the Senate to weigh the breaches against the intended policy outcomes of the bill.

The Committee notes that present subsection 34G(9) addresses the matters which it raised in relation to use immunity but not to derivative use immunity.

The Committee draws Senators' attention to the provisions, as they may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the Committee's terms of reference.

PROVISIONS OF BILLS WHICH IMPOSE CRIMINAL SANCTIONS FOR A FAILURE TO PROVIDE INFORMATION

The Committee's *Eighth Report of 1998* dealt with the appropriate basis for penalty provisions for offences involving the giving or withholding of information. In that Report, the Committee recommended that the Attorney-General develop more detailed criteria to ensure that the penalties imposed for such offences were 'more consistent, more appropriate, and make greater use of a wider range of non-custodial penalties'. The Committee also recommended that such criteria be made available to Ministers, drafters and to the Parliament.

The Government responded to that Report on 14 December 1998. In that response, the Minister for Justice referred to the ongoing development of the Commonwealth *Criminal Code*, which would include rationalising penalty provisions for 'administration of justice offences'. The Minister undertook to provide further information when the review of penalty levels and applicable principles had taken place.

For information, the following Table sets out penalties for 'information-related' offences in the legislation covered in this *Digest*. The Committee notes that imprisonment is still prescribed as a penalty for some such offences.

TABLE

Bill/Act	Section/Subsection	Offence	Penalty
<i>Australian Security Intelligence Act 1979</i> (See Australian Security Intelligence Organisation Amendment (Terrorism) Bill 2003, referred to earlier in this Digest)	Proposed new subsection 34G(3)	Fail to provide information to a public authority	Imprisonment for 5 years

STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

INDEX OF BILLS COMMENTED ON AND MINISTERIAL RESPONSES SOUGHT/RECEIVED - 2003

NAME OF BILL	ALERT DIGEST	INTRODUCED		MINISTER	RESPONSE SOUGHT RECEIVED	REPORT NUMBER
		HOUSE	SENATE			
Bills dealt with in 2002						
Charter of the United Nations Amendment Bill 2002	15(4.12.02)	14.11.02	5.12.02	Foreign Affairs	5.12.02	
Communications Legislation Amendment Bill (No. 1) 2002	7(21.8.02)	27.6.02		Communications, Information Technology and the Arts	22.8.02	16.9.02
<i>Crimes Legislation Amendment (People Smuggling, Firearms Trafficking and Other Measures) Act 2002</i>	16(11.12.02)	4.12.02	12.12.02	Justice and Customs	17.12.02	11.2.03
<i>Criminal Code Amendment (Offences Against Australians) Act 2002</i>	15(4.12.02)	12.11.02	13.11.02	Attorney-General	5.12.02	3.2.03
Electoral and Referendum Amendment (Roll Integrity and Other Measures) Bill 2002	3(20.3.02)	14.3.02		Special Minister of State	21.3.02	30.4.02
Environment Protection and Biodiversity Conservation Amendment (Invasive Species) Bill 2002	15(4.12.02)		19.11.02	Senator Bartlett	5.12.02	4.2.03
Fuel Quality Standards (Renewable Content of Motor Vehicle Fuel) Amendment Bill 2002	13(13.11.02)	21.10.02		Mr Katter	14.11.02	

NAME OF BILL	ALERT DIGEST	INTRODUCED		MINISTER	RESPONSE		REPORT NUMBER
		HOUSE	SENATE		SOUGHT	RECEIVED	
Health Insurance Amendment (Professional Services Review and Other Matters) Bill 2002	15(4.12.02)	27.6.02	11.11.02	Health and Ageing re Amendments	5.12.02	31.1.03	1(5.2.03)
Intellectual Property Laws Amendment Bill 2002	7(21.8.02)	27.6.02		Industry, Tourism and Resources	22.8.02	17.9.02	
<i>International Criminal Court Act 2002</i>	7(21.8.02)	25.6.02	26.6.02	Attorney-General	22.8.02	13.1.03	1(5.2.03)
<i>International Criminal Court (Consequential Amendments) Act 2002</i>	7(21.8.02)	25.6.02	26.6.02	Attorney-General	22.8.02	13.1.03	1(5.2.03)
Migration Legislation Amendment Bill (No. 1) 2002	3(20.3.02)	13.3.02	5.2.03	Immigration and Multicultural and Indigenous Affairs	21.3.02	27.5.02	2(5.3.03)
<i>Quarantine Amendment Act 2002</i>	3(20.3.02)	14.3.02	21.3.02	Agriculture, Fisheries and Forestry	21.3.02	24.1.03	1(5.2.03)
Superannuation Legislation (Commonwealth Employment) Repeal and Amendment Bill 2002	2(13.3.02)	21.2.02	19.6.02	Finance and Administration	14.3.02 20.6.02	16.5.02 20.12.02	5(19.6.02) 1(5.2.03)
Taxation Laws Amendment Bill (No. 8) 2002	16(11.12.02)	5.12.02		Treasury	12.12.02	30.1.03	
<i>Taxation Laws Amendment (Medicare Levy and Medicare Levy Surcharge) Act 2002</i>	5(19.6.02)	14.5.02	19.6.02	Treasurer	20.6.02	24.12.02	1(5.2.03)

NAME OF BILL	ALERT DIGEST	INTRODUCED		MINISTER	RESPONSE SOUGHT	RESPONSE RECEIVED	REPORT NUMBER
		HOUSE	SENATE				
Bills introduced 2003							
Agriculture, Fisheries and Forestry Legislation Amendment Bill (No. 2) 2002	1(5.2.03)	12.12.02	3.3.03	Agriculture, Fisheries and Forestry	6.2.03	24.2.03	2(5.3.03)
Criminal Code Amendment (Terrorism) Bill 2002	1(5.2.03)	12.12.03		Attorney-General	6.2.03		
Dairy Industry Service Reform Bill 2003	2(5.3.03)	12.2.03	19.3.03	Agriculture, Fisheries and Forestry	6.3.03		
Energy Grants (Credits) Scheme Bill 2003	2(5.3.03)	13.2.03		Treasurer	6.3.03	24.3.03	
Family Law Amendment Bill 2003	2(5.3.03)	12.2.03		Attorney-General	6.3.03		
Late Payment of Commercial Debts (Interest) Bill 2003	3(19.3.03)	6.3.03		Senator S Conroy	27.3.03		
Petroleum (Timor Sea Treaty) Bill 2003	3(19.3.03)	5.3.03		Industry, Tourism and Resources	27.3.03		
Petroleum (Timor Sea Treaty) (Consequential Amendments) Bill 2003	3(19.3.03)	5.3.03		Industry, Tourism and Resources	27.3.03		
Taxation Laws Amendment Bill (No. 4) 2003	2(5.3.03)	13.2.03	19.3.03	Treasurer	6.3.03	18.3.03	4(26.3.03)