



SENATE STANDING COMMITTEE

FOR THE

SCRUTINY OF BILLS

THIRD REPORT

OF

2006

14 June 2006

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ISSN 0729-6258

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MEMBERS OF THE COMMITTEE

Senator R Ray (Chair)
Senator B Mason (Deputy Chair)
Senator G Barnett
Senator D Johnston
Senator A McEwen
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.

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

THIRD REPORT OF 2006

The Committee presents its Third Report of 2006 to the Senate.

The Committee draws the attention of the Senate to clauses of the following bill which contains provisions that the Committee considers may fall within principles 1(a)(i) to 1(a)(v) of Standing Order 24:

ASIO Legislation Amendment Bill 2006

ASIO Legislation Amendment Bill 2006

Introduction

The Committee dealt with this bill in *Alert Digest No. 4 of 2006*. The Attorney-General responded to the Committee's comments in a letter dated 7 June 2006. A copy of the letter is attached to this report.

Extract from Alert Digest No. 4 of 2006

Introduced into the House of Representatives on 29 March 2006
Portfolio: Attorney-General

Background

This bill amends the *Australian Security Intelligence Organisation Act 1979* in response to the recommendations of the Parliamentary Joint Committee on ASIO, ASIS and DSD (now the Parliamentary Joint Committee on Intelligence and Security) concerning the operation of ASIO's questioning and detention powers in relation to terrorism.

The bill clarifies the operation of the current warrant regime by distinguishing between a questioning-only warrant and a questioning and detention warrant and by clarifying the rights of persons questioned or detained under each type of warrant. The bill also extends the existing sunset clause and prior joint committee review period by 10 years to July 2016 and 22 January 2016 respectively.

Legislative Instruments Act — Exemption Schedule 2, item 31

Proposed new section 34ZY of the *Australian Security Intelligence Act 1979*, to be inserted by item 31 of Schedule 2 to this bill, would declare that an instrument made under Division 3 of Part III (other than an instrument made under proposed new section 34C) is not a legislative instrument.

Where a provision specifies that an instrument is not a legislative instrument, The Committee expects the explanatory memorandum to explain whether:

- the provision is merely declaratory of the law and included to clarify that the instrument is not a legislative instrument within the meaning of section 5 of the *Legislative Instruments Act 2003*; or
- expresses a policy intention to exempt an instrument, which is legislative in character, from the usual tabling and disallowance regime set out in the *Legislative Instruments Act*.

Where the provision is a substantive exemption, the Committee expects the explanatory memorandum to include clear reasons justifying the need for the exemption.

Unfortunately, in this case, the explanatory memorandum simply states, on page 17, that the provision will ‘prevent things done under Division 3 from unintentionally becoming a legislative instrument.’ The Committee therefore **seeks the Attorney-General’s advice** as to the character of each of the instruments to which this exemption is to apply, the justification for each exemption and whether it would have been appropriate to include this information in the explanatory memorandum.

Pending the Attorney-General’s advice, the Committee draws Senators’ attention to the provision, as it may be considered to insufficiently subject the exercise of legislative power to parliamentary scrutiny, in breach of principle 1(a)(v) of the Committee’s terms of reference.

Relevant extract from the response from the Attorney-General

The Committee has sought my advice in relation to item 31 of Schedule 2 of the Bill, which proposes a new section 34ZY of the *Australian Security Intelligence Organisation Act 1979* (the Act). The proposed new provision would declare that instruments made under Division 3 of Part III of the Act (except the ASIO Protocol under proposed section 34C) are not legislative instruments within the meaning of section 5 of the *Legislative Instruments Act 2003*. Proposed section 34ZY is intended to merely restate the position in the current Act, that is, to be declaratory of the law. It was included to clarify that instruments created under Division 3, other than the ASIO Protocol, are clearly not legislative instruments.

There are a number of written instruments that can be made under Division 3 of Part III of the Act, as proposed to be amended by the Bill. The following provisions to which section 34Y applies are clearly instruments that are not of legislative character:

- Instruments under sections 34D, 34E, 34F and 34G (warrants, requests for warrants, Ministerial consent and requests for Ministerial consent), including the amendments made to these sections by Schedule 2 of the Bill, are clearly administrative in character. Each of these instruments will relate to a particular individual and therefore will apply the law rather than determine it.
- Directions under section 34K (including the amendments under Schedule 2), permissions under sections 34X and 34Z, consents and approvals under section 34ZB, directions under sections 34ZE, 34ZO, 34ZQ and 34ZR, and permitted disclosures under section 34ZS will relate to a particular individual and therefore will be clearly administrative in character.
- Reports and information under sections 34ZH, 34ZI and 34ZJ are not legislative in character because they do not affect any rights or obligations.

For all of these provisions, section 34ZY clearly only declares what would be the case anyway.

The regulations mentioned in section 34ZT will be legislative, as are all regulations. However, section 34ZY will not apply to those regulations as they are actually made under section 95 of the Act. Section 34ZT merely outlines one of the matters that may be included in the regulations.

Similarly, the Rules of Court mentioned in section 34ZU are not actually an instrument made under that section, but rather under provisions of the *Judiciary Act 1903* and *Federal Court of Australia Act 1976*, so section 34ZY will not apply to them. As you would be aware, Rules of Court are declared not to be legislative instruments under section 9 of the Legislative Instruments Act.

Proposed section 34ZX provides for an instrument in the form of guidelines relating to financial assistance. The guidelines that are intended to be made under proposed subsection 34ZX(4) are not expected to be legislative in character. Section 34ZX sets out the basis for and boundaries of financial assistance. It is expected that any guidelines will cover procedural issues such as the process for lodging an application and the level of fees available to barristers and solicitors representing the person who is questioned or detained. Such guidelines would not affect a person's right to apply for financial assistance. Accordingly, the guidelines are expected to be administrative in character.

The rationale behind item 31 of Schedule 2 of the Bill is to clarify that instruments, such as the financial assistance guidelines, are not of a legislative character. It is with this in mind that item 31 of Schedule 2 of the Bill was proposed.

It is my view that proposed section 34ZY is merely declaratory of the current operation of the Act. The only legislative instrument under the Bill is the Protocol and this is expressly provided for. I consider section 34ZY to be important to expressly provide for other instruments to not be legislative instruments. There is no policy intention to exempt any instrument that is legislative in character.

I note the Committee's comments concerning the explanatory memorandum and trust this advice assists the Committee.

The Committee thanks the Attorney-General for this response and for clarifying that the instruments made under Division 3 of Part III are not legislative in character. The Committee reiterates its expectation that provisions of this nature be clearly explained in the explanatory memorandum to the bill.

Robert Ray
Chair



ATTORNEY-GENERAL
THE HON PHILIP RUDDOCK MP

RECEIVED

8 JUN 2006

Senate Standing Ctee
for the Scrutiny of Bills

MC06/7683

Senator Robert Ray
Chair
Senate Standing Committee for the Scrutiny of Bills
Parliament House
CANBERRA ACT 2600

- 7 JUN 2006

Dear Senator Ray

Thank you for the letter of 11 May 2006 signed by the Secretary of the Senate Standing Committee for the Scrutiny of Bills, Ms Jeanette Radcliffe, drawing my attention to comments made in relation to the ASIO Legislation Amendment Bill 2006 (the Bill).

The Committee has sought my advice in relation to item 31 of Schedule 2 of the Bill, which proposes a new section 34ZY of the *Australian Security Intelligence Organisation Act 1979* (the Act). The proposed new provision would declare that instruments made under Division 3 of Part III of the Act (except the ASIO Protocol under proposed section 34C) are not legislative instruments within the meaning of section 5 of the *Legislative Instruments Act 2003*. Proposed section 34ZY is intended to merely restate the position in the current Act, that is, to be declaratory of the law. It was included to clarify that instruments created under Division 3, other than the ASIO Protocol, are clearly not legislative instruments.

There are a number of written instruments that can be made under Division 3 of Part III of the Act, as proposed to be amended by the Bill. The following provisions to which section 34Y applies are clearly instruments that are not of legislative character:

- Instruments under sections 34D, 34E, 34F and 34G (warrants, requests for warrants, Ministerial consent and requests for Ministerial consent), including the amendments made to these sections by Schedule 2 of the Bill, are clearly administrative in character. Each of these instruments will relate to a particular individual and therefore will apply the law rather than determine it.
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- Reports and information under sections 34ZH, 34ZI and 34ZJ are not legislative in character because they do not affect any rights or obligations.

For all of these provisions, section 34ZY clearly only declares what would be the case anyway.

The regulations mentioned in section 34ZT will be legislative, as are all regulations. However, section 34ZY will not apply to those regulations as they are actually made under section 95 of the Act. Section 34ZT merely outlines one of the matters that may be included in the regulations.

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Proposed section 34ZX provides for an instrument in the form of guidelines relating to financial assistance. The guidelines that are intended to be made under proposed subsection 34ZX(4) are not expected to be legislative in character. Section 34ZX sets out the basis for and boundaries of financial assistance. It is expected that any guidelines will cover procedural issues such as the process for lodging an application and the level of fees available to barristers and solicitors representing the person who is questioned or detained. Such guidelines would not affect a person's right to apply for financial assistance. Accordingly, the guidelines are expected to be administrative in character.

The rationale behind item 31 of Schedule 2 of the Bill is to clarify that instruments, such as the financial assistance guidelines, are not of a legislative character. It is with this in mind that item 31 of Schedule 2 of the Bill was proposed.

It is my view that proposed section 34ZY is merely declaratory of the current operation of the Act. The only legislative instrument under the Bill is the Protocol and this is expressly provided for. I consider section 34ZY to be important to expressly provide for other instruments to not be legislative instruments. There is no policy intention to exempt any instrument that is legislative in character.

I note the Committee's comments concerning the explanatory memorandum and trust this advice assists the Committee.

Yours sincerely



Philip Ruddock

