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

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INFORMATION AND RESEARCH SERVICES

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

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Law and Bills Digest Group
26 March 2003

# Contents

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

**Date Re-Introduced:** 20 March 2003

**House:** House of Representatives

**Portfolio:** Attorney-General's

**Commencement:** The day after Royal Assent, except for amendments to the definition of 'terrorist offence' that rely on changes to the *Criminal Code*.

**** This Bill was originally introduced on 21 March 2002 ****

## Purpose

To amend the *Australian Security Intelligence Organisation Act 1979* to improve ability of the Australian Security Intelligence Organisation (ASIO) to deal with terrorism by:

- re-incorporating terrorism within the definition of 'politically motivated violence'
- permitting personal searches to be authorised in conjunction with search warrants, and
- providing a power to detain, search and question persons before a prescribed authority.

## Background

Between September 2001 and February 2002 the Government announced a range of measures to improve its capacity to identify, prevent and respond to threats or possible threats of terrorism in Australia. On 21 March 2002 it introduced the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 (the '2002 Bill').

The other components of the anti-terrorism package were the:

- *Security Legislation Amendment (Terrorism) Act 2002*
- *Suppression of the Financing of Terrorism Act 2002*

- *Border Security Legislation Amendment Act 2002*
- *Criminal Code Amendment (Anti-hoax and Other Measures) Act 2002*, and the
- *Criminal Code Amendment (Suppression of Terrorist Bombings) Act 2002.*

Other amendments were made by the *Telecommunications Interception Legislation Amendment Act 2002*, which enabled interception warrants to be granted to investigate acts of terrorism,[1] and the *Australian Crime Commission Establishment Act 2002*, which reconstituted the National Crime Authority as the Australian Crime Commission, giving it powers to conduct broad criminal intelligence gathering functions and capabilities.

The 2002 Bill was referred to the Parliamentary Joint Committee on ASIO, ASIS and DSD (PJC) for report by 3 May 2002. It was also, along with the other five Bills,[2] referred to the Senate Legal and Constitutional Legislation Committee for report by the same date.

The Parliamentary Joint Committee reported on 5 June 2002, making recommendations in relation to three main areas: 'the issue of warrants; the detention regime, including legal representation and protection against self-incrimination; and accountability measures'.[3] The Senate Committee reported on 18 June, making observations on a limited number of constitutional and legal issues: the administrative detention of non-suspects, the executive power to issue warrants and the particular powers of questioning and detention in the Bill.

In a later report, the Senate Legal and Constitutional Reference Committee observed:[4]

> The Senate [Legislation] Committee noted that the two Committees have different roles: the [PJC] 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 [PJC]'s report, but made some additional observations on certain issues in light of the information it had received.

'Noting that the Government had not yet responded to the [PJC]'s report' it recommended that 'if the Government accepted all the [PJC]'s recommendations, the Bill as amended should proceed without further review by [the Legislation Committee]'.[5]

The Government accepted many of the recommendations,[6] except those relating to:

- [complete] access to legal representation during detention
- questioning or detention of children, and
- a proposed 3 year sunset clause.

In relation to the first point, the amended Bill restricted access in some circumstances to 'approved lawyers' and allowed them to be excluded in some emergency situations.

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

On 21 October, the Senate referred the 2002 Bill *and related matters* to the Senate Legal and Constitutional References Committee for inquiry and report by 3 December 2002. The report, *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 and related matters*, was tabled at 11.20 p.m. on 3 December 2002.[7]

### 12 December 2002

Readers may be aware that the Bill, among other unrelated matters, was the subject of an all-night sitting of the House of Representatives and Senate on 12–13 December 2002. This was the last time for debate before the next sitting of Parliament on 4 February 2003.

Essentially, the exchange of views between each of the Houses was compressed into a 12 hour period between 11.20 p.m. on 12 December and 11.42 a.m. on 13 December. Given the compressed sequence of events, the milestones in that period are highlighted below.

After the report was tabled, the Bill was considered in Committee of the Senate on 10 and 11 December. It was amended and eventually passed at 4.47 p.m. on 12 December.[8]

The amended Bill was considered by the House of Representatives at around **11.20 p.m.**[9] during which some Senate amendments were agreed to, while others were replaced with House of Representatives amendments, passed at around **1.08 a.m.** on 13 December 2002.

The twice amended Bill was returned and considered by the Senate at around **3.45 a.m.**. A motion that the Senate not insist on its outstanding amendments, and agree to the House of Representatives amendments, was negatived, sending the Bill back to the House.[10]

The House of Representatives then reconsidered the Senate amendments at **6.55 a.m.** during which three outstanding amendments, insisted upon by the Senate, were adopted.[11] The House dropped some of its replacement amendments and insisted on the remainder.

The Senate then considered the House of Representatives compromise at around **9.00 a.m.** The motion to accept the package was again negatived, returning the Bill to the House.[12]

After considering the Senate Message, the Bill was laid aside by the House at **11.42 a.m**.

To a large extent, the present Bill (the '2003 Bill') reflects the outcome of this process.

### The Dissolution Issue

This Bill is one of a number of potential double dissolution triggers before Parliament. A description of the issues surrounding double dissolution triggers appears at **Appendix 1**.

## Main Provisions

Given the similarity between the 2002 Bill and the 2003 Bill, the discussion below does not traverse each of the main provisions or the general themes canvassed in the latter. This sort of discussion is available in *Bills Digest No. 128 2001-02* and the report of the Senate Legal and Constitutional References Committee, *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 and related matters*.

Much of the discussion draws on information contained in Senate Journal No. 60, the Third Reading version of the Bill, reflecting amendments made prior to the Senate Legal and Constitutional References Committee Inquiry and the *Schedule of Amendments Made by the Senate* distributed by the Clerk of the Senate on 12 December 2002. As the latter is no longer on-line, it is fully extracted below, with permission, in **Appendix 2**.

### The 2002 Bill – Key Aspects

#### Overview

The 2002 Bill provided for warrants authorising the questioning and detention of persons, requiring them to appear before a prescribed authority to answer relevant questions and allowing them to be detained for the purposes of facilitating the questioning process.

As amended, following the Parliamentary Joint Committee Report, the Bill distinguished between '*issuing authorities*',[13] who would issue warrants, and '*prescribed authorities*',[14] who would oversee the return of the warrant or the questioning by ASIO or other officers.

As amended, following the PJC Report, the Bill set a maximum time limit of 168 hours (7 days) during which a person could be continuously detained.[15]

In the terms used by the Senate Legal and Constitutional References Committee the Bill distinguished between '*questioning warrants*', or warrants that focussed on questioning, and '*detention warrants*', or warrants that focussed equally on detention and questioning.

Warrants could list persons that detainees could contact while in custody or detention.[16] Moreover, in planned detention, warrants could restrict access to legal representation. As amended, following the PJC Report, the Bill guaranteed access to an '*approved lawyer*',[17] but allowed this access to be restricted under the warrant in certain emergency situations.

The Bill allowed the detention and questioning of children over 10 years. As amended, following the PJC Report, this was restricted to children over 14 years and would apply where it was thought the child was committing or would commit a terrorist offence.[18] Moreover, a child could only be questioned in the presence of a parent or guardian and, if detained, would be permitted to contact parent or guardian and a lawyer at any time.[19]

## The Senate's Position – Key Aspects

It is clear from the 'blow-by-blow' account above that the House of Representatives had moved to adopt some of the amendments that were insisted upon by the Senate, while the Senate had rejected replacement amendments proposed by the House of Representatives.

### Warrants

#### Issuing Authorities (proposed sections 34A, 34AB, 34B, 34C(4) and (5))

The Senate rejected a distinction between issuing authorities and prescribed authorities.[20]

The House of Representatives insisted on preserving the distinction. Moreover, it kept a power to make regulations appointing 'persons in a specified class' as issuing authorities.[21] This may allow members of various agencies, such as AAT, ASIO, etc., to be appointed.

#### Prescribed Authorities (proposed sections 34A and 34B)

The Senate proposed that the Attorney-General prepare a list of persons to be appointed as prescribed authorities. The list would comprise retired judges of superior courts,[22] or, if there were insufficient retired judges, serving State and Territory judges, or, if there were insufficient State and Territory judges, the President or Deputy President of the AAT.[23] The members of the prescribed authority would be appointed for 'a single 3 year term'.[24]

Initially, the Government made amendments to replace the Senate proposal.[25] It tabled advice and argued that the appointment of serving judges was unconstitutional.[26] It proposed that the Attorney-General prepare a list of persons that would be appointed as prescribed authorities, but could also be appointed as issuing authorities. The list would comprise *former* judges, of superior *or* inferior courts, appointed for an uncertain term.

The Government later accepted the Senate proposal,[27] dropping its own amendments.[28]

#### Statement of Procedures (proposed subsection 34C(3AA))

As noted below, various protocols governing questioning and detention were considered by both Houses of Parliament in response to various committee recommendations. The Bill presently contains a requirement for a 'written statement of procedures' that applies at the point of time where the Director-General seeks the Attorney-General's consent to request a warrant from an issuing authority. The procedure statement is discussed below.

### Detention

#### The Purposes of Detention (various)

The 2002 and 2003 Bills allow warrants where there are reasonable grounds for believing they will '*substantially assist the collection of intelligence*' in relation to terrorism.[29]

In simple terms, they distinguish between '*questioning warrants*' and '*detention warrants*':

> A questioning warrant must require a person to attend before a Prescribed Authority immediately after notification or at a time specified in the warrant. A detention warrant must authorise a person to be 'taken into custody immediately' by a police officer and brought before a Prescribed Authority immediately for questioning and then detained under arrangements made by the officer 'for a specified period …' commencing from the time the person is brought before the Prescribed Authority.[30]

A detention warrant would issue where there were 'reasonable grounds for believing' that, if the person was not detained, he or she would frustrate the questioning process by: alerting a third party involved in a terrorism offence, failing to appear (or to remain) before the prescribed authority, or destroying, damaging or altering relevant evidence.[31] A questioning warrant could be 'turned into a detention warrant'[32] on similar bases.[33]

They thus distinguish between what may be called '*planned*' and '*incidental*' detention. 'Planned detention', if allowed, would be allowed from the execution of the warrant. 'Incidental detention' would be allowed on an *ad hoc* basis during the questioning process.

They do not distinguish between '*interrogative*', '*facilitative*' and '*preventative*' detention:

> In theory, the purpose of detention is limited to the prevention of acts that may prejudice the task of collecting intelligence. The Bill allows the Attorney-General to authorise detention if there are reasonable grounds for believing that, if the person is not immediately taken into custody and detained he or she may alert a person involved in a terrorist offence, may fail to appear before the Prescribed Authority or may destroy, damage or alter evidence described in the warrant. The Prescribed Authority may authorise detention during the questioning process on similar bases.
>
> In practice, detention might be authorised for broader purposes. For example, it could be authorised in order to directly facilitate … the prosecution of detainees, or the prevention of possible acts or further acts of terrorism. Within these broad purposes, there is the possibility that detention might be authorised for more untoward purposes. For example, it might be authorised for the unstated purpose of coercing a person to provide answers or the prosecution of a person who might more properly be considered as a suspect in the criminal justice system.[34]

In fact, the overlap between '*interrogative*' and '*facilitative*' detention may be intentional. As noted above, the warrant only had to '*substantially assist the collection of intelligence*'. This could be served by questioning a detainee *and/or* by facilitating other investigations. So, at the outset there was an overlap between '*interrogative*' and '*facilitative*' detention.

In other words, while the warrant has to authorise that a person be 'brought before a prescribed authority for questioning',[35] neither the Attorney-General, nor the issuing authority, may need to be satisfied that the sole purpose of detention is questioning. Detention for other purposes could still '*substantially assist the collection of intelligence*'. Thus, the Bill always seemed to allow that a person could be detained not to be questioned but primarily to allow other persons to be questioned or premises to be searched.

The Senate rejected various provisions and references relating to 'detention',[36] reducing it to 'custody for questioning' and emphasising time limits and conditions on questioning:[37]

- an initial 4 hour time limit on questioning,[38]
- separate 8 hour extensions where further information is likely:
  - initially where a person has legal advice,[39]
  - subsequently where there is a threat of an imminent terrorist act;[40] and
- a maximum 20 hour cumulative total time limit on questioning (4 + 8 + 8).[41]

The Senate essentially rejected the notion of *incidental* detention. It also retained *planned* detention, without distinguishing *interrogative*, *facilitative* and *preventative* purposes. But, its proposal had three mechanisms intended to focus the detention regime on questioning.

First, a warrant could only 'authorise a person to be taken into custody … brought before a prescribed authority immediately for questioning … and held in custody under arrangements made by a police officer until questioning has been completed'.[42]

Second, questioning could be ended if there were 'no further questions'. It proposed that warrants could specify the end of the period 'for which the person could be questioned' by reference to the prescribed authority's opinion that there were no further questions.[43] This was included in the power to issue warrants rather than the process for requesting warrants and suggested that it could be inserted in a warrant at the prescribed authority's discretion.

Third, the time limits severely restricted the scope for *preventative* detention. In reality, the need to restate the case for a warrant within 4 or 8 hours served to focus the process. Moreover, the time limits offered a very small window in which to prevent terrorist acts.

### Process of Detention (proposed sections 34JA and 34JB)

In the Senate the Government moved amendments relating to the process of detention. Under the provisions, a person could only be detained in a 'dwelling house', or place of rest, between 6 a.m. and 9 p.m. unless it was the only practicable option.[44] The provisions permitted the arrest of witnesses with the use of 'such force as is necessary and reasonable in the circumstances, *at any time of the day or night* for the purpose of searching [certain] premises for the person or taking the person into custody'.[45] The proposed regime also contained guidelines and limitations as to the use of necessary and reasonable force.[46]

The Senate limited this process to 'incidental' detention.[47] In the House of Representatives, the Government insisted on replacement amendments in lieu of these Senate amendments, essentially running its original proposal as moved in the Senate. These are not in the 2003 Bill, possibly given the impact that it would have on the double dissolution process.

## Questioning and Detention Process

### Protocols (proposed subsection 34C(3AA))

The 2002 Bill, as amended following the PJC report, provided for a 'written statement of procedures' to govern the questioning and detention processes. It required that, before the Director-General of ASIO could request a warrant, certain 'adopting acts' must be done.[48] These were that a 'written statement of procedures' be made by the Director-General, in consultation with the Inspector-General of Intelligence and Security and the Australian Federal Police Commissioner, and 'presented' to each House of Parliament.[49] Under this regime, the statement of procedures would not be a 'disallowable instrument'.

The PJC recommended that the Bill require protocols 'governing custody, detention and the interview process'.[50] It said there were 'no guidelines on how certain legislative provisions relating to detention and interview would be implemented and governed':[51]

> [W]hat arrangements would be made when police took a person into custody? Where would a person be detained? Would ASIO officers be with police officers when a person was taken into custody? What are the steps that are taken during the first 48 hour period? How long should an interview be conducted before a break is required?

The Senate References Committee similarly observed:[52]

> It is unclear, either from the Bill, the Explanatory Memorandum or evidence during this inquiry, exactly what the protocols would cover. Matters such as the place and conditions of custody and detention, breaks in questioning, administrative procedures and the responsibilities of various agencies … might foreseably [sic.] be included.

The Senate proposed a list of matters that must be included in a 'procedural statement':[53]

- the requirement to inform the government stakeholders (eg prescribed authority);
- the obligation of the prescribed authority to provide information to witnesses;
- arrangements for interpreters;
- the transportation of persons in custody;
- the conduct of searches;
- questioning facilities;
- arrangements for contact with third parties;
- video recordings;
- continuous questioning, breaks and rest;
- food and medical care; and
- *reimbursement for reasonable witness costs.*

The Senate proposed that the statement would be a disallowable instrument[54] and that its tabling before both Houses of Parliament would be a mandatory 'adopting act' as above.[55] Moreover, it proposed that breaches of the statement would ground complaints 'to the [IGIS] or the Ombudsman under the *Inspector-General of Intelligence and Security Act 1986* or the *Complaints (Australian Federal Police) Act 1981*, as the case may be'.[56]

The House proposed its own list in lieu of the Senate amendments.[57] Leaving aside issues related to detention of witnesses, the differences in the 'statement of procedures' related to: the procedure, custody and future use of video recordings, toilet facilities and privacy; and reimbursement for reasonable witness costs. Neither list of procedures appears in the 2003 Bill, again, possibly given the impact that it would have on the double dissolution process.

### Conduct of Questioning

Aside from the 'statement of procedures', the Senate proposed conditions on questioning as to medical attention, intoxication, fitness and rest.[58] However, rather than include these in the warrant issuing process, they were proposed as conditions on the questioning process.

### Access to Lawyers (proposed section 34AA, various)

As noted above, following the PJC report, the 2002 Bill provided for 'approved lawyers'.

The 'approved lawyers' concept was rejected by the Senate.[59] The Senate strengthened the right to a 'legal adviser of first choice' or a 'suitable legal adviser' and the right to private legal communication.[60] It removed restrictions on access to lawyers in the first 48 hours.[61]

The Government's proposed restriction applied in emergency situations, where it was likely that a terrorism offence had been or was about to be committed that 'may have serious consequences' and it was 'appropriate in all the circumstances'.[62] The Senate rejected this, but proposed that questioning could commence 'before the arrival of the person's legal adviser' where there was a 'threat of an imminent terrorist act'.[63]

Both of the approaches relate to emergency situations. But, the Government's approach focused on *any terrorist offence* with 'serious consequences' (eg. membership of a terrorist organisation, provision of training to terrorist organisations, etc.) rather than a *terrorist act* (eg an act that causes serious harm to persons, damage to property, risk to life, etc).[64]

Both restricted access to lawyers. But the Government's approach was to exclude lawyers for 48 hours, based on fears that lawyers might frustrate related investigation processes, rather than up to 4 hours, based on the need to conduct questioning before lawyers arrived.

### Access by the IGIS (proposed section 34HAB)

In response to recommendations by the PJC, the Bill was amended by the Government to provide for the suspension of questioning, etc. in response to concerns by the IGIS.[65]

The Senate had proposed a provision clarifying the right of the IGIS to be present at the 'questioning or taking into custody' of a person under the proposed provisions.[66] The Government had proposed to expressly extend this right to the case of 'detention'.[67]

The 2003 Bill reverts to the Senate position, raising the question as to the apparent overlap between 'custody' and 'detention'. Any difference between these expressions may not be

significant in the context of the provisions in the Bill. Indeed, the term 'custody' would probably be read by courts to include 'detention' so as to guarantee oversight by the IGIS.

#### Children (proposed section 34NA, 34V)

Following the PJC report, the regime was restricted to children over 14 years.

The Senate rejected provisions allowing children to be questioned and detained in any circumstances, by removing the restriction on the power to request warrants in relation to persons under 18 years[68] and the controls over the conduct of parents or guardians.[69]

#### Sunset Clause (section 4)

Following a recommendation of the PJC, the Senate proposed a 3 year sunset clause. While initially opposed by the Government, this was eventually accepted.[70]

### The House of Representatives' Position – Key Aspects

It was noted above that the House of Representatives adopted some Senate amendments in the debate commencing at **11.20 p.m.** on 12 December[71] and **6.55 a.m.** on 13 December.[72]

- All of amendments adopted in the **11.20 p.m.** debate were those of the Government.
- All of the amendments adopted in the **6.55 a.m.** debate were those of the Opposition.

## Concluding Comments

The Senate agreed to none of the House of Representatives amendments. While the House of Representatives agreed to a number of Senate amendments, the Government only reached agreement with the Opposition and minor parties on:

- the 3 year sunset clause (**section 4**), and
- the composition of the prescribed authority (**proposed section 34B**).

The Houses *nearly* reached agreement on the protocols (**proposed subsection 34C(3AA)**) and the provisions for taking into custody (**proposed sections 34JA** and **34JB**).

# Appendix 1 – Double Dissolutions

Double dissolutions are provided for in section 57 of the Constitution:

> If the House of Representatives passes any proposed law, and the Senate rejects or fails to pass it, or passes it with amendments to which the House ... will not agree, and if after an interval of three months the House ..., in the same or the next session, again passes the proposed law with or without any amendments which have been made, suggested, or agreed to by the Senate, and the Senate rejects or fails to pass it, or passes it with amendments to which the House ... will not agree, the Governor-General may dissolve the Senate and the House ... simultaneously.

The following summary is drawn from a Bills Digest in 1999:

> A section 57 disagreement between the Houses in essence arises where the Senate:

- rejects a proposed law, or
- passes a proposed law but with amendments which are unacceptable to the House, or
- 'fails to pass' a proposed law.

> One 'disagreement' is, however, not enough to prime the double dissolution trigger, and the Senate must for a second time either reject the Bill, fail to pass the Bill, or pass the proposed law with amendments that prove unacceptable to the House of Representatives.

## The Circumstances

It is not always easy to identify Bills that fall within the ambit of section 57.

The case of rejection by the Senate is fairly clear and apparent from the terms of any Message from the Senate. The case of 'failure to pass' is more complex. The Bills Digest above states, citing *Victoria v. Commonwealth*,[73] that '[i]n very general terms, what amounts to a 'failure to pass' for the purposes of section 57 depends on the particular circumstances including the history and nature of the Bill and normal Senate practice and procedure at the time'.

Whether, in any particular case, the Senate has made amendments 'to which the House of Representatives will not agree' has been the subject of some debate. It has been argued that this involves circumstances where there is a single disagreement between the House of Representatives and the Senate.[74] However, it was the opinion of the Clerk of the Senate in 1998 that the Senate must be able to reconsider its amendments and change its mind:

> The condition prescribed by section 57 … is that the Senate passes the bill concerned "with amendments to which the House of Representatives *will not agree*" [emphasis added]. This expression indicates that there must be an ongoing unwillingness by the House of Representatives to accept amendments made by the Senate … It is therefore not sufficient for the House of Representatives to disagree once with the Senate

> amendments; it must indicate its ongoing disagreement after providing the Senate with an opportunity to change its mind and withdraw its amendments.[75]

### The Period

As noted, a Bill must be reintroduced and passed by the House after 3 months. This period is not measured from the date on which it was originally introduced in the House.[76]

In the case of a Bill that the Senate rejects, it is measured from the date of the rejection.[77]

In the case of a Bill that the Senate fails to pass, it is measured from the date of failure.[78]

In the case of a Bill that is passed with amendments that are unacceptable to the House, it *may* be measured from the date when the House has 'decided its attitude':

> The expression in s. 57 is 'passes it with amendments to which the House of Representatives will not agree'. Those words would not, in my opinion … necessarily be satisfied by the amendments made in the first place by the Senate. At the least, the attitude of the House of Representatives to the amendments must be decided and, I would think, must be made known before the interval of three months could begin. But the House of Representatives, having indicated in messages to the Senate why it will not agree, may of course find that the Senate concurs in its view so expressed, or there may be some modification thereafter of the amendments made by the Senate which in due course may be acceptable to the House of Representatives. It cannot be said, in my opinion, that there are amendments to which the House of Representatives will not agree until the processes which parliamentary procedure provides have been explored.[79]

But, this view, expressed by Barwick CJ in *Victoria v. Commonwealth,* is only an opinion.

It is also important to note that the period ends when the Bill is passed by the House. It may be reintroduced at any time, but may not be *passed* until 3 months after rejection, etc.

### The Bill as finally Sent to the Senate

Another question relates to the extent of amendments that the House may make to a Bill prior to its final re-introduction into the Senate after the 3 month interval required by section 57. As noted, section 57 allows the House to pass a Bill at this juncture 'with or without any amendments which have been made, suggested, or agreed to by the Senate'. Harris suggests that the House may not make any other amendments such as amendments in lieu of Senate amendments: '[t]he Bill which is again passed by the House and sent to the Senate after the three month interval must be *the original Bill modified only by amendments made, suggested or agreed to by the Senate*'.[80] Odgers notes that this issue has not been judicially considered, referring to a paper,[81] where it was said:

> The application of section 57 in respect of a particular proposed law at each stage depends on the retention of the identity of the proposed law as the proposed law originally introduced by the House of Representatives, or that proposed law with such

> amendments only as have been made, suggested or agreed to by the Senate. This would seem to preclude any alteration of the text of the proposed law (other than such amendments).[82]

### Summary

In summary, Bills may become 'double dissolution triggers', if:

- they originate in the House; **and**
- they are introduced into the Senate, and:
  - are rejected by the Senate; **or**
  - are amended by the Senate in an unacceptable way and laid aside by the House; **or**
  - 'fail to pass' the Senate; **and**
- they are reintroduced in the House and passed by the House 3 months after the rejection, etc, it seems that *provided they are not amended in any new way – it must be the old disagreement between the House and the Senate and not a new disagreement based on amendments by the House*; **and**
- they are again reintroduced into the Senate and are rejected, etc.

Even if this last step occurs, the Government does not have to exercise the double dissolution option. It can 'stockpile' a number of bills to be used as dissolution triggers. The only limitation on a dissolution is that it cannot occur within 6 months of the date of the expiry of the House of Representatives which is, for present purposes, 11 August 2004.

# Appendix 2 – Schedule of Amendments[83]

2002

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

THE SENATE

## Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002

*Schedule of the amendments made by the Senate*

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**(1) Opp (1) [Sheet 2764]**

Page 2 (after line 11), after clause 3, add:

**4 Cessation of operation of Act**

This Act, unless sooner repealed, ceases to be in force at the end of 3 years after Royal Assent.

**(2) Opp (2) [Sheet 2764]**

Schedule 1, item 8, page 4 (after line 14), before the definition of ***terrorism offence***, insert:

***terrorist act*** has the same meaning as in Part 5.3 of the *Criminal Code*.

**(3) Govt (1) [Sheet DT377]**

Schedule 1, page 6 (after line 18), after item 23, insert:

**23A After section 25**

Insert:

**25AA Conduct of ordinary or frisk search under search warrant**

An ordinary search or frisk search of a person that is authorised under paragraph 25(4A)(a) must, if practicable, be conducted by a person of the same sex as the person being searched.

**(4) Opp (3) [Sheet 2764]**

Schedule 1, item 24, page 6 (line 25) to page 7 (line 2), omit the definitions of ***approved lawyer***, ***Federal Magistrate*** and ***issuing authority***.

**(5) Opp (4) [Sheet 2764]** (*As amended by Opp (1) [Sheet 2796]*)

Schedule 1, item 24, page 7 (after line 7), after the definition of ***record***, add:

> ***superior court*** means the High Court, Federal Court, Family Court, the Supreme Court of a State or Territory or a District Court of a State or a Territory or an equivalent.

**(6) Opp (5) [Sheet 2764]**

Schedule 1, item 24, page 7 (line 8) to page 8 (line 3), omit sections 34AA and 34AB.

**(7) Opp (6) [Sheet 2764]** (*As amended by Opp (2) [Sheet 2796]*)

Schedule 1, item 24, page 8 (lines 4 to 15), omit section 34B, substitute:

**34B Prescribed authorities**

(1) The Minister may, by writing, appoint as a prescribed authority a person who has served as a judge in one or more superior courts for a period of 5 years and no longer holds a commission as a judge of a superior court.

(2) If the Minister is of the view that there is an insufficient number of people to act as a prescribed authority under subsection (1), the Minister may, by writing, appoint as a prescribed authority a person who is currently serving as a judge in a State or Territory Supreme Court or District Court (or an equivalent) and has done so for a period of at least 5 years.

(3) If the Minister is of the view that there are insufficient persons available under subsections (1) and (2), the Minister may, by writing, appoint as a prescribed authority, a person who holds an appointment to the Administrative Appeals Tribunal as President or Deputy President and who is enrolled as a legal practitioner of a federal court or of the Supreme Court of a State or Territory and has been enrolled for at least 5 years.

(4) The Minister must not appoint a person under subsection (1), (2) or (3) unless the person:

(a) has by writing consented to being appointed; and

(b) the consent is in force.

(5) A person can only be appointed as a prescribed authority for a single three-year term.

(6) The Minister must cause to be kept a list of names of persons who have consented to being appointed as prescribed authorities.

(7) If a person whose name is included in the list requests the Minister to have his or her name removed from the list, the Minister must cause the list to be amended to give effect to the request.

(8) The Minister may, on his or her own initiative, cause the name of a person to be removed from the list.

(9) A person appointed as a prescribed authority in accordance with this section shall be paid such remuneration as is determined by the Remuneration Tribunal, but until that

remuneration is so determined, he or she shall be paid such remuneration as is prescribed.

**(8) Opp (7) [Sheet 2764]**

Schedule 1, item 24, page 8 (line 16), omit "**, detention etc.**", substitute "**warrants**".

**(9) Opp (8) [Sheet 2764]**

Schedule 1, item 24, page 8 (line 17), after "**Requesting**", insert "**questioning**".

**(10) Opp (9) [Sheet 2764]**

Schedule 1, item 24, page 8 (after line 22), after subsection (1A), insert:

(1B) The Director-General may not seek the Minister's consent to request the issue of a warrant under section 34D in relation to a person under 18 years of age.

**(11) Govt (9) [Sheet DT377]**

Schedule 1, item 24, page 9 (lines 9 to 12), omit paragraph (ba), substitute:

(ba) that all the following conditions are met:

(i) there is a written statement (the ***procedural statement***) dealing with procedures to be followed in the exercise of authority under warrants issued under section 34D and with the exercise of powers under this Division;

(ii) the procedural statement deals with at least the matters described in subsection (3AA);

(iii) the acts (the ***adopting acts***) described in subsection (3A) have been done in relation to the procedural statement; and

**(12) Opp (11) [Sheet 2764]**

Schedule 1, item 24, page 9 (lines 13 to 29), omit paragraphs (c) and (d), substitute:

(c) if the warrant to be requested is to authorise the person to be taken into custody immediately and brought before a prescribed authority immediately for questioning—that there are reasonable grounds for believing that, if the person is not immediately taken into custody, the person:

(i) may alert a person involved in a terrorism offence that the offence is being investigated; or

(ii) may not appear before the prescribed authority; or

(iii) may destroy, damage or alter a record or thing the person may be requested in accordance with the warrant to produce.

**(13) Opp (10) [Sheet 2764]**

Schedule 1, item 24, page 9 (after line 31), after subsection (3), insert:

(3AA) The procedural statement is to deal with at least the following matters:

(a) informing the following persons about the issue of a warrant under section 34D:

(i) the prescribed authority before whom a person is to appear for questioning under the warrant;
(ii) the Inspector-General of Intelligence and Security;
(iii) police officers;

(b) transporting a person taken into custody under this Division in connection with such a warrant;

(c) facilities to be used for questioning of a person under such a warrant;

(d) a prescribed authority's obligation under section 34E to inform a person appearing before the prescribed authority for questioning under such a warrant of the matters mentioned in that section;

(e) arrangements under sections 34H and 34HAA for the presence of an interpreter during questioning of a person under such a warrant;

(f) procedures for recording interviews (including the custody and future use of records and transcripts);

(g) the periods for which a person may be questioned continuously under such a warrant;

(h) the periods for breaks between periods of questioning of a person under such a warrant;

(i) arrangements for the person to whom such a warrant relates to contact other persons (including provision of facilities under section 34F for the person to make a complaint orally to the Inspector-General of Intelligence and Security or the Ombudsman);

(j) conducting searches under section 34L;

(k) the periods for allowing a person to whom such a warrant relates an opportunity to sleep;

(l) providing a person to whom such a warrant relates with:
(i) adequate food and drink (taking account of any specific dietary requirements the person may have); and
(ii) adequate medical care; and
(iii) toilet facilities; and
(iv) privacy;

(m) reimbursement by the Commonwealth of reasonable costs (including legal costs) to a person who is the subject of a questioning warrant.

(3AB) The procedural statement required by this section is a disallowable instrument for the purposes of section 46A of the *Acts Interpretation Act 1901*.

(3AC) Failure to comply with a procedural statement is grounds for complaint to the Inspector-General of Intelligence and Security or the Ombudsman under the *Inspector-General of Intelligence and Security Act 1986* or the *Complaints (Australian Federal Police) Act 1981*, as the case may be.

**(14) Govt (11) [Sheet DT377]**

Schedule 1, item 24, page 9 (lines 32 to 34), omit "a written statement of procedures to be followed in the exercise of authority under warrants issued under section 34D", substitute "the procedural statement".

**(15) Govt (12) [Sheet DT377]**

Schedule 1, item 24, page 9 (line 36), omit "such a", substitute "the".

**(16) Opp (12) [Sheet 2764]**

Schedule 1, item 24, page 10 (line 3), omit subparagraph (iii).

**(17) Opp (13) [Sheet 2764]**

Schedule 1, item 24, page 10 (line 8), after "Parliament", insert "as a disallowable instrument".

**(18) Opp (14) [Sheet 2764]**

Schedule 1, item 24, page 10 (lines 13 to 37), omit subsections (3B) and (3C), substitute:

(3B) In consenting to the making of a request to issue a warrant authorising the person to be taken into custody immediately and brought before a prescribed authority immediately for questioning, the Minister must ensure that the warrant to be requested is to permit the person to contact a lawyer at any time when the person is being questioned under this Division in connection with the warrant.

**(19) Opp (15) [Sheet 2764]**

Schedule 1, item 24, page 11 (lines 1 to 15), omit subsections (4) and (5), substitute:

(4) If the Minister has consented under subsection (3), the Director-General may request the warrant by giving a prescribed authority:
  (a) a request that is the same as the draft request except for the changes (if any) required by the Minister; and
  (b) a copy of the Minister's consent.

**(20) Opp (16) [Sheet 2764]**

Schedule 1, item 24, page 11 (lines 17 to 30), omit subsection (1), substitute:

(1) A prescribed authority may issue a warrant under this section relating to a person, but only if:
  (a) the Director-General has requested it in accordance with subsection 34C(4); and
  (b) the prescribed authority is satisfied that there are reasonable grounds for believing that the warrant will substantially assist the collection of intelligence that is important in relation to a terrorism offence.

**(21) Opp (17) [Sheet 2764]**

Schedule 1, item 24, page 11 (line 37) to page 12 (line 10), omit paragraph (2)(b), substitute:

(b) do both of the following:
  (i) authorise a specified person to be taken into custody immediately by a police officer, brought before a prescribed authority immediately for questioning

under the warrant and held in custody under arrangements made by a police officer until questioning has been completed;

(ii) permit the person taken into custody to contact a lawyer (as described in section 34U) when the person is being questioned under the warrant.

**(22) Opp (18) [Sheet 2764]**

Schedule 1, item 24, page 12 (lines 11 to 27), omit subsections (3) and (4), substitute:

(3) For the purposes of subparagraph (2)(b)(i), the warrant may specify the end of the period for which the person is to be questioned by reference to the opinion of the prescribed authority that the Organisation does not have any further requests described in paragraph (5)(a) to make of the person.

(4) The warrant may identify other persons whom the person is permitted to contact by reference to the fact that he or she has a particular familial relationship with that person or persons. This does not limit the ways in which the warrant may identify persons whom the person is permitted to contact.

Note 1: The warrant may identify persons by reference to a class. See subsection 46(2) of the *Acts Interpretation Act 1901*.

Note 2: Section 34F permits the person to contact the Inspector-General of Intelligence and Security and the Ombudsman while the person is in custody, so the warrant must identify them.

**(23) Opp (19) [Sheet 2764]**

Schedule 1, item 24, page 12 (line 29), omit "issuing", substitute "prescribed".

**(24) Opp (20) [Sheet 2764]**

Schedule 1, item 24, page 13 (line 9), omit "issuing", substitute "prescribed".

**(25) Opp (21) [Sheet 2764]**

Schedule 1, item 24, page 13 (lines 22 to 24), omit paragraph (1)(a), substitute:

(a) the period for which the warrant authorises questioning of the person;

**(26) Opp (22) [Sheet 2764]**

Schedule 1, item 24, page 14 (lines 6 and 7), omit "or detention".

**(27) Opp (23) [Sheet 2764]**

Schedule 1, item 24, page 14 (line 8), at the end of subsection 34E(1), add:

; (h) the person's right to make a request under 34F(11).

**(28) Dem (2) [Sheet 2779 Revised]**

Schedule 1, item 24, page 14 (line 8), at the end of subsection 34E(1), add:

; (i) subject to section 34U, the person's right to contact a lawyer at any time during the period of their questioning.

**(29) Govt (14) [Sheet DT377]**

Schedule 1, item 24, page 14 (after line 11), after subsection 34E(2), insert:

(2A) The prescribed authority before whom the person appears for questioning must inform the person of the role of the prescribed authority, and the reason for the presence of each other person who is present at any time during the questioning. However:

(a) the prescribed authority must not name any person except with the consent of the person to be named; and

(b) the obligation to inform the person being questioned about a particular person's reason for presence need only be complied with once (even if that particular person subsequently returns to the questioning).

**(30) Opp (24) [Sheet 2764]**

Schedule 1, item 24, page 14 (line 12), omit "24", substitute "4".

**(31) Govt (15) [Sheet DT377]**

Schedule 1, item 24, page 14 (after line 17), after section 34E, insert:

**34EA Questioning to occur before prescribed authority who did not issue warrant**

If:

(a) the person appears before a prescribed authority for questioning under the warrant; and

(b) the prescribed authority is a listed former judge who issued the warrant;

the prescribed authority must not allow the questioning to proceed and must give a direction under section 34F for the person's further appearance for questioning before another prescribed authority.

**(32) Opp (25) [Sheet 2764]**

Schedule 1, item 24, page 14 (line 18) to page 16 (line 32), omit section 34F, substitute:

**34F Conduct of questioning**

(1) The prescribed authority shall regulate the conduct of questioning by the Organisation of the person under warrant.

(2) The prescribed authority shall only allow questioning to proceed or continue if the prescribed authority is satisfied that the person has not been questioned for a continuous period of more than 20 hours or for more than a total of 20 hours within a period of 7 days.

(3) If at any time the questioning of the person reaches or exceeds the time limits set out in subsection (2), the prescribed authority shall require the Organisation to immediately cease questioning the person.

(4) Questioning of a person under warrant before the prescribed authority may not be conducted:

(a) at times which interfere with the provision of medical attention to the person;

(b) when the person is intoxicated;

(c) at times when the prescribed authority considers the person is unfit to be questioned;

(d) at times when the prescribed authority considers questioning would interfere with reasonable rest or recuperation.

(5) When a person first appears before a prescribed authority, they may be questioned for a period not exceeding 4 hours.

(6) If on application by the Organisation, the prescribed authority is satisfied that:

(i) there are reasonable grounds to believe further questioning is likely to yield relevant information; and

(ii) the person has access to legal advice consistent with subsections 34U(1) to (3), the person may be questioned for a further period not exceeding 8 hours in addition to the questioning allowed by subsection (5).

(7) If on application by the Organisation, the prescribed authority is satisfied that there is a threat of an imminent terrorist act and that there are reasonable grounds to believe further questioning is likely to yield information relevant to that threat (including information relating to preparation or planning for a terrorist act), the prescribed authority may allow the person to be questioned for a further 8 hours in addition to those periods allowed by subsections (5) and (6).

(8) The prescribed authority may authorise a person who is or has been before the prescribed authority for questioning under warrant to disclose to other persons information about the warrant, the questioning or the production of records or things.

(9) The prescribed authority may authorise a legal practitioner who is accompanying or has accompanied a person who is or has been before the prescribed authority for questioning under warrant to disclose to other persons information about the warrant, the questioning or the production of records or things.

(10) An authorisation to allow disclosure of information made by the prescribed authority under subsection (8) or (9) shall be in writing and shall specify the information which may be disclosed and the persons to whom the information may be disclosed.

(11) A person appearing before a prescribed authority may at any time request the prescribed authority to make an authorisation under subsection (8) or (9) and the prescribed authority must immediately consider such a request.

(12) An authorisation to allow disclosure of information made by the prescribed authority under subsection (8) or (9) may be revoked at any time.

(13) This section does not in any way limit contact between the person and the Inspector-General of Intelligence and Security or the Ombudsman under:

(a) sections 10 and 13 of the *Inspector-General of Intelligence and Security Act 1986*; or

(b) section 22 of the *Complaints (Australian Federal Police) Act 1981*;

as the case may be.

Note: The sections mentioned in this subsection give the person an entitlement to facilities for making a written complaint.

(14) Anyone holding the person in custody under this Division must give the person facilities for contacting the Inspector-General of Intelligence and Security or the Ombudsman to make a complaint orally under a section mentioned in subsection (13) if the person requests them.

**(33) Opp (26) [Sheet 2764]**

Schedule 1, item 24, page 17 (lines 3 and 4), omit "or a direction given under section 34F".

**(34) Opp (27) [Sheet 2764]**

Schedule 1, item 24, page 17 (lines 6 to 10), omit subsection (2), substitute:

(2) Strict liability applies to the circumstance of an offence against subsection (1) that the warrant was issued under section 34D.

Note: For ***strict liability***, see section 6.1 of the *Criminal Code*.

**(35) Opp (28) [Sheet 2764]**

Schedule 1, item 24, page 17 (lines 17 and 18), omit the note.

**(36) Opp (29) [Sheet 2764]**

Schedule 1, item 24, page 18 (lines 3 and 4), omit the note.

**(37) Opp (30) [Sheet 2764]** (*As amended by Dem (4) [Sheet 2788]*)

Schedule 1, item 24, page 18 (after line 23), at the end of section 34G, add:

(10) A person who is or has been before a prescribed authority for questioning under warrant may not disclose any information about the questioning or the production of records or things unless authorised to do so in writing by the prescribed authority.

Penalty: Imprisonment for 5 years.

(11) A legal practitioner who is accompanying or has accompanied a person appearing before a prescribed authority for questioning under warrant may not disclose any information about the questioning or the production of records or things unless authorised to do so in writing by the prescribed authority.

Penalty: Imprisonment for 5 years.

(12) Subsections (10) and (11) do not apply to:

(a) contact between the person and the Inspector-General of Intelligence and Security or the Ombudsman under:

(i) sections 10 and 13 of the *Inspector-General of Intelligence and Security Act 1986*; or

(ii) section 22 of the *Complaints (Australian Federal Police) Act 1981*;

as the case may be; or

(b) contact between the person or the person's legal adviser and a court or another legal adviser for the purposes of seeking a remedy in relation to the warrant, the treatment of the person in connection with the warrant, or the questioning or custody of the person in connection with the warrant.

**(38) Govt (17) [Sheet DT377]**

Schedule 1, item 24, page 18 (line 24), at the end of the heading to section 34H, add "**provided at request of prescribed authority**".

**(39) Govt (18) [Sheet DT377]**

Schedule 1, item 24, page 19 (after line 2), after section 34H, insert:

**34HAA Interpreter provided at request of person being questioned**

(1) This section applies if a person appearing before a prescribed authority under a warrant requests the presence of an interpreter.

(2) A person exercising authority under the warrant must arrange for the presence of an interpreter, unless the prescribed authority believes on reasonable grounds that the person who made the request has an adequate knowledge of the English language, or is physically able, to communicate with reasonable fluency in that language.

(3) If questioning under the warrant has not commenced and the prescribed authority determines that an interpreter is to be present:
   (a) the prescribed authority must defer informing under section 34E the person to be questioned under the warrant until the interpreter is present; and
   (b) a person exercising authority under the warrant must defer the questioning until the interpreter is present.

(4) If questioning under the warrant commences before the person being questioned requests the presence of an interpreter and the prescribed authority determines that an interpreter is to be present:
   (a) a person exercising authority under the warrant must defer any further questioning until the interpreter is present; and
   (b) when the interpreter is present, the prescribed authority must again inform the person of anything of which he or she was previously informed under section 34E.

**(40) Govt (19) [Sheet DT377]** (*As amended by Opp (1) and (2) [Sheet 2787]*)

Schedule 1, item 24, page 19 (after line 2), after section 34H, insert:

**34HAB Inspector-General of Intelligence and Security may be present at questioning or taking into custody**

To avoid doubt, for the purposes of performing functions under the *Inspector-General of Intelligence and Security Act 1986*, the Inspector-General of Intelligence and Security, or an APS employee assisting the Inspector-General, may be present at the questioning or taking into custody of a person under this Division.

**(41) Govt (20) [Sheet DT377]** (*As amended by Opp (3) [Sheet 2787]*)

Schedule 1, item 24, page 19 (after line 9), at the end of subsection 34HA(1), add:

Note: For example, the Inspector-General may be concerned because he or she has been present at a questioning under section 34HAB.

**(42) Opp (32) [Sheet 2764]**

Schedule 1, item 24, page 19 (lines 23 to 32), omit the note.

**(43) Govt (21) [Sheet DT377]** (*As amended by Opp (4) to (7) [Sheet 2787]*)

Schedule 1, item 24, page 20 (after line 9), after section 34J, insert:

### 34JA Entering premises to take person into custody

(1) If:

(a) either a warrant issued under section 34D authorises a person to be taken into custody; and

(b) a police officer believes on reasonable grounds that the person is on any premises;

the officer may enter the premises, using such force as is necessary and reasonable in the circumstances, at any time of the day or night for the purpose of searching the premises for the person or taking the person into custody.

(2) A police officer must not enter a dwelling house under subsection (1) of this section at any time during the period:

(a) commencing at 9 pm on a day; and

(b) ending at 6 am on the following day;

unless the officer believes on reasonable grounds that it would not be practicable to take the person into custody, either at the dwelling house or elsewhere, at another time.

(3) In this section:

***dwelling house*** includes an aircraft, vehicle or vessel, and a room in a hotel, motel, boarding house or club, in which people ordinarily retire for the night.

***premises*** includes any land, place, vehicle, vessel or aircraft.

### 34JB Use of force in taking person into custody

(1) A police officer may use such force as is necessary and reasonable in:

(a) taking a person into custody under a warrant issued under section 34D; or

(b) preventing the escape of a person from such custody; or

(c) bringing a person before a prescribed authority for questioning under such a warrant.

(2) However, a police officer must not, in the course of an act described in subsection (1) in relation to a person, use more force, or subject the person to greater indignity, than is necessary and reasonable to do the act.

(3) Without limiting the operation of subsection (2), a police officer must not, in the course of an act described in subsection (1) in relation to a person:

(a) do anything that is likely to cause the death of, or grievous bodily harm to, the person unless the officer believes on reasonable grounds that doing that thing is necessary to protect life or to prevent serious injury to another person (including the officer); or

(b) if the person is attempting to escape being taken into custody by fleeing—do such a thing unless:

(i) the officer believes on reasonable grounds that doing that thing is necessary to protect life or to prevent serious injury to another person (including the officer); and

(ii) the person has, if practicable, been called on to surrender and the officer believes on reasonable grounds that the person cannot be taken into custody in any other manner.

**(44) Opp (33) [Sheet 2764]**

Schedule 1, item 24, page 20 (line 11), omit "Director-General", substitute "police".

**(45) Opp (34) [Sheet 2764]**

Schedule 1, item 24, page 20 (line 17), omit "Director-General", substitute "police".

**(46) Opp (35) [Sheet 2764]**

Schedule 1, item 24, page 20 (after line 20), at the end of section 34K, add:

(3) The police must immediately provide the Organisation with a copy of any video recording made under this section.

**(47) Opp (36) [Sheet 2764]**

Schedule 1, item 24, page 20 (line 22), omit "detained", substitute "taken into custody".

**(48) Govt (22) [Sheet DT377]**

Schedule 1, item 24, page 20 (after line 25), after subsection 34L(1), insert:

(1A) An ordinary search of the person under this section must, if practicable, be conducted by a police officer of the same sex as the person being searched.

**(49) Govt (23) [Sheet DT377]**

Schedule 1, item 24, page 21 (line 24), omit "subsection (3)", substitute "subsections (3) and (3A)".

**(50) Govt (24) [Sheet DT377]**

Schedule 1, item 24, page 22 (after line 27), after subsection (3), insert:

(3A) Paragraph (1)(c) does not apply to a parent, guardian or personal representative of the person being searched if the person being searched has no objection to the person being present.

**(51) Opp (37) [Sheet 2764]**

Schedule 1, item 24, page 23 (line 17) to page 26 (line 16), omit section 34NA.

**(52) Govt (25) [Sheet DT377]**

Schedule 1, item 24, page 27 (lines 13 and 14), omit "or subsection 34H(4) or", substitute ", subsection 34H(4), paragraph 34HAA(3)(b) or (4)(a) or subsection".

**(53) Govt (26) [Sheet DT377]**

Schedule 1, item 24, page 28 (after line 5), after section 34NB, insert:

**34NC Complaints about contravention of procedural statement**

(1) Contravention of the procedural statement mentioned in section 34C of this Act may be the subject of a complaint:

(a) to the Inspector-General of Intelligence and Security under the *Inspector-General of Intelligence and Security Act 1986*; or

(b) to the Ombudsman under Part III of the *Complaints (Australian Federal Police) Act 1981*.

(2) This section does not limit the subjects of complaint under the *Inspector-General of Intelligence and Security Act 1986* or Part III of the *Complaints (Australian Federal Police) Act 1981*.

**(54) Opp (38) [Sheet 2764]**

Schedule 1, item 24, page 28 (lines 19 and 20), omit paragraph (c), substitute:

(c) a statement containing details of any seizure or taking into custody under this Division;

**(55) Opp (39) [Sheet 2764]** (*As amended by Dem (5) [Sheet 2788]*)

Schedule 1, item 24, page 29 (line 27) to page 32 (line 4), omit section 34U, substitute:

**34U Legal advice during questioning**

(1) Subject to subsections (2) and (3), a person appearing before a prescribed authority for questioning under warrant may be accompanied by a legal adviser.

(2) If the prescribed authority is satisfied on application by the Organisation that the legal adviser chosen by the person being questioned may prejudice the collection of

intelligence that is important in relation to a terrorism offence, the prescribed authority can deny the person their legal adviser of first choice.

(3) In the circumstances mentioned in subsection (2), the prescribed authority must assist the person to locate a suitable legal adviser.

(4) If the prescribed authority is satisfied, on application by the Organisation, that there is a threat of an imminent terrorist act, questioning may commence before the arrival of the person's legal adviser.

*Breaks in questioning to give legal advice*

(5) The prescribed authority before whom a person is being questioned must provide a reasonable opportunity for the legal adviser to provide advice.

*Removal of legal adviser for disrupting questioning*

(6) If the prescribed authority considers the legal adviser's conduct is unduly disrupting the questioning, the prescribed authority may direct a person exercising authority under the warrant to remove the legal adviser from the place where the questioning is occurring.

(7) If the prescribed authority directs the removal of the person's legal adviser, the prescribed authority must assist the person to locate a suitable legal adviser.

*Communications*

(8) The prescribed authority must not refuse to authorise the person being questioned or the legal adviser of that person to communicate with a court or another legal adviser for the purposes of seeking a remedy in relation to the warrant, the treatment of the person in connection with the warrant, or the questioning or custody of the person in connection with the warrant.

**(56) Opp (40) [Sheet 2764]**

Schedule 1, item 24, page 32 (line 5) to page 34 (line 21), omit section 34V.

**(57) Govt (27) [Sheet DT377]**

Schedule 1, item 24, page 34 (after line 26), after section 34W, insert:

**34WA Law relating to legal professional privilege not affected**

To avoid doubt, this Division does not affect the law relating to legal professional privilege.

**(58) Govt (28) [Sheet DT377]**

Schedule 1, item 27A, page 35 (lines 21 to 33), omit subsection (1A), substitute:

(1A) The report must include a statement of:

(a) the total number of requests made under section 34C to issuing authorities during the year for the issue of warrants under section 34D; and

(b) the total number of warrants issued during the year under section 34D; and

(c) the total number of warrants issued during the year that meet the requirement in paragraph 34D(2)(a) (about requiring a person to appear before a prescribed authority); and

(d) the number of hours each person appeared before a prescribed authority for questioning under a warrant issued during the year that meets the requirement in paragraph 34D(2)(a) and the total of all those hours for all those persons; and

(e) the total number of warrants issued during the year that meet the requirement in paragraph 34D(2)(b) (about authorising a person to be taken into custody, brought before a prescribed authority and detained); and

(f) the following numbers:

(i) the number of hours each person appeared before a prescribed authority for questioning under a warrant issued during the year that meets the requirement in paragraph 34D(2)(b);

(ii) the number of hours each person spent in detention under such a warrant;

(iii) the total of all those hours for all those persons; and

(g) the number of times each prescribed authority had persons appear for questioning before him or her under warrants issued during the year.

(1B) A statement included under subsection (1A) in a report must not name, or otherwise specifically identify, any person to whom information provided in the report relates.

Note: Subsection (4) lets the Minister delete information described in subsection (1A) from the copy of the report laid before each House of the Parliament under subsection (3), if the Minister considers it necessary to avoid prejudice to security, the defence of the Commonwealth, the conduct of the Commonwealth's international affairs or the privacy of individuals.

**HARRY EVANS**
Clerk of the Senate

The Senate
12 December 2002

## Endnotes

1 See **item 7**, **Schedule 1**, *Telecommunications Interception Legislation Amendment Act 2002*.

2 As stated above, the Anti-hoax Bill has received Royal Assent.

3 Senate Legal and Constitutional References Committee, *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 and related matters*, December 2002.

4 ibid., p. 2.

5 ibid., p. 3.

6 Daryl Williams, Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002: Consideration in Detail, House of Representatives, *Debates*, 23 September 2002, p. 7043.

7 Senate, Debates, 3 December 2002, p. 7075.

8 Senate, *Debates*, 12 December 2002, p. 7923.

9 House of Representatives, *Debates*, 12 December 2002, p. 10417.

10 Senate, *Debates*, 12 December 2002, p. 8086–8099.

11 House of Representatives, *Debates*, 12 December 2002, p. 10523.

12 Senate, *Debates*, 12 December 2002, pp. 8151–8164.

13 Proposed section 34AB.

14 Proposed section 34B.

15 Proposed paragraph 34C(3)(d) (consent by the Attorney-General to allow the Director-General of ASIO to request a warrant) and 34D(1)(c) (conditions for the issue of a warrant).

16 Proposed sub-paragraph 34D(2)(b)(ii) (conditions for the issue of a warrant).

17 Proposed sections 34AB

18 Proposed subsection 34NA(4).

19 Proposed subsection 34NA(6).

20. Proposed section 34AB ((6) Opp (5) [Sheet 2764]); proposed subsections 34C(4) and (5) ((19) Opp (15) [Sheet 2764]); proposed subsection 34D(5) ((23) Opp (19) [Sheet 2764] and (24) Opp (20) [Sheet 2764]).

21. Proposed section 34AB(3).

22. 'Superior courts' being defined as 'the High Court, Federal Court, Family Court, the Supreme Court of a State or Territory or a District Court of a State or a Territory or an equivalent' proposed section 34A ((5) Opp (4) [Sheet 2764] (As amended by Opp (1) [Sheet 2796])).

23. Proposed section 34B ((7) Opp (6) [Sheet 2764] (As amended by Opp (2) [Sheet 2796])).

24 Proposed subsection 34B(5) ((7) Opp (6) [Sheet 2764] (As amended by Opp (2) [Sheet 2796])).

25. House of Representatives, *Debates*, 12 December 2002, p. 10440.

26 For example, Senator Ian Campbell, Senate, *Debates*, 12 December 2002, pp. 8090–8091.

27. House of Representatives, *Debates*, 12 December 2002, p. 10530.

28. House of Representatives, *Debates*, 12 December 2002, p. 10538.

29 Proposed paragraph 34C(3)(a).

30 Senate Legal and Constitutional References Committee, op. cit., p. 34.

31 Proposed subsections 34C(3)(c).

32 Senate Legal and Constitutional References Committee, op. cit., p. 34.

33 Proposed subsection 34F(3).

34 Senate Legal and Constitutional References Committee, op. cit., p. 72.

35 Proposed paragraph 34C(3)(c), 34D(2)(b)(i).

36. Headings for Subdivision B ((8) Opp (7) [Sheet 2764]) and proposed section 34C ((9) Opp (8) [Sheet 2764]; paragraph 34C(3)(c); subsections 34C(3B) and (3C) ((18) Opp (14) [Sheet 2764]); subsection 34C(5) ((19) Opp (15) [Sheet 2764]); paragraph 34D(1)(a) and (c) ((20) Opp (16) [Sheet 2764]); paragraph 34D(2)(b) ((21) Opp (17) [Sheet 2764]); subsection 34D(3) ((22) Opp (18) [Sheet 2764]); subsection 34E(1)(a) ((25) Opp (21) [Sheet 2764]); paragraph 34E(1)(g) ((26) Opp (22) [Sheet 2764]); subsection 34L(1) ((47) Opp (36) [Sheet 2764]); subsection 34Q(c) ((54) Opp (38) [Sheet 2764]).

37. Proposed section 34F, (32) Opp (25) [Sheet 2764].

38. Proposed subsection 34F(5).

39. Proposed subsection 34F(6).

40. Proposed section 5 and proposed subsection 34F(7).

41. Proposed subsections 34F(2) and (3).

42 Proposed section 34D(2)(b)(i).

43 Proposed section 34D(3) ((12) Opp (18) [Sheet 2764]).

44. Proposed subsection 34JA(2) ((43) Govt (21) [Sheet DT377]).

45. Proposed subsection 34JA(1) ((43) Govt (21) [Sheet DT377]), (emphasis added).

46. Proposed section 34JB ((43) Govt (21) [Sheet DT377]).

47. Proposed sections 34JA and 34JB ((43) Govt (21) [Sheet DT377] (As amended by Opp (4) to (7) [Sheet 2787])). The intention was clear, albeit that the result required further amendment: as amended by the Senate, proposed paragraph 34JA(1)(a) referred to '*either* a warrant issued under section 34D' even though the reference to the alternative (subsection 34F(6)) had been removed.

48 Proposed paragraph 34C(3)(ba).

49 Proposed subsection 34C(3A).

50 Parliamentary Joint Committee on ASIO, ASIS and DSD, *An Advisory Report on the on the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002*, May 2002, Recommendation 7, p. xv.

51 Parliamentary Joint Committee on ASIO, ASIS and DSD, op. cit., pp. 36–37.

52 Senate Legal and Constitutional References Committee, *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 and related matters*, December 2002, p. 110.

53. Proposed subsection 34C(3AA) ((13) Opp (10) [Sheet 2764]).

54. Proposed subsection 34C(3AB) ((13) Opp (10) [Sheet 2764]).

55. Proposed paragraph 34C(3A)(d) ((17) Opp (13) [Sheet 2764]).

56. Proposed subsection 34C(3AC) ((13) Opp (10) [Sheet 2764]) *and* proposed subsection 34NC ((53) Govt (26) [Sheet DT377]).

57. House of Representatives, *Debates*, 12 December 2002, p. 10441.

58. Proposed subsection 34F(4) ((32) Opp (25) [Sheet 2764]).

59. Proposed section 34A ((4) Opp (3) [Sheet 2764]), proposed section 34AA ((6) Opp (5) [Sheet 2764]) proposed section 34D(4) ((22) Opp (18) [Sheet 2764]).

60. Proposed paragraph 34E(1)(i) ((28) Dem (2) [Sheet 2779 Revised]); proposed section 34U ((55) Opp (39) [Sheet 2764] (As amended by Dem (5) [Sheet 2788])).

61. Proposed subsection 34C(3C) ((18) Opp (14) [Sheet 2764]).

62. Proposed subsection 34C(3C).

63. Proposed subsection 34U(4) ((55) Opp (39) [Sheet 2764] (As amended by Dem (5) [Sheet 2788])).

64. *Criminal Code*, section 100.1.

65 Proposed section 34HA.

66. Proposed section 34HAB (40) Govt (19) [Sheet DT377] (As amended by Opp (1) and (2) [Sheet 2787]).

67. House of Representatives, *Debates*, 12 December 2002, p. 10441.

68. Proposed subsection 34C(1B) ((10) Opp (9) [Sheet 2764]).

69. Proposed section 34V ((56) Opp (40) [Sheet 2764]).

70. Proposed section 5 ((1) Opp (1) [Sheet 2764]).

71 Proposed paragraph 34C(3)(ba) ((11) Govt (9) [Sheet DT377]), proposed section 34C(3A) ((14) Govt (11) and (15) Govt (12) [Sheet DT377]), proposed subsection 34E(2A) ((29) Govt (14) [Sheet DT377]), proposed section 34EA ((31) Govt (15) [Sheet DT377]), proposed

section 34H ((38) Govt (17) [Sheet DT377]), proposed section 34HAA (39) Govt (18) [Sheet DT377]), proposed subsection 34L(1A) ((48) Govt (22) [Sheet DT377]), proposed section 34M ((49) Govt (28) and (50) Govt (29) [Sheet DT377]), proposed section 34NC ((52) Govt (26) [Sheet DT377]).

72 Section 4 ((1) Opp (1) [Sheet 2764]), proposed section 34A ((5) Opp (9) [Sheet 2764]) and proposed section 34B ((7) Opp (6) [Sheet 2764]).

73 (1975) 134 CLR 81.

74 George Williams, 'The Road to a Double Dissolution', *Research Note No. 29 1997-98*.

75 Harry Evans, 'Constitution, section 57; Native Title Amendment Bill 1997; and Public Service Bill 1997', hc/pap/11732, 28 January 1998.

76. *Victoria v. Commonwealth* (1975) 134 CLR 81.

77. The headnotes to *Victoria v. Commonwealth* describe the majority decision as follows: '[t]he three month interval is measured not from the first passage of a proposed law by the House of Representatives, but from the Senate's rejection or failure to pass it. This interpretation follows both from the language of section 57 and its purpose which is to provide time for the reconciliation of the differences between the Houses; the time therefore does not begin to run until the deadlock occurs'.

78. Clearly, as noted, this may be difficult to quantify.

79. *Victoria v. Commonwealth* (1975) 134 CLR 81, per Barwick CJ at p. 124.

80 Harris, Op. Cit., p. 447. Harris refers to a case involving the Aboriginal and Torres Strait Islander Commission Amendment (Indigenous Land Corporation and Land Fund) Bill 1994 in which the Government agreed to accept some of the Senate amendments, but changed the short title of the Bill.

81 Harry Evans (Ed), *Odgers' Australian Senate Practice*, 10th Edition, p. 86.

82 Comans, 'Constitution, section 57 — further questions', *Federal Law Review*, Vol. 15 No. 3, September 1985, p. 243 at p. 246. Comans suggests that 'identity of text is not necessarily enough' and that section 57 may require an identity in terms of legal operation or effect. He refers to the potential problem that would arise if, in the meantime, other amendments were made to the principal legislation that would vary the legal operation of the Bill or would partly enact its provisions or a variation of. The Bill would not be the same, *in a legal sense*, as the one originally introduced in the House: 'It would seem that , to keep within the terms of section 57 the twice rejected Bill would have had to be introduced in its original form notwithstanding that that form included some provisions already enacted. however, as these provisions of the reintroduced Bill could not, in the circumstances, have any legal effect, it could have been argued with some force that the Bill was not the same proposed law as that previously twice rejected by the Senate' (at p. 247).

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