

The Conscience of Democracy?
The Role of Australian Parliamentary Committees in Enacting Counter-Terrorism Laws
By Dominique Dalla-Pozza*

The events in the United States on 11 September 2001 prompted the Australian Federal Parliament to engage in making a new type of legislation: laws specifically designed to combat terrorism.¹ The counter-terrorism legislative framework they created in the five years between 11 September 2001 and 11 September 2006 is significant in both quantitative and qualitative terms. For the purpose of this paper, the "Australian counter-terrorism law framework" consists of 42 pieces of federal legislation which I consider have the predominant purpose of combating terrorism.

In terms of qualitative impact, commentators have consistently emphasised the significance of the legislation. Simon Bronitt described the laws passed by the end of 2003 as "almost a new *genus* of law".² Writing in 2006 Andrew Lynch and George Williams expressed the view that the laws "realign our legal system."³ The Federal Government also sees the enactment of new legislation as critical to ensuring Australia's national security. Indeed the Prime Minister highlighted that "strong domestic laws" are a necessary part of the "struggle against terrorism".⁴

More importantly the Federal Government has been keen to give Parliament credit for playing a pivotal role in crafting these laws. When talking about the counter-terrorism

legislation that had been passed before September 2002, the Prime Minister commented that "through the great parliamentary processes... this country has... got the balance right".⁵ In these comments, he presented the laws as a compromise between the two competing goals of national security and individual

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¹ See Nathan Hancock, 'Terrorism and the Law in Australia: Legislation, Commentary and Constraints' *Department of the Parliamentary Library Research Paper No 12 2001-02* (12 March 2002) available at <http://www.aph.gov.au/library/Pubs/RP/2001-02/02RP12.htm> (last accessed 15 August 2007), 1.

² Although he does go on to argue that the laws can be seen as being consistent with the development of the criminal law reform for the last 30 years. See Simon Bronitt 'Australia's Legal Response to Terrorism: Neither Novel Nor Extraordinary' (Paper presented at the Castan Centre for Human Rights Law Conference "Human Rights 2003: The Year in Review", Melbourne, 4 December 2003) <http://www.law.monash.edu.au/castancentre/events/2003/bronitt-paper.pdf> (accessed 23 January 2007).

³ Andrew Lynch and George Williams, *What Price Security? Taking Stock of Australia's Anti-Terror Laws* (2006), 85.

⁴ Prime Minister John Howard, 'Address to the SA Division State Council AGM' (Speech delivered to the SA Division of the State Council of the Liberal Party of Australia, Adelaide, 19 August 2006). <http://www.pm.gov.au/media/speech/2006/speech2084.cfm> (accessed 31 July 2007).

⁵ Prime Minister John Howard, "Address to the National Press Club" (Speech delivered at the National Press Club, Canberra, 11 September 2002). Transcript available at <http://www.pm.gov.au/media/speech/2002/speech1848.cfm> (last accessed 21 August 2007).

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rights, and identified Parliament as the forum responsible for achieving this compromise. Similarly, the Attorney-General has indicated that "our democratic traditions and processes are our greatest ally and our greatest strength" in protecting Australia from "the terrorist threat".⁶ On the other hand, doubts have been expressed about the role Parliament can play in the struggle against terrorism. In 2004 John Uhr opined that Federal Parliament lacked institutions robust enough to allow it to make its own contribution to protecting Australia from terrorism.⁷

In this paper I present statistical data to shed some light on one aspect of the role Parliament has played in developing the Australian counter-terrorism legislative framework: the work done by parliamentary committees as they scrutinise proposed legislation. My results are provisional and form part of my ongoing doctoral research. I am aware that there are limits to conducting a statistical analysis of parliamentary committee activity.⁸ However, the broad sketch provided by such statistics does act as a starting point for further analysis. I contend that parliamentary committees role in providing pre-enactment scrutiny is a vital aspect of the Australian counter-terrorism law-making process. This is because committees can assist in ensuring that pieces of counter-terrorism legislation are properly deliberated. I further maintain that proper deliberation of such legislation is a "democratic tradition" to which Australia should adhere.

The extent to which the committees were able to fulfil this role determines whether they functioned as "Parliament's conscience"⁹ during the development of the counter-terrorism legislative framework. Senator Murray used this metaphor to describe the contribution Senate committee inquiries can make to the law-making process. He claimed that, among other things, "a robust committee system...ensures[s] that the Parliament does not act in ignorance of the ... consequences of its actions".¹⁰ Thus the metaphor provides a succinct explanation of what pre-enactment scrutiny of counter-terrorism legislation strives to achieve. To invoke the idea of 'listening to one's conscience' calls to mind the pause taken before important decisions are made to allow for differing viewpoints on those decisions to be weighed.

⁶ The Hon Philip Ruddock MP, 'Australia's Legislative Response to the Ongoing Threat of Terrorism' (2004) 27 *The University of New South Wales Law Journal* 254, 261.

⁷ John Uhr, 'Terra Infirma? Parliament's Uncertain Role in the 'War on Terror'' (2004) 27 *The University of New South Wales Law Journal* 339, 339- 341.

⁸ Geoffrey Lindell, 'How (and Whether) to Evaluate Parliamentary Committees- From a Lawyer's Perspective' (Paper presented to the Canberra Evaluation Forum, Canberra, 18 December 2004), 3. Available at http://www.aph.gov.au/house/house_news/magazine/ath24_lindell.pdf (accessed 29 May 2007).

⁹ Senator Andrew Murray, 'An Evaluation of the Protection of Rights by Parliament' (2006) 87 (3) *The Parliamentarian*, 228, 229.

¹⁰ *Ibid.*

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To illustrate the extent to which the committees acted as Parliament's conscience I will discuss two tentative conclusions which have emerged from my results at this stage: First, the results demonstrate that, in specific circumstances, the holding of a parliamentary committee inquiry provided an opportunity for diverse community concerns to be expressed directly to parliamentarians. Unfortunately, my second conclusion is that, overall, committees had more mixed success in functioning as such a conduit.

Before elaborating on these conclusions, I will explain why I assume that proper deliberation is a democratic tradition that should apply to the counter-terrorism law making process. I will outline the special role pre-enactment scrutiny by parliamentary committees plays within this tradition. I will also provide an overview of the activities of parliamentary committees as the Australian Federal counter-terrorism legislative framework was developed over the five year period spanning 11 September 2001 to 11 September 2006.

DELIBERATION AS AN AUSTRALIAN DEMOCRATIC TRADITION

I referred earlier to the Prime Minister's claim that the Parliament was fundamental to striking the appropriate balance required for Australia's counter-terrorism legislation. This use of a "balance" metaphor pervades the Federal Government's rhetoric when the

approach to enacting counter-terrorism legislation is discussed.¹¹ On one side of the 'scale' is the need to keep Australia secure from terrorist activity, on the other is the need to preserve the individual rights that are assumed to be part of Australian life.¹²

¹¹ For recent examples of the use of the term 'balance' and its derivatives see, Prime Minister John Howard, 'Australian Government Rejects Amnesty International Report' (Press Release, 24 May 2007)

http://www.pm.gov.au/media/release/2007/Media_Release24335.cfm (accessed 15 August 2007); Prime Minister John Howard, 'Address to the ASPI Global Forces 2006 Conference: Australia's Security Agenda' (Speech delivered at the ASPI Global Forces 2006 Conference, Hyatt Hotel, Canberra, 26 September 2006)

<http://www.pm.gov.au/media/speech/2006/speech2150.cfm> (last accessed 21 August 2007); Prime Minister John Howard 'A Sense of Balance: The Australian Achievement in 2006' (Address to the National Press Club, Canberra, 25 January 2006) <http://www.pm.gov.au/media/speech/2006/speech1754.cfm> (accessed 31 July 2007); transcript of the Prime Minister, John Howard, Joint Press Conference with Attorney-General, Parliament House, 8 September 2005,

<http://www.pm.gov.au/media/interview/2005/Interview1553.cfm> (last accessed 21 August 2007) (which contains the comments of the Prime Minister and the Attorney General announcing the Government's approach to making counter-terrorism legislation in late 2005). See also Jenny Hocking 'Protecting Democracy By Preserving Justice: 'Even for the Feared and the Hated'' (2004) 27 *University of New South Wales Law Journal*, 319, 327. But see Ben Golder and George Williams who note that the Attorney-General Philip Ruddock has moved away from the idea that the laws represent a "balance": 'Balancing National Security and Human Rights: Assessing the Legal Response of Common Law Nations to the Threat of Terrorism' (2006) 8(1) *Journal of Comparative Policy Analysis* 43, 44. Finally, for a warning of the limitations of the balancing metaphor see Christopher Michelsen 'Balancing Civil Liberties Against National Security? A Critique of Counterterrorism Rhetoric' (2006) 29(2) *The University of New South Wales Law Journal* 1 and Simon Bronitt 'Constitutional Rhetoric v Criminal Justice Realities: Unbalanced Responses to Terrorism?' (2003) 14 *Public Law Review* 76, 79-80.

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This rhetoric suggests that the Government sees the Australian Parliament as a deliberative forum and the counter-terrorism legislation as the product of a process of deliberation. This rhetorical strategy is not surprising because the idea of deliberation is linked with this notion of balance. As has been noted by John Uhr the word "deliberation" originates from the word *libra* which evokes images of balancing scales.¹³ It is also understandable that the Government should wish to present this controversial legislation in such a light. To say that legislation strikes "the right" balance implies that some

consideration of various options has been undertaken before that balance was struck.¹⁴ In turn, this suggests that deliberation itself is one of the key democratic traditions and processes which characterised the way in which the Australian counter-terrorism legislation was made. It also justifies examining the laws to determine if they were in fact produced by such a process.

Legal scholars are beginning to explore the connections between Parliament as a democratic institution and a law-making body.¹⁵ However to explore the relationship between democracy and deliberation, I am primarily drawing on the work of political scientists who have engaged in an appraisal of the deliberative capacities of institutions to assess how democratic those institutions might be.¹⁶ In 1998 John Uhr subjected the Australian Parliament to such an analysis. One way he suggests deliberative capacity can be tested is to investigate the efficacy of the debate which occurs in those assemblies.¹⁷

For Uhr the "most basic" test of debate is how many different viewpoints are represented in the discussions of the "political assembly"¹⁸. One way to test debate is to establish the extent to which that assembly has access to independent information. This independent information is important because it

¹² See, for example, Commonwealth, *Parliamentary Debates*, House of Representatives, 21 March 2002, 1930 (Darryl Williams, Attorney-General); Parliamentary Joint Committee on ASIO, ASIS and DSD, Parliament of Australia, *An Advisory Report on the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002* (2002), vii; Senate Legal and Constitutional Legislation Committee, Parliament of Australia, *Provisions of the Anti-Terrorism Bill (No 2) 2005* (2005), [2.6-2.7] (recording concerns that the Bill being considered was not "proportionate").

¹³ John Uhr, 'Instituting Republicanism: Parliamentary Vices, Republican Virtues?' (1993) 28, Special Issue, *Australian Journal of Political Science*, 27, 30.

¹⁴ For a brief discussion of the importance of the concept of "consideration" to the idea of deliberation see Robert E. Goodin and Simon J. Niemeyer, 'When Does Deliberation Begin? Internal Reflection versus Public Discussion in Deliberative Democracy' (2003) 51 *Political Studies*, 627 at 628-629.

¹⁵ See for example, Andrew Lynch, 'Legislating with Urgency-The Enactment of the *Anti-Terrorism Act [No 1] 2005*' (2006) 30 *Melbourne University Law Review* 747, 778-9; Carolyn Evans and Simon Evans 'Evaluating the Human Rights Performance of Australian Legislatures: A Research Agenda and Methodology' (2005) *Melbourne Law School Legal Studies Research Paper No 123*, <http://www.ssrn.com/abstract=771224> (accessed at 7 August 2006) 3 and 8.

¹⁶ See John Uhr "Parliament and Public Deliberation: Evaluating the Performance of Parliament" (2001) 24 *The University of New South Wales Law Journal* 708, 712 (and the references cited there; John Uhr, "The Constitutional Convention and Deliberative Democracy" (1998) 21 *University of New South Wales Law Journal*, 875, 879.

¹⁷ John Uhr, *Deliberative Democracy in Australia: The Changing Place of Parliament* (1998), 220 and 227.

¹⁸*Ibid.*, 227.

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provides a counter-weight to the information provided to Parliament by the Government.¹⁹ In theory, parliamentary committees are uniquely placed to enhance this aspect of Parliament's overall deliberative capacity because the provision of external information is one of the key justifications for

their existence. It has long been recognised that one of the main functions of the parliamentary committee system is to provide ordinary people and interest groups with a channel to address parliamentarians directly.²⁰ Moreover, this "direct route"²¹ is also important because providing Parliament with access to "expert and informed opinion" can lay the basis for an improvement in public policy.²²

The information and external opinions that were conveyed to committee members during their probes into specific pieces of Federal counter-terrorism legislation originated from two main sources: submissions and information given by witnesses in the public hearings held by the committees. For the most part, the submissions and evidence are publicly available, although there are cases where the information was provided to the committee confidentially.²³ To test the extent to which the parliamentary committee system fulfilled the function of enhancing the Australian Parliament's deliberative capacity by providing legislators with this external information I collected data showing the extent to which Government and non-Government sources contributed to the debate about counter-

¹⁹ Ibid., 230.

²⁰ Lindell, above note 8, 2 citing the aims proffered by the Joint Standing Committee on Broadcasting in 1943. See for a similar point made in relation to Senate Committees, Liz Young quoting the work of John Vander Wyk and Angie Lilley, Liz Young, 'Parliamentary Committees: The Return of the Sausage Machine' (2006) *Democratic Audit* (Discussion Paper 28/06) 5. Available at http://arts.anu.edu.au/democraticaudit/papers/20060831_youngl_senatecomms.pdf (accessed 30 May 2007).

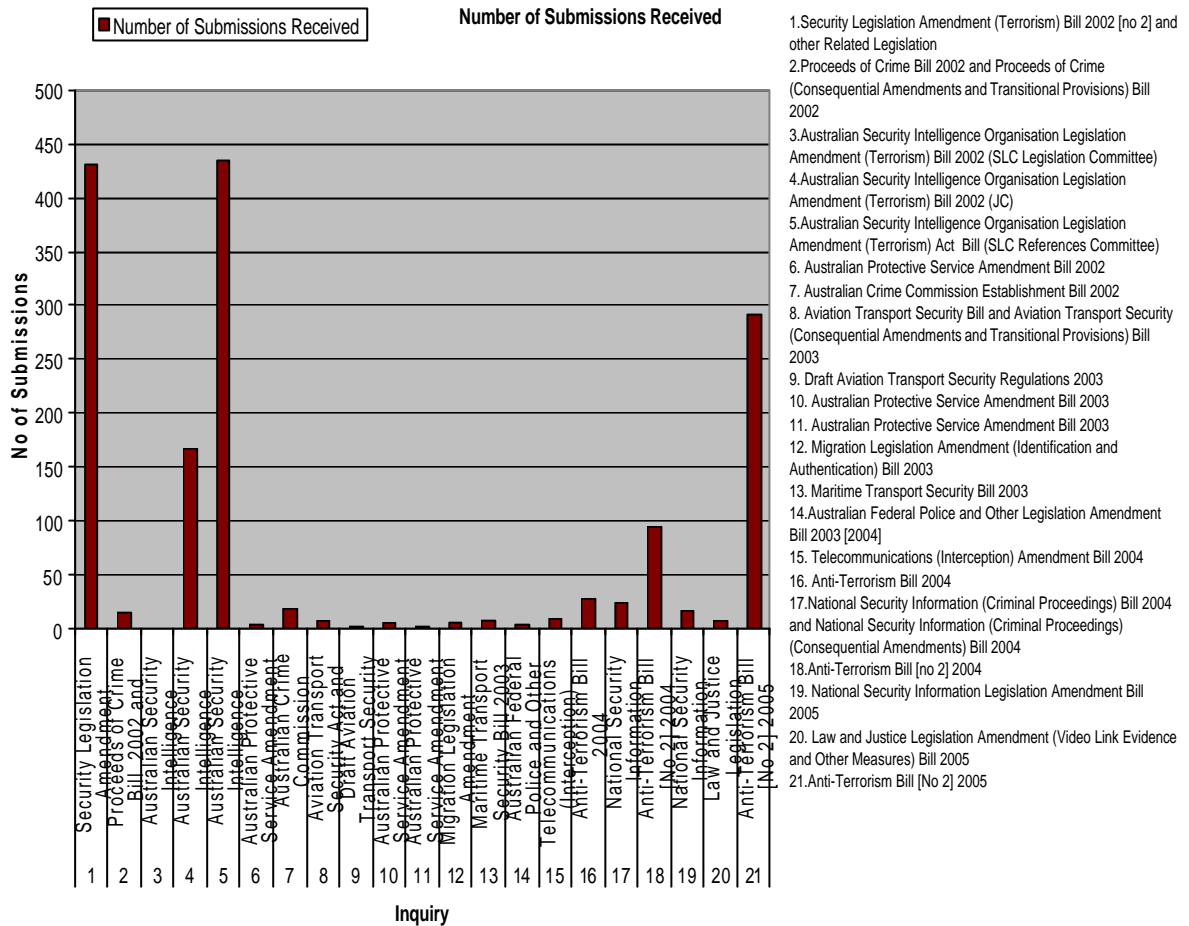
²¹ Toby Miller, 'Quis Custodiet Ipsos Custodes? A Review Article on the Committee System of the Australian Senate' (1986) 1(2) *Legislative Studies: Official Publication of the Australasian Study of Parliament Group* 5, 5.

²² Kate Burton, 'Community Participation in Parliamentary Committees: Opportunities and Barriers' (1999) *Australian Parliament Information and Research Services Research Paper* No 10 1999-2000, 1 available at <http://parlinfoweb.aph.gov.au/piweb/Repository1/Library/PrsPub/PMJ063.doc> (last accessed 16 August 2007).

²³ For example, three submissions to the Senate Legal and Constitutional References Committee Inquiry into the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 were listed as confidential; see Senate Legal and Constitutional References Committee, Parliament of Australia, *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 and Related Matters* (2002), 171, 176 & 177 (Appendix 1); The Parliamentary Joint Committee on ASIO, ASIS and DSD received a private briefing from ASIO during the course of its investigation into the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002, see Parliamentary Joint Committee on ASIO, ASIS and DSD, Parliament of Australia, *An Advisory Report on the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002* (2002) [1.47]. Similarly six confidential submissions and three confidential supplementary submissions and made to the Senate Legal and Constitutional Legislation Committee inquiry into the Anti-Terrorism Bill (No 2) 2005; see Senate and Legal Constitutional Legislation Committee, Parliament of Australia, *Provisions of the Anti-Terrorism Bill (No 2) 2005*, (2005), 216, 217 224, 225 & 227 (Appendix 1).

terrorism laws. Graph 1 depicts the number of submissions that were provided to each inquiry.

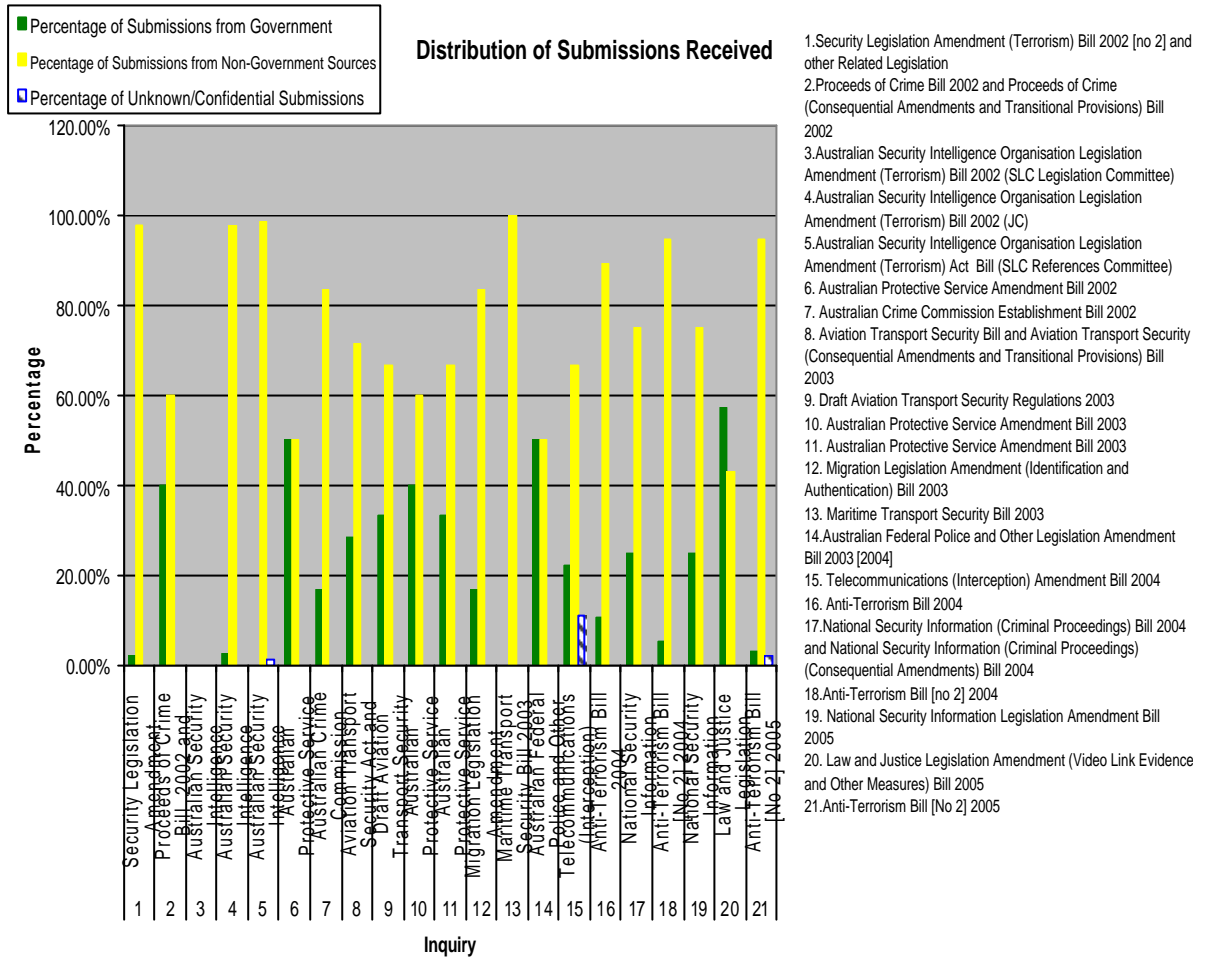
GRAPH 1



Graph 2 shows the percentage of Government and non-Government submissions made to each committee inquiry and Graph 3 shows the percentages of Government and non-Government witnesses appearing before each committee.²⁴

GRAPH 2

²⁴ At this stage the distinction I am drawing between Government and non-Government sources is reasonably crude. "Government" refers only to sources with clear links to the Federal Government (for example Government departments, the Australian Federal Police etc).



GRAPH 3

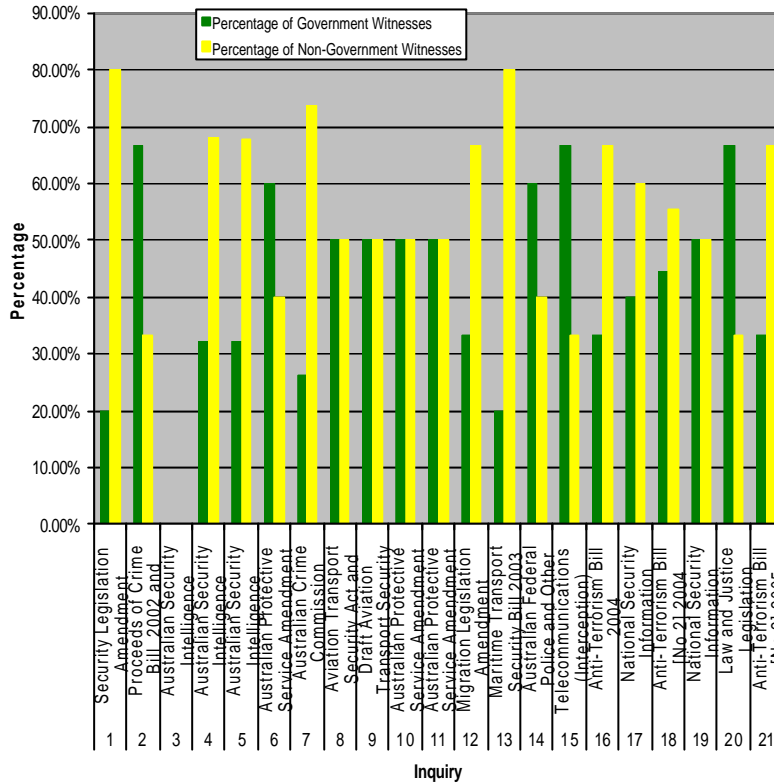
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Distribution of Witnesses



1. Security Legislation Amendment (Terrorism) Bill 2002 [no 2] and other Related Legislation
2. Proceeds of Crime Bill 2002 and Proceeds of Crime (Consequential Amendments and Transitional Provisions) Bill 2002
3. Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 (SLC Legislation Committee)
4. Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 (JC)
5. Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act Bill (SLC References Committee)
6. Australian Protective Service Amendment Bill 2002
7. Australian Crime Commission Establishment Bill 2002
8. Aviation Transport Security Bill and Aviation Transport Security (Consequential Amendments and Transitional Provisions) Bill 2003
9. Draft Aviation Transport Security Regulations 2003
10. Australian Protective Service Amendment Bill 2003
11. Australian Protective Service Amendment Bill 2003
12. Migration Legislation Amendment (Identification and Authentication) Bill 2003
13. Maritime Transport Security Bill 2003
14. Australian Federal Police and Other Legislation Amendment Bill 2003 [2004]
15. Telecommunications (Interception) Amendment Bill 2004
16. Anti-Terrorism Bill 2004
17. National Security Information (Criminal Proceedings) Bill 2004 and National Security Information (Criminal Proceedings) (Consequential Amendments) Bill 2004
18. Anti-Terrorism Bill [no 2] 2004
19. National Security Information Legislation Amendment Bill 2005
20. Law and Justice Legislation Amendment (Video Link Evidence and Other Measures) Bill 2005
21. Anti-Terrorism Bill [No 2] 2005

AN OVERVIEW OF THE ACTIVITIES OF PARLIAMENTARY COMMITTEES IN ENACTING AUSTRALIAN COUNTER-TERRORISM LAWS

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The initial impression of the work done by parliamentary committees is that they played an active role in the development of many parts of the Australian counter-terrorism legislative framework. As shown in the graphs, parliamentary committees conducted 21 pre-enactment inquiries. These inquiries looked at 24 of the 42 Acts I have classified as

being part of the counter-terrorism legal framework.²⁵ The Senate Legal and Constitutional Legislation Committee was the most active committee: it produced pre-enactment scrutiny reports on 20 of the Acts. The Senate Rural and Regional Affairs and Transport Legislation Committee reviewed three pieces of legislation: those which related to aviation and maritime transport security. The Parliamentary Joint Committee on the National Crime Authority (as it then was) reviewed the Australian Crime Commission Establishment Bill 2002 (Cth).

Some pieces of legislation were reviewed more than once, and by more than one committee, before they were enacted. The Senate Legal and Constitutional Legislation Committee produced two reports into the Australian Protective Service Amendment Bill 2003.²⁶ The Senate Rural and Regional Affairs and Transport Legislation Committee produced a report into the Aviation Transport Security Bill 2003 (Cth) and the Aviation Transport Security (Consequential Amendments and Transitional Provisions) Bill 2003 (Cth) which was tabled in October 2003. The committee held a second inquiry into the Draft Aviation Transport Security Regulations 2003 (Cth) which was completed before the overarching legislation was finally enacted.²⁷

The parliamentary committee pre-enactment scrutiny of the Australian Security Legislation Organisation Amendment (Terrorism) Bill 2002 (Cth) (the *ASIO Bill*) was more exceptional.²⁸ The Bill was first introduced into Parliament in March 2002, but was not enacted into law until June 2003. As passed the legislation empowers ASIO to detain persons aged 16 years or older for up to one week.²⁹ To obtain a warrant for such detention, ASIO has to show that there were "reasonable grounds" to believe that detaining the person would "substantially assist the collection of intelligence that is important in relation to a terrorism

²⁵ Some of these committees inquiries related to more than one piece of legislation.

²⁶ The first report was dated August 2003, see Senate Legal and Constitutional Legislation Committee, Parliament of Australia, *Provisions of the Australian Protective Service Amendment Bill 2003* (2003) [1.1]. The second report was dated October 2003, see Senate Legal and Constitutional Legislation Committee, Parliament of Australia, *Proposed Government Amendments to the Australian Protective Service Amendment Bill 2003* (2003) [1.1]-[1.2].

²⁷ The evidence to the inquiry into the overarching legislation indicated concerns about the draft Aviation Transport Security Regulations, which the Department of Transport and Regional Services acknowledged were "important" to the way in which the legislation was to operate. Senate Rural and Regional Affairs and Transport Legislation Committee, Parliament of Australia, *Aviation Transport Security Bill 2003 and the Aviation Transport Security (Consequential Amendments and Transitional Provisions) Bill 2003* (2003) [2.4]; Senate Rural and Regional Affairs and Transport Legislation Committee, Parliament of Australia, *Draft Aviation Transport Security Regulations 2003* (2003), 1.

²⁸ See Jenny Hocking, *Terror Laws: ASIO, Counter-Terrorism and the Threat to Democracy* (2004), 218.

²⁹ See the combined effect of the following sections: *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003* (Cth) 34D(3)(c), 34HC and 34NA(1).

The Conscience of Democracy?

The Role of Australian Parliamentary Committees in Enacting Counter-Terrorism Laws

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offence.”³⁰ This Bill was the subject of three inquiries: The Parliamentary Joint Committee on ASIO, ASIS and DSD (as it then was) produced a major report which was dated May 2002 and tabled in June 2002. The Senate Legal and Constitutional Legislation Committee conducted a limited review at the same time.³¹ The Bill was amended in the wake of these reports. The Senate Legal and Constitutional References Committee scrutinised this amended bill, and produced a report in December 2002.

PARLIAMENTARY COMMITTEES HAVE THE CAPACITY TO ACT AS PARLIAMENT’S CONSCIENCE

My first conclusion focuses on those committee inquiries that received large numbers of submissions. These results suggest that parliamentary committees have the capacity to function as a forum where the public can voice their concern about the laws being enacted.

As is clear from Graph 1, four inquiries received over 100 submissions. Not surprisingly, these inquiries dealt with some of the most dramatic aspects of the counter-terrorism legislative framework. As indicated by points 4 and 5 two of these inquiries

concerned the *ASIO Bill*. Only two of the three inquiries held into this Bill took submissions.³² The Parliamentary Joint Committee received a total of 167 submissions³³.

The Senate References Committee received 435 submissions. The inquiry into the Security Legislation Amendment (Terrorism) Bill 2002 (Cth) and four other Bills which constituted the first major tranche of dedicated counter-terrorism legislation received 431 submissions (see Point 1 on Graph 1). As passed, The *Security Legislation Amendment (Terrorism) Act 2002 (Cth)* inserted the definition of a terrorist act and a series of terrorism offences into the *Criminal Code (Cth)*.³⁴ The Bill as considered by the committee also contained the first attempt by the Government to bestow upon the Executive a power to proscribe

³⁰ *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003 (Cth)* 34D(1)(b).

³¹ See Senate and Legal Constitutional Legislation Committee, Parliament of Australia, *Provisions of the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 (2002)*, [1.4-1.8].

³² As noted above, this Bill was referred to the Joint Committee on ASIO, ASIS and DSD and the Senate Legal and Constitutional Legislation Committee at the same time. The Senate Legislation committee decided not to conduct a full inquiry, or formally take submissions, but would record its views on the constitutional issues raised by the bill and the new powers contained in it. For more detail see Senate and Legal Constitutional Legislation Committee, Parliament of Australia, *Provisions of the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 (2002)*, [1.4-1.8].

³³ The Joint Committee counted supplementary submissions as separate submissions. As such for this inquiry only, I have included the number of supplementary submissions in the total number of submissions overall. According to Appendix B there were 162 primary submissions and 5 supplementary submissions. See Parliamentary Joint Committee on ASIO, ASIS and DSD, Parliament of Australia, *An Advisory Report on the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 (2002)* 67-73 (Appendix B).

³⁴ By inserting a new Part 5.3 into the *Criminal Code (Cth)*. The definition of “terrorist act” is found in s 100.1 of the *Criminal Code (Cth)*.

organisations.³⁵ Finally, the inquiry into the Anti-Terrorism Bill (No 2) 2005 (Cth) which introduced control orders and preventative detention into Australian counter-terrorism law³⁶, received 292 submissions³⁷.

The data I collected which was particularly encouraging in demonstrating that parliamentary committee's attempted to ensure that pieces of the counter-terrorism legislative framework were deliberated is shown in Graph 2. This graph breaks down the source of the submissions to the committees. Submissions originating from Government sources formed the majority of submissions received in only one case: the inquiry held into the Law and Justice Legislation Amendment (Video Link Evidence and Other Measures) Bill 2005 (Graph 2, point 20). Equal numbers of submissions from Government and non-Government sources were received by the Committee investigating two other Bills³⁸: This means that non-Government sources were the authors of the majority of submissions received by the other inquiries where submissions were requested. Moreover, as is shown in the graph, in many of those cases the majority of non-Government submissions was overwhelming.

The large number of submissions from non-Government sources is one indication of the controversial nature of these legislative proposals.³⁹ A high level of public concern explains another interesting feature: some of the submissions to these four inquiries originated from individuals, some of whom did not indicate any affiliation with an interest group, organisation or network.⁴⁰ This last point is

³⁵ See the discussion of this proposed section by the committee; Senate and Legal Constitutional Legislation Committee, Parliament of Australia, *Consideration of Legislation Referred to the Committee: Inquiry into the Security Legislation Amendment (Terrorism) Bill [No 2] and Related Bills* (2002) [2.23-2.26].

³⁶ The provisions relating to control orders were included in the new Division 104 which was inserted into the *Criminal Code* (Cth) by the *Anti-Terrorism Act [No 2] 2005* (Cth). The provisions relating to preventative detention were included in the Division 105 which was inserted into the *Criminal Code* (Cth) by the *Anti-Terrorism Act [No 2] 2005* (Cth).

³⁷ The Senate Legal and Constitutional Committee records that it received 294 submissions (see paragraph 1.4 and Appendix 1. However, as I was conducting my research I discovered that the numbers 235 and 243 had been omitted from the submission list printed in Appendix 1. In the online version of the list, submissions for these numbers are entitled "not yet available" (see http://www.aph.gov.au/senate/committee/legcon_cite/terrorism/submissions/sublist.htm (accessed 20 August 2007)). As a result, I have calculated the number of submissions received to be 292.

³⁸ The Australian Protective Service Amendment Bill 2002 (at Graph 2, point 6) and the Australian Federal Police and Other Legislation Amendment Bill 2003 [2004] (at Graph 2, point 14).

³⁹ The Senate Legal and Constitutional Legislation Committee described the Security Legislation Amendment (Terrorism) Bill 2002 and accompanying Bills as "some of the most important to come before the Parliament in the last twenty years". See Senate Legal and Constitutional Committee, Parliament of Australia, *Inquiry into the Security Legislation Amendment (Terrorism) Bill [No 2] 2002 and Related Bills* (2002) [1.11]. This controversial nature of the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 was acknowledged by the Senate References Committee; Senate Legal and Constitutional References Committee, Parliament of Australia, *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 and Related Matters* (2002) xix; The controversial nature of the amendments contained in the Anti-Terrorism Bill [No 2] were also averted to by the committee who scrutinised that bill. See Senate Legal and Constitutional Legislation Committee *Provisions of the Anti-Terrorism Bill (No 2) 2005* (2005) [2.7] and [2.11].

⁴⁰ For example submission number 116 (by Ms Gabrielle Peut received 4 April 2002) Senate Legal and Constitutional Legislation Committee *Submissions to Senate Legal and Constitutional Legislation Committee for the Committee's*

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significant because, as Kelly Paxman notes, one of the most frequent criticisms of the parliamentary committee process is that

the evidence gathering process is dominated by “witness cliques” or the “usual suspects”.⁴¹ Anthony Marinac defines ‘the usual suspects’ as the “narrow range of articulate and professional organisations...[who appear] before the committee during virtually every inquiry”.⁴²

Many of these “articulate and professional organisations” also expressed their concerns about these counter-terrorism laws, especially as witnesses invited to testify directly to committees.⁴³ It is also true that the committee’s final report on these legislative proposals is littered with quotes from submissions and evidence given by representatives of such organisations.⁴⁴ It is important to recognise that by recording their views, parliamentary committees are providing a vital source of non-Government information about various legislative proposals to members of parliament. Indeed, these sorts of groups provide the ‘expert’ opinions on legislative proposals that a parliamentary inquiry is intended to convey to parliament.⁴⁵ However, a high level of engagement from the wider community arguably adds force to a Committees’ conclusions. For example, in their report on the Security Legislation (Terrorism) Bill 2002 and related legislation the Committee

Inquiry into the Security Legislation Amendment (Terrorism) Bill 2002 and Related Bills (2002) Vol 2 (copy in author’s possession); Submission no 14 (by Mr and Mrs F. and S. Irvine received 5 April 2002, Joint Committee on ASIO, ASIS and DSD Inquiry into the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 (copy of submission in author’s possession); submission number 5 (by Mr Sam Adie, undated), Senate Legal and Constitutional Committee, Parliament of Australia, Senate Legal and Constitutional Legislation Committee *Provisions of the Anti-Terrorism Bill [No 2] 2005* (2005). Submission available at http://www.aph.gov.au/senate/committee/legcon_cte/terrorism/submissions/sub05.pdf (last accessed 17 August 2007).

⁴¹ Kelly Paxman ‘Referral of Bills to Senate Committees: An Evaluation’ (1998) 31 *Papers on Parliament*, 76, 83-84.

⁴² Anthony Marinac ‘The Usual Suspects? ‘Civil Society’ and Senate Committees’ (2004) 42 *Papers on Parliament*, 129, 131.

⁴³ For example the non-Government witnesses who testified during the public hearings held by the Senate Legal and Constitutional Legislation Committee as part of their inquiry into the Security Legislation Amendment (Terrorism) Bill 2002 and related legislation included the New South Wales Council for Civil Liberties, the Australian Council of Trade Unions, the Law Council of Australia and the Uniting Church in Australia. Legal academics such as Professor George Williams, Dr Jenny Hocking, Professor David Kinley, Ms Sarah Joseph and, Mr Joo-Cheong Tham also gave evidence to the committee. See *Consideration of Legislation Referred to the Committee: Inquiry into the Security Legislation Amendment (Terrorism) Bill [No 2] and Related Bills* (2002), 107-108 (Appendix 2).

⁴⁴ These sorts of organisations or professional individuals provided many of the submissions/testimony the committee quoted from in the report discussing the Security Legislation Amendment (Terrorism) Bill 2002. See for example Senate and Legal Constitutional Legislation Committee, Parliament of Australia, *Consideration of Legislation Referred to the Committee: Inquiry into the Security Legislation Amendment (Terrorism) Bill [No 2] and Related Bills* (2002) Chapter 3, [3.1]- [3.154].

⁴⁵ Burton, above note 22, 1.

The Conscience of Democracy?

The Role of Australian Parliamentary Committees in Enacting Counter-Terrorism Laws

By Dominique Dalla-Pozza

Work in Progress draft for the Australasian Study of Parliament Group Conference August 2007.

noted that the proposed proscription power "raised the most concern in submissions"⁴⁶ This statement, in conjunction with the long list of submissions incorporated into the report, represents the committee's attempt to signal to Parliamentarians the depths of public concern about those provisions.

Overall, these committees were placed in an excellent position to present legislators with information about these proposed pieces of legislation from non-Government sources. More importantly, they were able to offer parliamentarians a report based on more than the 'usual' range of views. The results show that for at least some of the pieces of counter-terrorism legislation, parliamentary committees were able to enhance the deliberation which these pieces of legislation received. Thus the most significant aspect of these results is that they indicate that parliamentary committees have the capacity to play the role of Parliamentary 'conscience'.

THE MORE USUAL SCENARIO: COMMITTEES CONSTRAINED IN PROVIDING A RANGE OF VIEWS

Unfortunately, the data I have collected shows that these instances of parliamentary committees being able to utilise their capacity to function "as a conscience" were exceptional. In all cases, parliamentary committees *attempted* to obtain information from a wide range of sources independent from Government. However, the results show that their ability to do so successfully was not consistent. Again, the results in Graph 1 provide the best illustration for this. The Senate Legal and Constitutional Legislation committee received the fifth highest number of submissions for its inquiry into the Anti-Terrorism Bill (No 2) 2004. By contrast the 15 remaining inquiries into pieces of counter-terrorism legislation that took submissions received between 3 and 28 submissions.

One consequence of receiving a limited number of submissions was that the information received by the committee, which they can then pass on to parliamentarians, was more limited. The inquiries held into the laws which established a new system of dealing with national security information in criminal and civil trials are examples of this

more restricted committee activity. In their current form, these laws give the Attorney-General the power to certify that disclosure of certain information in a civil or criminal trial would have a detrimental affect on national security.⁴⁷ Once a certificate has been issued the court must conduct a closed hearing to consider

⁴⁶ Senate and Legal Constitutional Legislation Committee, Parliament of Australia, *Consideration of Legislation Referred to the Committee: Inquiry into the Security Legislation Amendment (Terrorism) Bill [No 2] and Related Bills* (2002), [3.101].

⁴⁷ See ss 26, 28, 38F and 38H *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth).

The Conscience of Democracy?

The Role of Australian Parliamentary Committees in Enacting Counter-Terrorism Laws

By Dominique Dalla-Pozza

Work in Progress draft for the Australasian Study of Parliament Group Conference August 2007.

the certificate.⁴⁸ The court can exclude parties or their lawyers from the closed hearing if the disclosure of the information to those parties in the closed hearings would be likely to “prejudice national security”.⁴⁹

The closed hearing is designed to allow the court to rule on whether or not the information should be disclosed. The court is specifically directed to give “greatest weight” to whether there would be “a risk of prejudice to national security” before deciding whether to disclose the information.⁵⁰

The National Security Information Legislation scheme was established by the *National Security Information (Criminal Proceedings) Act 2004* (Cth). The scheme was extended to civil proceedings by the *National Security Information Legislation Amendment Act 2005* (Cth). Both Acts were subjected to parliamentary committee inquiries before they were enacted. The inquiry into the 2004 Act only attracted 24 submissions (Point 17, Graph 1) The committee inquiring into the 2005 Act received only 16 (Point 19, Graph 1).

One indication that the committee was attempting to function as a conscience is shown in Graph 2. Point 17 on Graph 2 does show that 75 percent of submissions received originated from a non-government source. The submissions received by the inquiry into the 2005 legislation also divided in an identical way (see Point 19). However, a closer look at the identity of those preparing the submissions undercuts this more optimistic view. It is easier to argue that these submissions were made by “the usual suspects”. For both of the inquiries the majority of non-Government sourced submissions were received from groups with a recognisable interest in these laws. The 2004 legislation was commented on by groups including Australian Lawyers for Human Rights, the Australian Muslim Civil Rights Advocacy Network and the Criminal Bar Association.⁵¹ The

names of only three individuals appear on the list of submissions received by this inquiry. Two of those individuals were legal academics.⁵² The third was the Attorney-General for

⁴⁸ See ss 27(3) 27(5), 28(5), 28(7) and 38G, 38H(6) and 38H(7) *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth).

⁴⁹ See ss 29(3) and 38I(3) *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth).

⁵⁰ See ss 31(8) and 38L(8) *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth).

⁵¹ See Senate Legal and Constitutional Legislation Committee, Parliament of Australia, *Provisions of the National Security Information (Criminal Proceedings) Bill 2004 and the National Security (Criminal Proceedings)(Consequential Amendments) Bill 2004* (2004) 49 (Appendix 1), submissions 10, 12 and 16 respectively.

⁵² Mr Joo-Cheong Tham who at the time held the post of Associate Lecturer at the School of Law and Legal Studies at La Trobe University; see submission 9, Senate Legal and Constitutional Legislation Committee, Parliament of Australia, *Provisions of the National Security Information (Criminal Proceedings) Bill 2004 and the National Security (Criminal Proceedings)(Consequential Amendments) Bill 2004* (25 June 2004) (at http://www.aph.gov.au/senate/committee/legcon_ctte/completed_inquiries/2002-04/national_security/submissions/sub09.pdf) (accessed 21 August 2007) and Mr Patrick Emerton an academic at Monash University. See submissions 13 and 13A, Senate Legal and Constitutional Legislation Committee, Parliament of Australia, *Provisions of the National Security Information (Criminal Proceedings) Bill 2004 and the National Security (Criminal Proceedings)(Consequential Amendments) Bill 2004* (2004) (at

The Conscience of Democracy?

The Role of Australian Parliamentary Committees in Enacting Counter-Terrorism Laws

By Dominique Dalla-Pozza

Work in Progress draft for the Australasian Study of Parliament Group Conference August 2007.

Western Australia, the Hon Jim McGinty.⁵³ The submissions list for the inquiry into the 2005 legislation contains the names of only three individuals, all of whom were legal academics.⁵⁴

One explanation for these results is that these legislative proposals did not generate the sort of public controversy which accompanied the enactment process of new terrorism offences or alterations to the powers exercised by ASIO operatives or the Australian Federal Police. There are two probable sources for the lack of public interest. Julian Burnside hints at the first arguing that in the current political conditions, there is not a large

amount of public sympathy for those who are seen to be terrorists.⁵⁵ The second point is that this legislation adjusts court procedure. It is possible that the general public did not feel their interests would be sufficiently affected to warrant their participation in the parliamentary committee process.

Finally, a comparison of Graph 2, which shows the source of submissions and Graph 3, which shows the origin of witnesses, provides a similar demonstration of the limits on the diversity of information parliamentary committees were able to provide to legislators. Such a comparison shows that the preponderance of non-Government sources of information was less pronounced in the information provided directly to committees by witnesses. In ten of the committee hearings a majority of witnesses were either individuals or representatives of non-Government organisations. However, as is shown in Graph 3, five of the Committees heard from an even number of Government and non-Government witnesses,⁵⁶ and there

http://www.aph.gov.au/senate/committee/legcon_ctte/completed_inquiries/2002-04/national_security/submissions/sub13.pdf (accessed 21 August 2007).

⁵³ See submission 23, Senate Legal and Constitutional Legislation Committee, Parliament of Australia, *Provisions of the National Security Information (Criminal Proceedings) Bill 2004 and the National Security (Criminal Proceedings)(Consequential Amendments) Bill 2004* (2004)

(http://www.aph.gov.au/senate/committee/legcon_ctte/completed_inquiries/2002-04/national_security/submissions/sub23.pdf) (accessed 21 August 2007).

⁵⁴ See Senate Legal and Constitutional Legislation Committee, Parliament of Australia, *Provisions of the National Security Information Legislation Amendment Bill 2005* (2005) 53 (Appendix 1). Submissions 8 and 8A from Mr Patrick Emerton of Monash University, Senate Legal and Constitutional Legislation Committee, Parliament of Australia, *Provisions of the National Security Amendment Bill 2005* (2005),

http://www.aph.gov.au/senate/committee/legcon_ctte/national_sec/submissions/sub08.pdf and

http://www.aph.gov.au/senate/committee/legcon_ctte/national_sec/submissions/sub08A.pdf (accessed 13 August

2007). See also Submission 10 from Professor George Williams and Dr Ben Saul from the Gilbert + Tobin Centre of Public Law, Faculty of Law University of New South Wales, Senate Legal and Constitutional Legislation Committee, Parliament of Australia, *Provisions of the National Security Amendment Bill 2005* (6 April 2005),

http://www.aph.gov.au/senate/committee/legcon_ctte/national_sec/submissions/sub10.pdf (accessed 13 August 2007).

⁵⁵ Julian Burnside, 'The New Terror: Gunpowder Plot to Guantanamo' (2006) 24 *The Australian Feminist Law Journal*, 24, 36.

⁵⁶ These were the inquiries into the Aviation Transport Security Bill 2003 and the Aviation Transport Security (Consequential Amendments and Transitional Provisions) Bill (as shown at point 8 on Graph 3); the inquiry into the Draft Aviation Transport Security Regulations 2003 (as shown at point 9 on Graph 3); the two inquiries into the Australian Protective Service Amendment Bill 2003 (shown at points 10 and 11 on Graph 3) and the inquiry into the National Security Information Legislation Amendment Bill 2005 (shown at point 19 on Graph 3).

The Conscience of Democracy?

The Role of Australian Parliamentary Committees in Enacting Counter-Terrorism Laws

By Dominique Dalla-Pozza

Work in Progress draft for the Australasian Study of Parliament Group Conference August 2007.

were five inquiries where a majority of the people or organisations who appeared committees represented Government.⁵⁷

Moreover, the 'usual suspects' feature more prominently in the lists of people asked to testify directly to the committee. The only non-Government witnesses who appeared before the inquiry into the 2004 National Security Information legislation represented the Law Council of Australia, the Australian Press Council and Australian Lawyers for Human Rights.⁵⁸ The non-Government witnesses to the inquiry into the proposal to amend the

legislation in 2005 consisted of one academic from the Faculty of Law at Monash University, the Australian Muslim Civil Rights Advocacy Network and the Law Council of Australia.⁵⁹ On one view, it is not surprising that the Committees should receive information from those recognised as 'experts' about the potential impact of this counter-terrorism legislative proposal. Indeed, as noted above, it is part of the committee's job to present this sort of information to parliamentarians.⁶⁰ However, having only received the views of 'professional' organisations the Committee could only present a narrower scope of viewpoints on these legislative proposals in their report to Parliament.

CONCLUDING COMMENTS

The statistics I have presented concern one function of parliamentary committees: their ability to provide legislators with access to information independent of Government. Restricting my focus to a single aspect of the work of parliamentary committees means the statistical sketch is incomplete. Nevertheless, even this incomplete data can be interpreted in two ways. An optimistic assessment concentrates on the fact that parliamentary committees were clearly active over the period when Australian legislators embarked upon the process of constructing these important counter-terrorism laws. It is encouraging to see signs that these committees have the capacity to provide a forum for a wide variety of views to be expressed about

⁵⁷ These were the inquiries into the Proceeds of Crime Bill and Proceeds of Crime (Consequential Amendments and Transitional Provisions) Bill 2002 (as shown at point 2 on Graph 3), the Australian Protective Service Amendment Bill 2002 (as shown at point 6 on Graph 3), the Australian Federal Police and Other Legislation Bill 2003 [2004] (as shown at point 14 on Graph 3), the Telecommunications (Interception) Amendment Bill 2004 (as shown at point 15 on Graph 3) and the Law and Justice Legislation Amendment (Video Link Evidence and Other Measures) Bill 2005 (as shown at point 20 on Graph 3).

⁵⁸ Senate Legal and Constitutional Legislation Committee, Parliament of Australia, *Provisions of the National Security Information (Criminal Proceedings) Bill 2004 and the National Security Information (Criminal Proceedings) (Consequential Amendments) Bill 2004* (2004), 51 (Appendix 2).

⁵⁹ Senate Legal and Constitutional Legislation Committee, Parliament of Australia, *Provisions of the National Security Information Amendment Bill 2005* (2005), 55 (Appendix 2).

⁶⁰ See Burton, above note 22, 1.

The Conscience of Democracy?

The Role of Australian Parliamentary Committees in Enacting Counter-Terrorism Laws

By Dominique Dalla-Pozza

Work in Progress draft for the Australasian Study of Parliament Group Conference August 2007.

counter-terrorism legislation. In certain circumstances, committees receive large numbers of submissions from a cross section of society. Unfortunately, it is also clear that it is atypical for a parliamentary committee inquiry into a piece of counter-terrorism legislation to receive that much interest. Under 'normal' conditions committee inquiries are more reliant on a body of established organisations (and a few individuals). The views expressed by such 'experts' are still a valid source of non-government information, albeit a much more restricted one.

Public interest in counter-terrorism legislation and the process by which it is made seems to be one important variable which dictates how successfully such committees can fulfil their conscience function. If such committees are to continue to play a similar role as

the counter terrorism legislative framework develops in the future it will be important to try and establish ways to enhance this interest in the activities of parliamentary committees.⁶¹

⁶¹ John Uhr discusses a related point about increasing the 'marketability' of Parliamentary Committees. However he indicates that strategies to increase the broad public appeal of committees should be taken as an "adjunct" to ensuring that "selected 'publics' are more aware of Parliamentary Committee activity". See John Uhr, 'Marketing Parliamentary Committees' (2000) 98 *Canberra Bulletin of Public Administration* 38, 38 and 40.

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Session 1

The Role of Parliamentary Committees in Public Accountability (1)

**The Conscience of Democracy?
The Role of Australian Parliamentary Committees in Enacting
Counter-Terrorism Laws.**

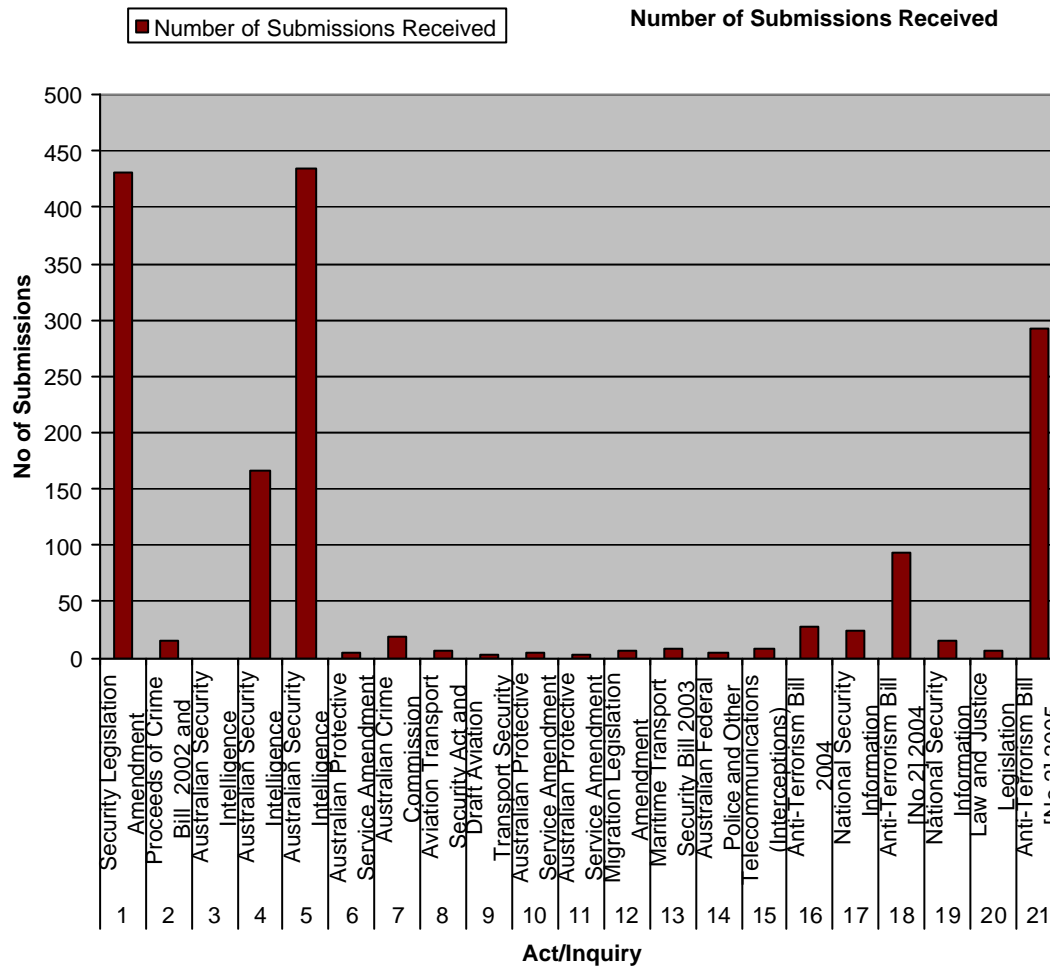
By Dominique Dalla-Pozza

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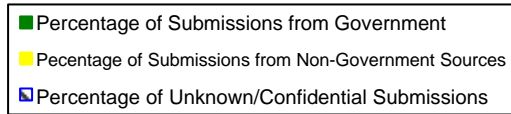
Handout accompanying presentation to the Australasian Study of Parliament
Group Conference
Adelaide, 24 August 2007.

Graph 1

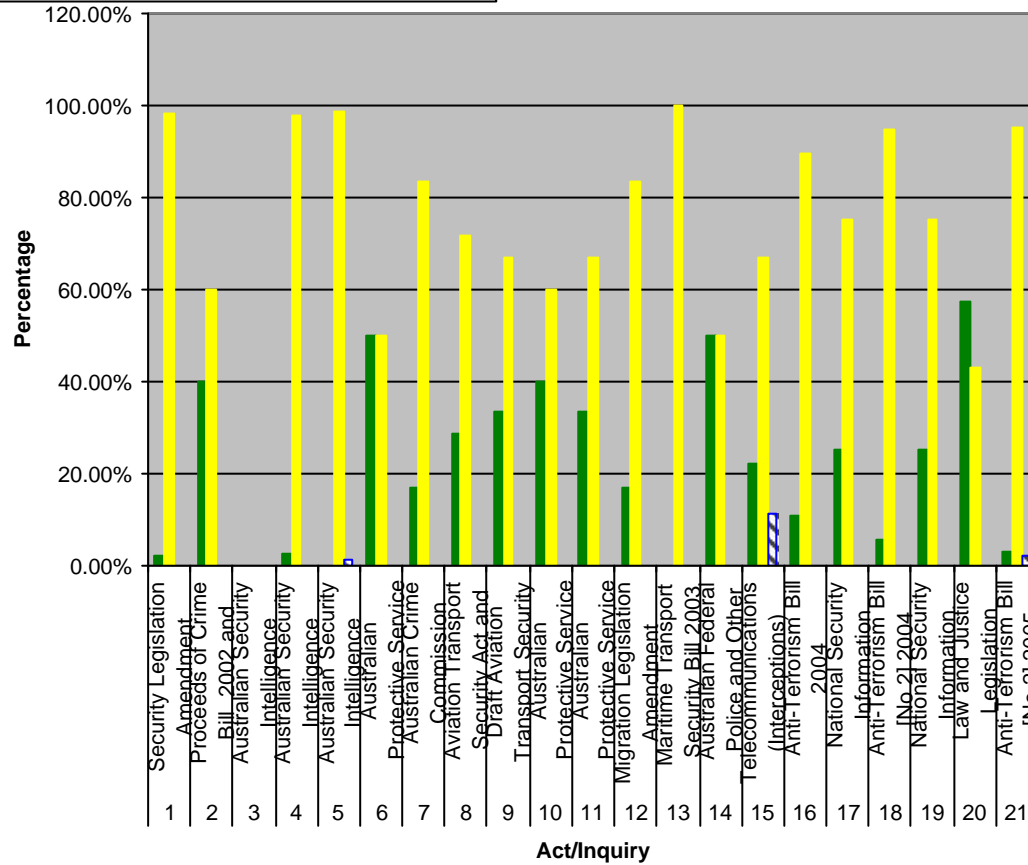


1. Security Legislation Amendment (Terrorism) Bill [no 2] 2002 and other Related Legislation
2. Proceeds of Crime Bill 2002 and Proceeds of Crime (Consequential Amendments and Transitional Provisions) Bill 2002
3. Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 (SLC Legislation Committee)
4. Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 (JC)
5. Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act Bill (SLC References Committee)
6. Australian Protective Service Amendment Bill 2002
7. Australian Crime Commission Establishment Bill 2002
8. Aviation Transport Security Bill and Aviation Transport Security (Consequential Provisions) Bill 2003
9. Draft Aviation Transport Security Regulations 2003
10. Australian Protective Service Amendment Bill 2003
11. Australian Protective Service Amendment Bill 2003
12. Migration Legislation Amendment (Identification and Authentication) Bill 2003
13. Maritime Transport Security Act 2003
14. Australian Federal Police and Other Legislation Amendment Bill 2003
15. Telecommunications (Interceptions) Amendment Bill 2004
16. Anti-Terrorism Bill 2004
17. National Security Information (Criminal Proceedings) Bill 2004 and National Security Information (Criminal Proceedings) (Consequential Amendments) Bill 2004
18. Anti-Terrorism Bill [no 2] 2004
19. National Security Information Legislation Amendment Bill 2005
20. Law and Justice Legislation Amendment (Video Link Evidence and Other Measures) Bill 2005
21. Anti-Terrorism Bill [No 2] 2005

Graph 2



Distribution of Submissions Received



1. Security Legislation Amendment (Terrorism) Bill [no 2] 2002 and other Related Legislation
2. Proceeds of Crime Bill 2002 and Proceeds of Crime (Consequential Amendments and Transitional Provisions) Bill 2002
3. Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 (SLC Legislation Committee)
4. Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 (JC)
5. Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act Bill (SLC References Committee)
6. Australian Protective Service Amendment Bill 2002
7. Australian Crime Commission Establishment Bill 2002
8. Aviation Transport Security Bill and Aviation Transport Security (Consequential Provisions) Bill 2003
9. Draft Aviation Transport Security Regulations 2003
10. Australian Protective Service Amendment Bill 2003
11. Australian Protective Service Amendment Bill 2003
12. Migration Legislation Amendment (Identification and Authentication) Bill 2003
13. Maritime Transport Security Act 2003
14. Australian Federal Police and Other Legislation Amendment Bill 2003
15. Telecommunications (Interceptions) Amendment Bill 2004
16. Anti-Terrorism Bill 2004
17. National Security Information (Criminal Proceedings) Bill 2004 and National Security Information (Criminal Proceedings) (Consequential Amendments) Bill 2004
18. Anti-Terrorism Bill [no 2] 2004
19. National Security Information Legislation Amendment Bill 2005
20. Law and Justice Legislation Amendment (Video Link Evidence and Other Measures) Bill 2005
21. Anti-Terrorism Bill [No 2] 2005

Graph 3

Distribution of Witnesses

