

Promoting Deliberative Debate? The Submissions and Oral Evidence Provided to Australian Parliamentary Committees in the Creation of Counter-Terrorism Laws[#]

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 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

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* PhD Candidate, with the Gilbert + Tobin Centre of Public Law, Faculty of Law, University of New South Wales. This paper is a revised version of a paper I delivered at the Australasian Study of Parliament Group Conference on 'Parliament's Accountability to the People' in August 2007. Parts of this paper are based on an earlier paper I delivered at the Australasian Law Society Conference in December 2006, and on my draft doctoral thesis. I would like to thank Professor George Williams, Dr Andrew Lynch, Ms Edwina MacDonald, Ms Catherine Bond, the two anonymous referees and the editor of the *Australasian Parliamentary Review* for their comments on drafts of this paper. All flaws remain my own.

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), i-ii.

² Although he does go on to argue that the laws can be seen as being consistent with criminal law reform in the past. 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).

George Williams expressed the view that the ‘laws realign our legal system.’³ The former Federal Government also saw the enactment of new legislation as critical to ensuring Australia’s national security. Indeed former Prime Minister John Howard highlighted that ‘strong domestic laws’ are a necessary part of the ‘struggle against terrorism’.⁴

More importantly the Coalition Government was 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, Mr Howard commented that ‘through the great parliamentary processes ... this country has ... got the balance right’.⁵ He presented the laws as a compromise between the two competing goals of national security and individual rights, and identified Parliament as the forum responsible for achieving this compromise. Similarly, former Attorney-General Philip Ruddock 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 scrutinised proposed legislation. Indeed the results presented here are even more specific and relate only to the submissions and oral evidence received as part of this process.⁸ My results are provisional and form part of my ongoing doctoral research project where I am examining the Australian approach to enacting counter-terrorism law

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 at 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). A transcript of this speech is now available at <http://pandora.nla.gov.au/pan/10052/20061221-0000/www.pm.gov.au/news/speeches/speech2084.html> (last accessed 11 February 2008).

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). A transcript of this speech is now available at <http://pandora.nla.gov.au/pan/10052/20021121-0000/www.pm.gov.au/news/speeches/2002/speech1848.htm> (last accessed 11 February 2008).

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, 339–41.

⁸ This means that there are many aspects of parliamentary committee activities which relate to the process by which the Australian counter-terrorism legislative framework was developed which is beyond the scope of this paper. For example, this paper does not examine the political composition of the various committees, and the impact this might have had on the work done by those committees.

more generally.⁹ I am aware that there are limits to conducting a statistical analysis of parliamentary committee activity.¹⁰ However the broad sketch provided by such statistics acts as a starting point. I contend that parliamentary committees' role in providing pre-enactment scrutiny is a vital aspect of the Australian counter-terrorism law-making process. 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.

Two tentative conclusions emerged from my results at this stage: first, 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 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 former 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 infused the Federal Government's rhetoric when its representatives discussed their approach to enacting counter-terrorism legislation.¹¹ On one side of the 'scale' is the need to keep

⁹ So, for example, as part of my doctoral research I have collected data relating to other aspects of the counter-terrorism law-making process, such as the amount of time parliamentarians spent debating these laws in each parliamentary chamber. These results will not be discussed here.

¹⁰ 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).

¹¹ For 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). This media release is now available at http://pandora.nla.gov.au/pan/10052/20070823-1732/www.pm.gov.au/media/Release/2007/Media_Release24335.html (last accessed 11 February 2008); 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). A transcript of this speech is now available at <http://pandora.nla.gov.au/pan/10052/20061221-0000/www.pm.gov.au/news/speeches/speech2150.html> (last accessed 11 February 2008); Prime Minister John Howard 'A Sense of Balance: The Australian Achievement in 2006'

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 Various scholars have identified the limitations of using the ‘balance’ metaphor in this way. Clive Walker indicates that using the metaphor in this way invites the assumption that limiting rights increases security. Partly on this basis he comments that ‘this concept of balance is ... largely spurious’.¹³ Jeremy Waldron has warned that because it may be impossible to accurately assess whether security has been enhanced by measures which restrict rights, discussing these changes in terms of altering a ‘balance’ is inherently flawed.¹⁴

It is important that the public justifications for the Australian counter-terrorism laws be analysed in this way so their shortcomings can be exposed. Nevertheless, it is possible to consider the use of the language of ‘balance’ from another perspective. This rhetoric could be taken to imply that the Government has presented the Australian Parliament as a deliberative forum and the counter-terrorism legislation as the product of a process of deliberation. Viewed from this perspective, this rhetorical appeal is less surprising. As has been noted by John Uhr the word ‘deliberation’ originates from the word *libra* which evokes images of balancing

(Address to the National Press Club, Canberra, 25 January 2006) <http://www.pm.gov.au/media/speech/2006/speech1754.cfm> (accessed 31 July 2007). A transcript of this speech is now available at <http://pandora.nla.gov.au/pan/10052/20061221-0000/www.pm.gov.au/news/speeches/speech1754.html> (last accessed 11 February 2008); 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). A transcript of this press conference is now available at <http://pandora.nla.gov.au/pan/10052/20051121-0000/www.pm.gov.au/news/interviews/Interview1553.html> (last accessed 11 February 2008). See also Jenny Hocking, ‘Protecting Democracy by Preserving Justice: ‘Even for the Feared and the Hated’’ (2004) 27 *The 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 this type of ‘balance’: Ben Golder and George Williams, ‘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.

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 Clive Walker, ‘The United Kingdom’s Anti-Terrorism Laws: Lessons for Australia’ in Andrew Lynch, Edwina MacDonald and George Williams (eds) *Law and Liberty in the War on Terror*, (2007) 181, 191.

¹⁴ Jeremy Waldron, ‘Security and Liberty: The Image of Balance’ (2003) 11 *The Journal of Political Philosophy* 191, 192 and 208–209 Clive Walker also makes a similar argument, Walker above n 13, 191. See also for an extremely detailed critique of the limitations of using the rhetoric of balance: Christopher Michaelsen ‘Balancing Civil Liberties Against National Security? A Critique of Counterterrorism Rhetoric’ (2006) 29 *The University of New South Wales Law Journal* 1–21.

scales.¹⁵ So it is 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.¹⁶ 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.

In 1998 John Uhr suggested deliberative capacity of the Australian Parliament as a democratic institution 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 provides a counter-weight to the information provided to Parliament by the Government.¹⁹ In theory parliamentary committees are well 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

¹⁵ John Uhr, ‘Instituting Republicanism: Parliamentary Vices, Republican Virtues?’ (1993) 28, Special Issue, *Australian Journal of Political Science*, 27, 30.

¹⁶ 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.

¹⁷ John Uhr, *Deliberative Democracy in Australia: The Changing Place of Parliament* (1998), 220 and 227. See also 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 *The University of New South Wales Law Journal*, 875, 879 (and the references cited there).

¹⁸ *Ibid.*, 227.

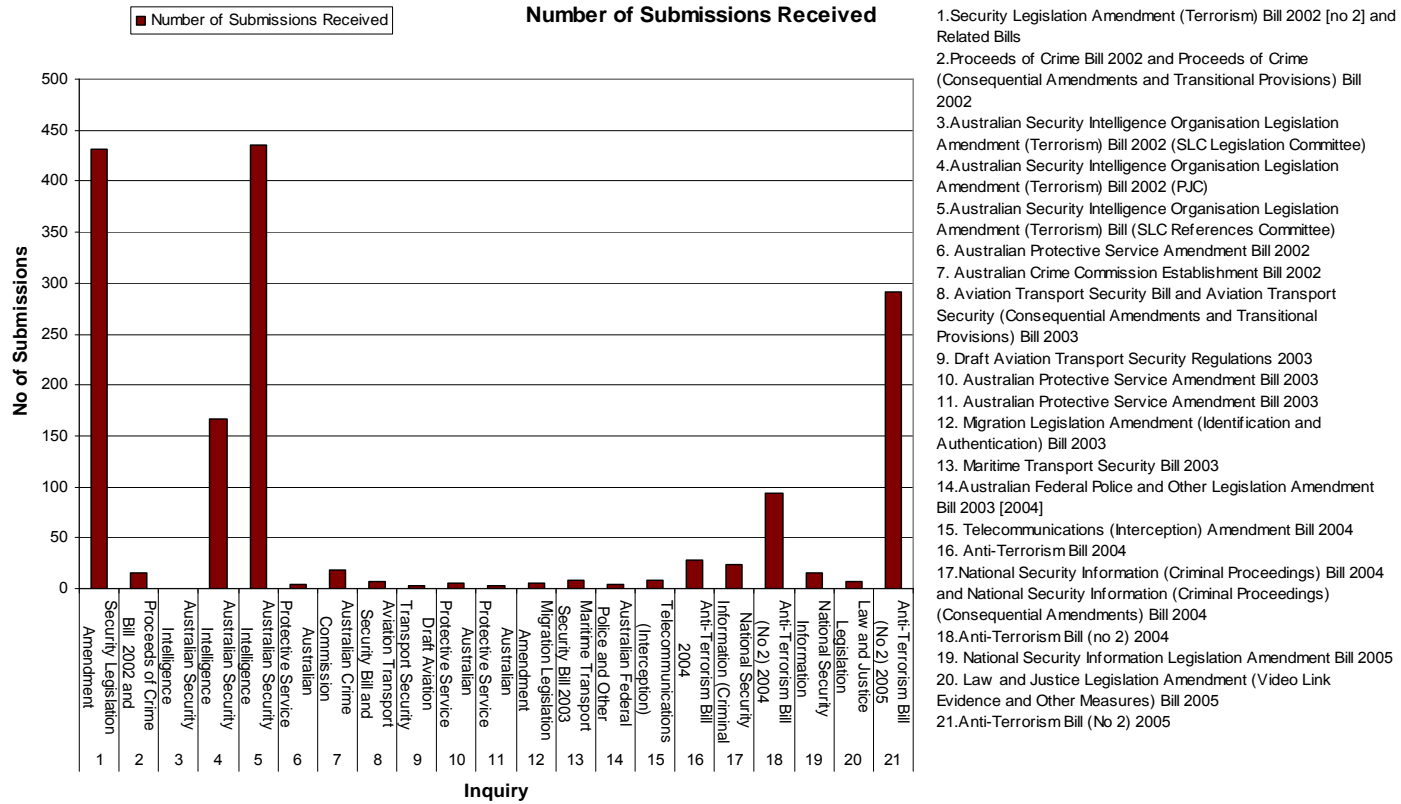
¹⁹ *Ibid.*, 230.

²⁰ Lindell, above n 10, 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 Custodet? 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).

Graph 1



As noted above, this paper focuses on two types of information and external opinions that were conveyed to committee members during their probes into specific pieces of Federal counter-terrorism legislation: 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 sort of external information I collected data showing the extent to which Government and non-Government sources contributed to the debate about counter-terrorism laws. To do this, I analysed the lists of submissions received, and witnesses heard, by each committee that were provided as appendices to each of the parliamentary committee reports.²⁴ Graph 1 depicts the number of submissions that were provided to each inquiry.

On the basis of the information provided in these appendices, I then determined whether each submission or witness represented a Government or a non-Government source. **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.²⁵ The label 'Government' was applied to submissions and evidence

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 were 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).

²⁴ At this stage, I have only counted submissions received. Occasionally some inquiries received 'additional information'. (See for example, the reference to additional information in the inquiry into the Migration Legislation Amendment (Identification and Authentication) Bill 2003. See Senate Legal and Constitutional Legislation Committee, Parliament of Australia, *Provisions of the Migration Legislation Amendment (Identification and Authentication) Bill 2003* (2003) 35 (Appendix 1). As these were not listed as 'submissions', they were not included in these statistics.

²⁵ For the purposes of this paper, an organisation was counted as a single 'witness' even if multiple members of staff from that organisation or Government department actually appeared before a particular committee. Where an individual appeared in their capacity as an individual, they were also counted as a single witness. However, each appearance of a particular individual or group was counted as a separate witness. So if representatives from the Commonwealth Attorney-General's Department appeared on more than one occasion before an inquiry each occasion on which they appeared was counted as a separate witness. For example, representatives from the Attorney-General's Department appeared before the Senate Legal and Constitutional Legislation Committee inquiry into the Anti-Terrorism Bill (No 2) 2005 on two separate occasions This was counted as two

given by representatives of bodies with clear links to the *Federal* Government. A number of implications flow from this: representatives of State or Territory Governments, or State or Territory Government bodies were not classified as providing information from a 'Government source',²⁶ and, second, for the purposes of this paper, the category of Government sources includes a wide variety of bodies with links to the Federal Government: submissions from representatives of Federal Government Departments fall within the ambit of this type of evidence, as do submissions made, or evidence given, on behalf of various independent statutory bodies. A key factor when determining whether a particular statutory body could be categorised as being a 'Government' source, was whether that body carried out functions that are associated with government or that only governments primarily perform. On this basis, bodies such as ASIO, the AFP and even the Inspector-General of Intelligence and Security and the Australian Securities and Investments Commission were classed as providing information from a 'Government' source.

Once the 'Government' sources were identified, the remaining submissions and witnesses were (for the most part) classified as representing 'non-Government' sources.²⁷ The third category, 'Unknown/Confidential/Other' was used when a submission was labelled 'confidential' or where the identity of the author of the submission was not stated. This category also included sources with links to both State/Territory and Federal Governments.

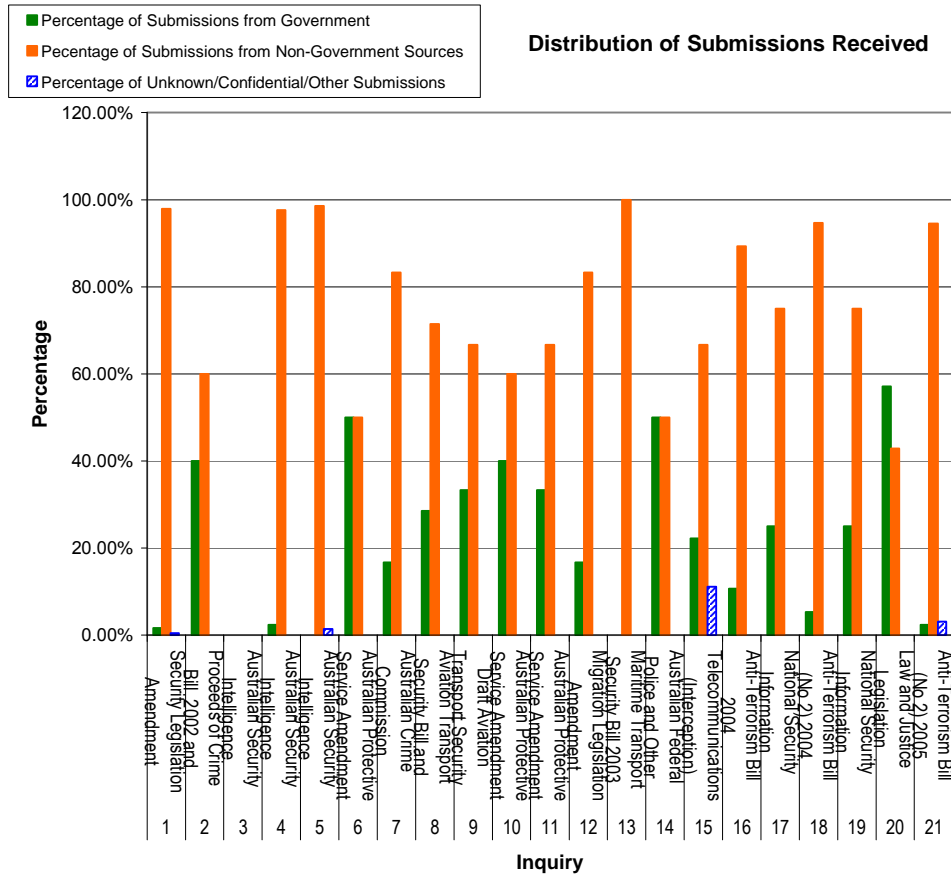
separate witnesses. See Senate Legal and Constitutional Legislation Committee, Parliament of Australia, *Provisions of the Anti-Terrorism Bill (No 2) 2005* (2005) 229 and 233 (Appendix 2).

This methodology was adopted so that when the percentages of Government vs non-Government witnesses were calculated the fact that Government bodies often appeared before committees more than once was taken into account.

²⁶ So submissions or witnesses from these sorts of sources were classed as 'non-Government'.

²⁷ This category also includes the submissions labelled 'Standard Form Letter' which were made to the Senate Legal and Constitutional Legislation Committee inquiry into the Anti-Terrorism Bill (No 2) 2005. See submissions 45–50 Senate Legal and Constitutional Legislation Committee, Parliament of Australia, *Provisions of the Anti-Terrorism Bill (No 2) 2005* (2005), 217 (Appendix 1). The online version of this submissions list indicates that these submissions were received by 'various individuals and organisations'. See Senate Legal and Constitutional Legislation Committee, Parliament of Australia, *List of Submissions Received by the Committee as at 23/11/2005* available at http://www.aph.gov.au/senate/committee/legcon_ctte/terrorism/submissions/sublist.htm (last accessed 15 February 2008).

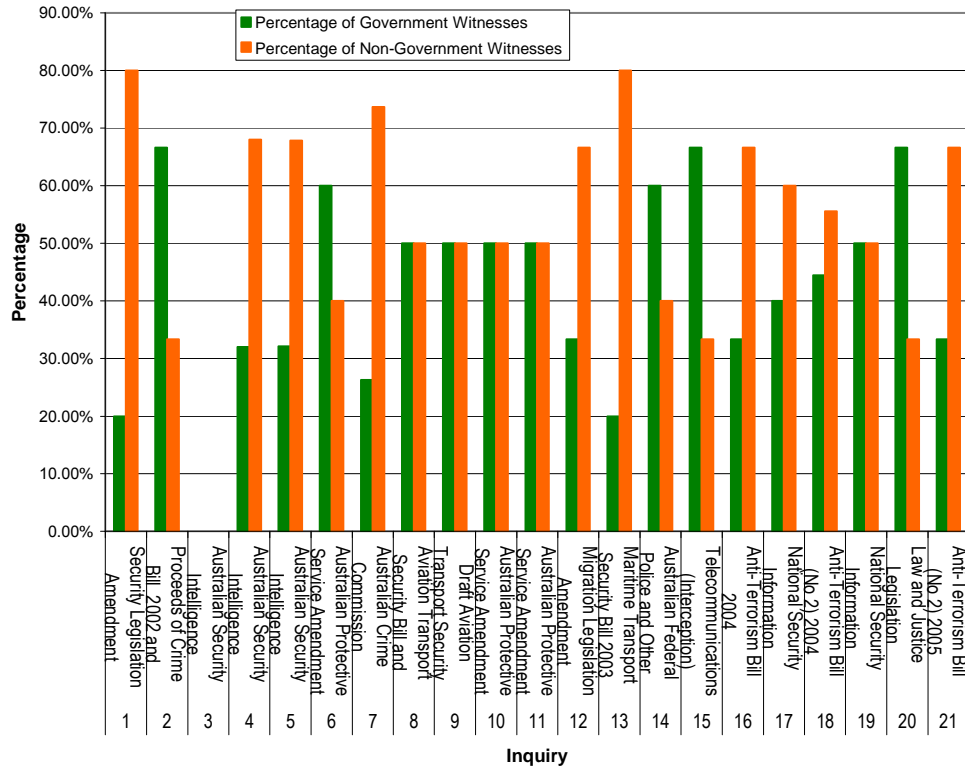
Graph 2



1. Security Legislation Amendment (Terrorism) Bill 2002 [no 2] and Related Bills
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 (PJC)
5. Australian Security Intelligence Organisation Legislation Amendment (Terrorism) 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

Graph 3

Distribution of Witnesses



1. Security Legislation Amendment (Terrorism) Bill 2002 [no 2] and Related Bills
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 (PJC)
5. Australian Security Intelligence Organisation Legislation Amendment (Terrorism) 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 Creating Australian Counter-Terrorism Laws

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 the statistical data relate to 21 pre-enactment inquiries conducted by parliamentary committees. These inquiries looked at 24 of Acts I have classified as being part of the counter-terrorism legal framework.²⁸ 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 2003.²⁹ 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.³⁰

²⁸ Some of these committee inquiries related to more than one piece of legislation. This figure does not include the Anti-Terrorism (No 3) Bill 2004. In this form, this Bill was not subject to pre-enactment scrutiny by a committee. However, the substance of this Bill was analysed by the Senate Legal and Constitutional Legislation Committee as part of its inquiry into the Anti-Terrorism Bill (No 2) 2004. See Commonwealth, *Parliamentary Debates*, Senate, 12 August 2004, 26464 (Senator Joseph Ludwig).

²⁹ 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].

³⁰ 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.

The parliamentary committee pre-enactment scrutiny of the Australian Security Legislation Organisation Amendment (Terrorism) Bill 2002 (Cth) (the *ASIO Bill*) was more exceptional.³¹ 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.³² 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 offence.'³³ This Bill was the subject of three inquiries: The Parliamentary Joint Committee on ASIO, ASIS and DSD (as it then was) (the Parliamentary Joint Committee) 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.³⁴ The Senate Legal and Constitutional References Committee scrutinised this amended bill, and produced a report in December 2002.³⁵

Assessing the precise extent to which parliamentary committee recommendations had an impact on legislation is a complex task.³⁶ It is also an element of my doctoral research which is still to be completed. However, for the purposes of this paper, the legislative history of the *ASIO Bill* indicates that parliamentary committee recommendations can have some influence on the counter-terrorism legislation that was passed by Parliament.

Even in the form in which it was enacted, this particular piece of legislation is acknowledged to have granted ASIO operatives 'extraordinary new powers'.³⁷ To Greg Carne the 'distinctive characteristic' of this piece of counter-terrorism law is that it allows people to be detained who may not be suspected of having committed terrorism offences.³⁸ Indeed he notes that in this respect, these powers exceed those

³¹ See Jenny Hocking, *Terror Laws: ASIO, Counter-Terrorism and the Threat to Democracy* (2004), 218.

³² See the combined effect of the following sections *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003* (Cth) s 24 which inserted the following provisions into the *Australian Security Intelligence Organisation Act 1979* (Cth) 34D(3)(c), 34HC and 34NA(1).

³³ *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003* (Cth) s 24 which inserted s34D(1)(b) into the *Australian Security Intelligence Organisation Act 1979* (Cth).

³⁴ 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].

³⁵ Senate Legal and Constitutional References Committee, Parliament of Australia, *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 and Related Matters* (2002).

³⁶ See Lindell, above n 10, 3 and 6. Lindell's warnings about the complexities of conducting such an analysis have been cited by Evans and Evans, above n 17, 22.

³⁷ Lynch and Williams, above n 3, 29.

³⁸ Greg Carne 'Gathered Intelligence or Antipodean Exceptionalism? Securing the Development of ASIO's Detention and Questioning Regime' (2006) 27 *Adelaide Law Review* 1, 4.

in other jurisdictions such as the United States, the United Kingdom and Canada³⁹ Nevertheless many commentators have pointed out that the Bill that was actually passed by the Parliament in 2003 differed substantially from that introduced by the Government in 2002. Lynch and Williams highlighted that in its original form the *ASIO Bill* could have permitted indefinite detention.⁴⁰ There was no restriction of the legislation to persons aged over 16. As Hocking points out, this meant that children could have been detained under the proposed law.⁴¹ In 2002, Williams also observed that while the original version of the Bill did stipulate that persons detained under the law be 'treated with humanity' the proposed legislation contained no penalties for officers who did not comply with this.⁴²

These were matters upon which the Parliamentary Joint Committee made recommendations.⁴³ More importantly, the Government signalled that it had 'accepted 10 [recommendations] in full'.⁴⁴ Accordingly, as passed in 2003 the legislation only permits a detention period of 7 days.⁴⁵ The legislation as originally enacted also includes s34NB(4) which among other things makes it an offence for a person to knowingly contravene the stipulation that a person subject to a warrant be 'treated with humanity'.⁴⁶ While the Government argued it could not accept the Parliamentary Joint Committee's recommendation that 'no person under the age of eighteen years ... be questioned or detained under the legislation',⁴⁷ it did propose amendments which ensured that children under 14 would not be able to be questioned or detained.⁴⁸ In fact, as passed, the powers given to ASIO by this Act cannot be used against people under 16.⁴⁹

³⁹ Carne, 'Gathered Intelligence' above n 40, 6.

⁴⁰ Lynch and Williams above n 3, 32.

⁴¹ Hocking, above n 33, 216.

⁴² George Williams, 'One Year On: Australia's Legal Response to September 11' (2002) 27(5) *Alternative Law Journal* 212, 214. According to Williams, the proposed section was s 34J.

⁴³ See recommendations 3, 10 and 9, 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), xiii and xv.

⁴⁴ Commonwealth, *Parliamentary Debates*, House of Representatives, 23 September 2002, 7054 (Daryl Williams, Attorney-General).

⁴⁵ See *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003* (Cth) s 24 which inserted s34HC the *Australian Security Intelligence Organisation Act 1979* (Cth).

⁴⁶ See *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003* s 24 which inserted the following provisions into the *Australian Security Intelligence Organisation Act 1979* (Cth) s34NB(4) and also s 34J.

⁴⁷ Recommendation 10 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), xv.

⁴⁸ Commonwealth, *Parliamentary Debates*, House of Representatives, 23 September 2002, 7055 (Daryl Williams, Attorney-General).

⁴⁹ See *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003* (Cth) s24 which inserted s34NA(1) into the *Australian Security Intelligence Organisation Act 1979* (Cth).

It is more difficult to assess the impact of the reviews of this legislation conducted by the two Senate Committees.

The Senate Legal and Constitution Legislation Committee which ran in tandem with the Parliamentary Joint Committee, did not present a formal list of recommendations; rather it noted that ‘the Government is yet to respond to the PJC’s [Parliamentary Joint Committee’s] report and recommendations’⁵⁰. Moreover, they indicated they would support the passage of the Bill if all the Joint Committee’s recommendations were accepted, but reserved the right to conduct a further review if the Government did not accept them.⁵¹

The recommendations put forward in the review conducted by the Senate Legal and Constitutional References Committee, (tabled in December 2002) were held to have ‘reinforced the JCAAD [the Parliamentary Joint Committee’s] recommendations and extended them’.⁵² This comment was made in a report of a review of the questioning and detention powers conducted by the Parliamentary Joint Committee on ASIO, ASIS and DSD in November 2005. This report also indicated that in the Parliamentary Debates which followed, most notably in December 2002 and in 2003 the recommendations of both committees shaped some of the amendments proposed to this piece of legislation.⁵³

One amendment to the *ASIO Bill* which could perhaps be seen as being inspired by this committee report is s34HAA⁵⁴. This section stipulates that a person appearing before the ‘prescribed authority’ under a warrant can request an interpreter be provided. One of the Bills Digests produced in relation to this Bill suggests that this particular amendment was made by the Senate, after the Senate Legal and Constitutional References Committee tabled its report into the Bill.⁵⁵ Interestingly,

⁵⁰ Senate and Legal Constitutional Legislation Committee, Parliament of Australia, *Provisions of the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002* (2002) [1.37].

⁵¹ Senate and Legal Constitutional Legislation Committee, Parliament of Australia, *Provisions of the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002* (2002), [1.38].

⁵² Parliamentary Joint Committee on ASIO, ASIS and DSD, Parliament of Australia, *ASIO’s Questioning and Detention Powers: Review of the Operation, Effectiveness and Implications of Division 3 of Part III in the Australian Security Intelligence Organisation Act 1979* (2005), 122.

⁵³ Parliamentary Joint Committee on ASIO, ASIS and DSD, Parliament of Australia, *ASIO’s Questioning and Detention Powers: Review of the Operation, Effectiveness and Implications of Division 3 of Part III in the Australian Security Intelligence Organisation Act 1979* (2005), 124–5.

⁵⁴ See *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003* s 24 which inserted this section into the *Australian Security Intelligence Organisation Act 1979* (Cth).

⁵⁵ Nathan Hancock ‘Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 [No 2] *Bills Digest* No 133 (2003), 3–4 and 23. This digest is available at <http://parlinfoweb.aph.gov.au/piweb/Repository/Legis/Billsdgs/80X860.pdf> (last accessed 12 February 2008).

placing this sort of provision into the legislation was one of the things that Senate Legal and Constitutional References Committee recommended in its report.⁵⁶

In this instance at least, it is possible to see the work of parliamentary committees as having some influence in the creation of this piece of the counter-terrorism legislative framework. Thus, it is interesting to analyse the information which members of committees were presented with during the process by which they conducted this pre-enactment scrutiny.

Parliamentary Committees and their Capacity to Function as Deliberative Forums

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 fora 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*, which the Parliamentary Joint Committee described as 'one of the most controversial pieces of legislation considered by the Parliament in recent times'.⁵⁷ Only two of the three inquiries held into this Bill formally took submissions.⁵⁸ The Parliamentary Joint Committee received a total of 167 submissions.⁵⁹ 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). This

⁵⁶ Recommendation 18, Senate Legal and Constitutional References Committee, Parliament of Australia, *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 and Related Matters* (2002), [11.44].

⁵⁷ 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.

⁵⁸ 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].

⁵⁹ 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).

legislative package was important because, as passed, the *Security Legislation Amendment (Terrorism) Act 2002 (Cth)* inserted a series of terrorism offences into the *Criminal Code (Cth)*.⁶⁰ The Bill as considered by the committee also contained the first attempt by the Government to bestow upon the Executive a power to proscribe organisations.⁶¹ Finally, the inquiry into the Anti-Terrorism Bill (No 2) 2005 (Cth) which introduced Control Orders and Preventative Detention Orders (PDO) into Australian counter-terrorism law,⁶² received 292 submissions.⁶³ These legislative reforms also represented significant elements of the counter-terrorism law framework introduced in response to the London Bombings in July 2005.⁶⁴ As enacted in 2005, a PDO allows persons to be detained for an initial period of 24 hours. This can be extended so that the order does not exceed 48 hours.⁶⁵ These orders can only be made to prevent an imminent terrorist attack or to preserve evidence relating to a terrorist attack which has occurred in the last 28 days.⁶⁶ In either case, detaining the person must be ‘reasonably necessary’.⁶⁷ The initial PDO can be made by senior members of the Australian Federal Police (AFP); ‘continued’ PDO’s must be issued by certain members and former members of the judiciary, or certain senior members of the Administrative Appeals Tribunal, who have been appointed by the Minister, and who have consented to being appointed.⁶⁸

⁶⁰ By inserting a new Part 5.3 into the *Criminal Code (Cth)*.

⁶¹ 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].

⁶² 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)*.

⁶³ 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_ctte/terrorism/submissions/sublist.htm (accessed 20 August 2007)). As a result, I have calculated the number of submissions received to be 292.

⁶⁴ Anthony Reilly, ‘The Processes and Consequences of Counter-Terrorism Law Reform in Australia 2001–2005’ (2007) 10 *Flinders Journal of Law Reform* 81, 89–90.

⁶⁵ *Anti-Terrorism Act (No 2) 2005 (Cth)* Schedule 4 Part 1 s 24 adding s 105.8(5), s105.12 (5) and s 105.14(6) to the *Criminal Code (Cth)*. For a more detailed analysis of the operation of control orders and PDO’s see Lynch and Williams, above n 3, 41–58. The following two paragraphs draw on the description of the powers they provide there.

⁶⁶ *Anti-Terrorism Act (No 2) 2005 (Cth)* Schedule 4 Part 1 s 24 adding s 105.1, 105.4(4), 105.4(5) and 105.4(6) to the *Criminal Code*.

⁶⁷ *Anti-Terrorism Act (No 2) 2005 (Cth)* Schedule 4 Part 1 s 24 adding s 105.4(4)(c) and 105.4(6)(c) to the *Criminal Code (Cth)*.

⁶⁸ *Anti-Terrorism Act (No 2) 2005 (Cth)* Schedule 4 Part 1 s 24 adding s 105.2, s 105.8 and s 105.11 to the *Criminal Code (Cth)*. See also Reilly, above n 67, 90.

By contrast, Control Orders are made by a court.⁶⁹ There are many different restrictions such orders can place on the activities of the person subjected to it.⁷⁰ They can be made if a court is convinced (on the balance of probabilities) that a person has ‘provided training to, or received training from a listed terrorist organisation’,⁷¹ or that an order would ‘substantially assist in preventing a terrorist act’.⁷² The court also needs to be satisfied (on the balance of probabilities) that each of the conditions imposed by the order is ‘reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the public from a terrorist act’.⁷³ The power to make these orders has been described as ‘controversial’ because the orders impact upon the right of people not to be arbitrarily detained.⁷⁴ In their report into this Bill the Senate Legal and Constitutional Committee recorded concerns that PDO’s would alter the way in which Australian criminal law has operated.⁷⁵ McCulloch is critical of the control order regime because they ‘impose coercive sanction ... not for what people have done or are preparing to do but what it is anticipated they might do in the future’.⁷⁶ Lynch and Williams highlight that both these types of orders can be made on the basis of evidence that does not need to meet the standards required in a criminal trial.⁷⁷

The data I collected demonstrating that parliamentary committees 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 Bills:⁷⁸ this means that non-Government sources formed the majority of submissions received by the other inquiries where submissions were requested.

⁶⁹ *Anti-Terrorism Act (No 2) 2005* (Cth) Schedule 4 Part 1 s 24 adding s 104.4, s104.7, s104.9 and 104.14 to the *Criminal Code* (Cth).

⁷⁰ *Anti-Terrorism Act (No 2) 2005* (Cth) Schedule 4 Part 1 s 24 adding 104.5(3) to the *Criminal Code* (Cth).

⁷¹ *Anti-Terrorism Act (No 2) 2005* (Cth) Schedule 4 Part 1 s 24 adding s104.4(1)(c)(ii) to the *Criminal Code* (Cth).

⁷² *Anti-Terrorism Act (No 2) 2005* (Cth) Schedule 4 Part 1 s 24 adding s104.4(1)(c)(i) to the *Criminal Code* (Cth).

⁷³ *Anti-Terrorism Act (No 2) 2005* (Cth) Schedule 4 Part 1 s 24 adding 104.4(d) to the *Criminal Code* (Cth).

⁷⁴ James Renwick, ‘Counter-Terrorism and Australian Law’ (2007) 3(3) 67,73.

⁷⁵ Senate Legal and Constitutional Legislation Committee, Parliament of Australia, *Provisions of the Anti-Terrorism Bill (No 2) 2005* (2005),[3.33]-[3.35].

⁷⁶ Jude McCulloch ‘Contemporary Comments: Australia’s Anti-Terrorism Legislation and the Jack Thomas Case’ (2006) 18 *Current Issues in Criminal Justice* 357, 360.

⁷⁷ Lynch and Williams, above n 3, 55–56.

⁷⁸ 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).

Moreover, as is shown in the graph, in some of those cases the number of non-Government submissions was overwhelming.

The large number of submissions from non-Government sources is an indication of the controversial nature of these legislative proposals.⁷⁹ A high level of public concern explains another interesting feature: some submissions to these four inquiries appear to have originated from individuals, some of whom did not indicate any affiliation with an interest group, organisation or network.⁸⁰ This last point is 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’.⁸¹ Anthony Marinac defines ‘the usual suspects’ as the ‘narrow range of articulate and professional organisations ... [who appear] before the committee during virtually every inquiry’.⁸²

Many of these ‘articulate and professional organisations’ also expressed their views about the counter-terrorism laws, especially as witnesses invited to testify directly to committees.⁸³ It is also true that the committee’s final report on these legislative

⁷⁹ 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].

⁸⁰ 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 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_ctte/terrorism/submissions/sub05.pdf (last accessed 17 August 2007).

⁸¹ Kelly Paxman ‘Referral of Bills to Senate Committees: An Evaluation’ (1998) 31 *Papers on Parliament*, 76, 83–84. Available at <http://www.aph.gov.au/SENATE/pubs/pops/pop31/c07.pdf> (last accessed 14 February 2008).

⁸² Anthony Marinac ‘The Usual Suspects? ‘Civil Society’ and Senate Committees’ (2004) 42 *Papers on Parliament*, 129, 131. Available at <http://www.aph.gov.au/SENATE/pubs/pops/pop42/marinac.pdf> (last accessed 14 February 2008).

⁸³ 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

proposals is littered with quotes from submissions and evidence given by representatives of such organisations.⁸⁴ 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.⁸⁵ However, a high level of engagement from the wider community arguably adds force to a committee’s conclusions. For example, in their report on the Security Legislation (Terrorism) Bill 2002 and related legislation the Committee noted that the proposed proscription power ‘raised the most concern in submissions’.⁸⁶ 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 information and assessments derived from more than the ‘usual’ range of sources.⁸⁷ 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 provide a forum for democratic deliberation.

The More Usual Scenario

Unfortunately, the data I have collected show that these instances of parliamentary committees being able to utilise their capacity to promote extensive deliberation

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).

⁸⁴ 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].

⁸⁵ Burton, above n 24, 1.

⁸⁶ 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].

⁸⁷ This paper does not explore the opinions about the counter-terrorism law framework expressed by each submission, or each witness to each committee. This means that, at this stage, beyond assessing the origin of each submission, I am not yet in a position to provide a more nuanced assessment of what views might be expressed by the ‘usual range of sources’.

were the exceptions. 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, as the results in Graph 1 illustrate. The Senate Legal and Constitutional Legislation committee received the fifth highest number of submissions for its inquiry into the Anti-Terrorism Bill (No 2) 2004.⁸⁸ 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.⁸⁹ Once a certificate has been issued the court must conduct a closed hearing to consider the certificate.⁹⁰ 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'.⁹¹ 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.⁹²

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 promote deliberative 'debate' is shown in Graph 2. Point 17 on Graph

⁸⁸ The Senate Legal and Constitutional Committee records that it received 95 submissions (see paragraph [1.5] and Appendix 1. However, as I was conducting my research I discovered that the number 63 had been omitted from the submission list printed in Appendix 1. This was also the case in the online version of the list, submissions see http://www.aph.gov.au/senate/committee/leg_con_ctte/completed_inquiries/2002-04/anti_terror_2/submissions/sublist.htm (accessed 14 February 2008). As a result, I have calculated the number of submissions received to be 94.

⁸⁹ See ss 26, 28, 38F and 38H *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth).

⁹⁰ 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).

⁹¹ See ss 29(3) and 38I(3) *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth).

⁹² See ss 31(8) and 38L(8) *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth).

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.⁹³ The names of only three individuals appear on the list of submissions received by this inquiry. Two of those individuals were legal academics.⁹⁴ The third was the Attorney-General for Western Australia, the Hon Jim McGinty.⁹⁵ The submissions list for the inquiry into the 2005 legislation contains the names of only three individuals, all of whom were legal academics.⁹⁶

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

⁹³ 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.

⁹⁴ 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, to *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 http://www.aph.gov.au/senate/committee/legcon_ctte/completed_inquiries/2002-04/national_security/submissions/sub13.pdf) (accessed 21 August 2007).

⁹⁵ 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).

⁹⁶ 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).

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 much public sympathy for those who are seen to be terrorists.⁹⁷ 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 draw on when providing their reports 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 sources. However as is shown in Graph 3, five of the Committees heard from an even number of Government and non-Government witnesses,⁹⁸ and there were five inquiries where a majority of the people or organisations who appeared committees represented Government entities.⁹⁹

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.¹⁰⁰ 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.¹⁰¹ On one view, it is not surprising that the Committees should receive information from those recognised as

⁹⁷ Julian Burnside, 'The New Terror: Gunpowder Plot to Guantanamo' (2006) 24 *The Australian Feminist Law Journal* 24, 36.

⁹⁸ 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).

⁹⁹ 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).

¹⁰⁰ 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).

¹⁰¹ Senate Legal and Constitutional Legislation Committee, Parliament of Australia, *Provisions of the National Security Information Amendment Bill 2005* (2005), 55 (Appendix 2).

'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.¹⁰² However, having only received the views of 'professional' organisations the Committee had a narrower range of sources of information on which to base their ultimate report on these legislative proposals 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 views from a wide variety of sources to be expressed about counter-terrorism legislation. In certain circumstances, for example, when proposed legislation that generates public controversy is being scrutinised, 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 stemming from a more restricted set of sources.

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 function as a deliberative forum. 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.¹⁰³ ▲

¹⁰² See Burton, above n 24, 1.

¹⁰³ 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.