

# **A TROJAN HORSE?**

## **Australian anti-terrorism legislation**

Civil Liberties, Human Rights and the Parliamentary System of Government in Australia in the Context of Anti-Terrorism Legislation Post 11 September 2001.

ANU LAW INTERNSHIP REPORT  
2007

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## **List of Abbreviations**

AGD	Attorney-General's Department
ALRC	Australian Law Reform Commission
ASIO	Australian Security Intelligence Organisation
Blunn Report	Report of the Review of the Regulation of Access to Communications 2005
COAG	Council of Australian Governments
Criminal Code	<i>Criminal Code Act 1995 (Cth)</i>
FPC	First Parliamentary Counsel
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social & Cultural Rights
OPC	Office of Parliamentary Counsel
PJCIS	Parliamentary Joint Committee on Intelligence and Security
Scrutiny of Bills	Senate Standing Committee on the Scrutiny of Bills
Sheller Report	Report of the Security Legislation Review Committee 2006
UN	United Nations

## Introduction

1. Over fifty pieces of anti-terrorism and national security related legislation have been enacted federally since September 11, 2001. In excess of \$6.7 billion dollars has already been expended by the federal government since 2001-2002, and a total of \$8.3 billion dollars has been committed over the ten years from September 2001 to counter terrorism and improve national security.<sup>1</sup>
2. Over two hundred years ago Franklin cautioned that “those who would give up essential Liberty, to purchase a little temporary Safety, deserve neither Liberty nor Safety.”<sup>2</sup> Yet, nowhere is the tension between balancing the security of the nation, and the human rights and civil liberties of those it is seeking to protect, more apparent than in Australia's anti-terror legislation.
3. This report reviews the central pieces of federal anti-terrorism legislation passed between 2001 and 2006, as well as the constitutional basis for this legislation. It does so through analysis of fundamental rights and liberties in the context of structures of governance; individuals and the judicial system; as well as individual rights and liberties. The report also outlines the legislative process surrounding the enactment of this legislative regime, and the consequent importance of processes of legislative scrutiny and review.
4. Unfortunately, Hamilton's suggestion that "to be more safe, they at length become willing to run the risk of being less free,"<sup>3</sup> appears to be particularly pertinent in Australia as a result of the anti-terror and national security legislative framework imposed over the last six years. This is the case despite the fixing of Australia's security risk alert level at medium since September 11 2001, and the limited direct impact of terrorism in Australia, which Walters suggests may indicate "we are boxing at shadows, or at the very least, providing a disproportionate response."<sup>4</sup>

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<sup>1</sup> See Attorney-General's Portfolio Security Environment Update, Budget 2006-2007, Parliament House Canberra and Protecting Australia Against Terrorism 2006: Australia's National Counter-Terrorism Policy & Arrangements, Department of Prime Minister and Cabinet, p 1.

<sup>2</sup> Benjamin Franklin, 'Reply to the Governor, Nov 11 1755' Leonard W Labaree (ed) 'The Papers of Benjamin Franklin' (1963) Vol 6, p 242 in Duncan Kerr 'Australia's Legislative Response to Terrorism' Address to Criminal Bar Association of Victoria, 26 August 2003, p 4.

<sup>3</sup> James Madison, Alexander Hamilton and John Jay 'The Federalist Papers' (1987) Penguin Books, pp 114-115 in Andrew Lynch and George Williams 'What Price Security?' (2006) UNSW Press, Sydney, p 93.

<sup>4</sup> Brian Walters 'Terrorism and Human Rights' Discussion Paper, 22 September 2005, p 9. Accessed at: <http://www.libertyvictoria.org.au/documents/TerrorismHumanRights220905.pdf> as at 8/1/2007.

## State and Territory References of Power

5. The legislative competence of the Commonwealth is limited to the heads of power expressed in the Constitution (primarily, but not exclusively, in section 51). Prior to 2003, terrorism offences under Commonwealth law were based on numerous Commonwealth constitutional powers; however no single power was adequate to deal with terrorism offences.
6. Section 51 (xxxvii) of the Constitution provides the Commonwealth Parliament with legislative powers with respect to matters referred to it by the Parliament of any State.<sup>5</sup> Following a summit of Commonwealth, State and Territory leaders in April 2002, the states made a referral of power which allowed the Commonwealth to enact the *Criminal Code Amendment (Terrorism) Act 2003* which re-enacted federal counter-terrorism offences with national application, providing far greater constitutional certainty. The Act contained two referrals of power relating to substantive provisions of the *Criminal Code*, and to amendment of those provisions with the approval of a majority of the States and Territories, including at least four states.<sup>6</sup>
7. The Agreement on Counter-Terrorism Laws, negotiated by the Council of Australian Governments' (COAG), outlines the processes by which the Commonwealth may pass amendments or regulations in relation to the relevant divisions of the *Criminal Code*. The Agreement requires the consultation and agreement of the parties before enactment of amending legislation, or the making of regulations proscribing a terrorist organisation.<sup>7</sup>

### New South Wales

8. The legislation enacted by the States in order to give effect to this agreement is largely uniform. However by way of example, New South Wales enacted the *Terrorism (Commonwealth Powers) Act 2002*, which contains the reference of power providing for the amendment of the Commonwealth legislation and

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<sup>5</sup> *Commonwealth of Australian Constitution Act 1900*, s 51 (xxxvii) provides:

The Parliament shall, subject to this Constitution, have power to make laws for the peace, order and good governance of the Commonwealth with respect to- matter referred to the Parliament of the Commonwealth by the Parliament or Parliaments of any State or States, but so that the law shall extend only to States by whose Parliaments the matter is referred, or which afterwards adopt the law.

<sup>6</sup> See *Criminal Code Amendment (Terrorism) Bill 2002*, Explanatory Memorandum. The substantive offences include Division 101 (terrorist acts), 102 (terrorist organisations), and 103 (financing of terrorism) under Part 5.3 of the *Criminal Code* to 'the extent to which they deal with matters that are included in the legislative powers of the Parliaments of the States.'

<sup>7</sup> Inter-governmental Agreement on Counter-Terrorism Laws, 25 June 2004:

3.1 (2)(a) the enactment of any legislation that would amend or alter Chapter 2 or Part 5.3 of the Commonwealth Criminal Code (to the extent that amendments of Chapter 2 are intended to apply only to Part 5.3, and not to be of general application to Commonwealth offences); and  
3.1 (2)(b) the making of any regulation specifying a terrorist organisation for the purposes of Part 5.3 of the Commonwealth Criminal Code.

instruments effecting the operation of the criminal responsibility legislation.<sup>8</sup> The reference may be terminated with 3 month's notice by proclamation, and a termination of the reference may be revoked.<sup>9</sup>

9. The state reference of legislative power in this area indicates a degree of cooperation between state, territory and federal governments; equally however, the reference undermines the federal system and dispenses with the safeguard provided by the division of power between levels of government articulated in the Constitution consistent with the move towards increased federal legislative power.

## **Legislative Impact on Human Rights and Civil Liberties**

10. This report examines the central pieces of anti-terrorism legislation passed since 2001 (*Appendix A*) in the context of a framework of human rights and civil liberties. Whilst this legislative regime runs contrary to numerous fundamental rights and liberties not discussed in this paper, the legislation is analysed with reference to:

1. **Structures of Governance:** (Freedom of opinion, political communication and expression);
2. **Individuals and the Judicial System:** (Right to a fair trial and legal representation; the onus of proof; doctrines of strict and absolute liability; and the rule against self-incrimination); and
3. **Individual Rights and Liberties:** (Right to liberty and security of person; privacy; and freedom of (political and religious) association and belief.)

11. The Australian Constitution contains few express rights,<sup>10</sup> and only limited implied rights, such as freedom of political communication. Consequently, many have argued a federal Bill of Rights or a Human Rights Act, as exists in the ACT and Victoria, is necessary in order to provide a 'safety net' for the adherence to human rights standards and recognition of civil liberties. Consequently, where no Constitutional basis for a right exists in Australia, rights are often provided for under legislation, common law or are guaranteed under international law.

12. Arguably, the rule of law and all it encompasses, such as the right of habeas corpus, the presumption of innocence, and in some instances the principle of *nullem crimen sine lege*, are contravened by much of the anti-terrorism legislation. Indeed, the ASIO powers and secrecy provisions to be discussed later

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<sup>8</sup> S 4 *Terrorism (Commonwealth Powers) Act 2002*.

<sup>9</sup> S 5 *Terrorism (Commonwealth Powers) Act 2002*.

<sup>10</sup> *Commonwealth of Australian Constitution Act 1900*, section 51 (xxxi) provides for the acquisition of property on just terms; Section 80 provides for trial by jury for some criminal offences; Section 116 contains a right to exercise any religion; and Section 117 prohibits discrimination against residents of different states.

represent the most blatant “contemporary challenge to the rule of law, arising from the actions of the State.”<sup>11</sup> This is largely a result of provisions including:

- ASIO’s secrecy provisions, sanctioning lawless behaviour;
- The arbitrary exercise of executive discretion by the Attorney-General in proscribing terrorist organisations, which effectively “creates criminal liability by the making of a declaration”<sup>12</sup>; and
- The denial of access to the judicial system for determination of the lawfulness of detention under ASIO’s preventative detention and warrant regimes.

13. The failings of the legislative process itself, as well as of particular pieces of legislation in allowing for adequate scrutiny and government accountability are examined below in relation to review of legislation, as well as the parliamentary committee system. Overall, each of the rights and liberties outlined form the foundation upon which Australia’s legal and political systems as characteristic of a liberal democracy are formed, thus the diminution of these rights, liberties and protections “is the diminution of democracy itself.”<sup>13</sup>

## **Structures of Governance**

### **Freedom of Opinion and Political Communication/Expression**

14. The High Court has recognised an implied Constitutional right to freedom of political communication exists in Australia,<sup>14</sup> however rather than conferring individual rights; the right precludes “the curtailment of the protected freedom by the exercise of legislative or executive power.”<sup>15</sup>

15. The right to freedom of political communication is further curtailed by laws relating to defamation, vilification, offensive language, and sedition. Without detailed analysis of the scope of this right, it is important to note that it is not an absolute right rather a two-fold test applies:

- a) The law must effectively burden the freedom of political communication in its terms, operation or effect; and
- b) The law must go beyond what is reasonable or appropriate to serve a legitimate end under the Australian system of government.<sup>16</sup>

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<sup>11</sup> Jenny Hocking ‘Protecting Democracy By Preserving Justice: ‘Even For the Feared and the Hated’ (2004) *UNSW Law Journal* Vol 27, pp 319-338 at p 330.

<sup>12</sup> Senate Standing Committee on the Scrutiny of Bills, Alert Digest No. 3 of 2002, p 173 comments made in relation to the *Security Legislation Amendment (Terrorism) Act 2002*.

<sup>13</sup> Jenny Hocking ‘Protecting Democracy By Preserving Justice: ‘Even For the Feared and the Hated’ *UNSW Law Journal* Vol 27 (2004) pp 319-338 at p 336.

<sup>14</sup> First implied by the majority of the High Court in *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106.

<sup>15</sup> *Lange v Australian Broadcasting Commission* (1997) 189 CLR 520 at 560.

<sup>16</sup> See *Lange v Australian Broadcasting Commission* (1997) 189 CLR 520 at 567-568 for articulation of the two-fold test.

Consequently, upon analysis it seems that while some limitations upon speech may be required within a democracy, much of the legislation examined disproportionately burdens this right. Examples include:

16. The *Anti-Terrorism Act (No.2) 2005*, limits contact permitted by people detained under the preventative detention regime,<sup>17</sup> and has been justified in terms of avoiding alerting others suspected of terrorist offences to the existence of an investigation. Clearly however, the disappearance and ongoing absence of a member of an organisation with no reasonable explanation is likely to raise suspicions. Further, the scope of these provisions is so broad as to mean a parent is prevented from informing a spouse of the detention of their child, thus these sections appear “to privilege security interests in monopolised information over freedom of political communication.”<sup>18</sup>
17. The Act also amends several pieces of legislation<sup>19</sup> in relation to sedition offences.<sup>20</sup> Examination of the sedition provisions, the subject of a recent ALRC report, extends beyond the scope of this work. Suffice to say, the theoretical basis for sedition is misplaced in an Australian democracy, and the “broadening of the basis for prosecuting political speech as ‘seditious’ is a matter of grave concern in a liberal democracy.”<sup>21</sup>
18. Finally, as discussed, the secrecy provisions relating to the disclosure of 'operational information' under the *ASIO Legislation Amendment Act 2003*, remove freedom of speech and limit opportunities for public debate and transparency in relation to ASIO's operations whilst the warrant is in force, and continue to do so for a further two years following the expiry of the warrant.
19. Essentially these secrecy provisions silence members of society who have been detained by ASIO, without necessarily even being a suspect in relation to terrorist offences. This reflects an unacceptable curtailment of an individual's right to enjoyment of freedom of speech and expression. More broadly, this results in the substantial and disproportionate diminution of the right to freedom of speech and communication enjoyed by Australians prior to the enactment of this legislation.

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<sup>17</sup> S 105.41 (4A) of the *Criminal Code 1995* provides that any person contacted by a detainee is prevented from disclosing the existence of the preventative detention order to any other person, contravention of which attracts a five-year jail term.

<sup>18</sup> Nick O'Neill, Simon Rice and Roger Douglas 'Retreat from Injustice: Human Rights Law in Australia' (2004) (2<sup>nd</sup> ed) Federation Press, NSW, p 271.

<sup>19</sup> The *Anti-Terrorism Act (No.2) 2005* amends the *Crimes Act 1914*, *Criminal Code 1995*, *Migration Act 1958* and *Surveillance Devices Act 2004*.

<sup>20</sup> S 80.2 of the *Criminal Code 1995* provides that sedition encompasses the urging of violence against the community on the basis or race, religion, nationality or political opinion.

<sup>21</sup> Chong, Emerton, Kadous, Pettit, Sempill, Sentas, Stratton and Tham 'Laws for Insecurity? A Report on the Federal Government's Proposed Counter-Terrorism Measures' (2005), p 28.

## **Individuals and the Judicial System**

### **The Right to a Fair Trial and Legal Representation**

20. The right to a fair trial is a foundational concept ingrained in the Australian legal system, and is a principle of international law, confirmed by the High Court in *Dietrich v R*,<sup>22</sup> and by Article 14 of the ICCPR.
21. However, under this legislative regime the Attorney-General is entitled to preclude disclosure of information which may prejudice national security in federal proceedings,<sup>23</sup> and this power “in subjecting a defendant’s right to a fair hearing in a criminal trial to the demands of national security...trespass[es] on the defendant’s personal rights.”<sup>24</sup>
22. The High Court in *Dietrich* also articulated and confirmed the existence of the right to legal representation before a court of law, guaranteed under common law.<sup>25</sup> Contrary to this, provisions of the ASIO legislation provide for an inexcusable exercise of discretion in relation to the right to contact legal representation, questioning without the presence of a lawyer, and limit the role of lawyers present during questioning to merely seeking clarification of ambiguous questions.<sup>26</sup>

### **Onus of Proof**

23. A centrally accepted principle of Australian criminal law is that the prosecution must both prove guilt beyond reasonable doubt, and must do so after establishing all the elements of an offence.<sup>27</sup> Contrary to this however, rather than mounting a defence centred on proving doubt in one or more elements of the offence, provisions of the *Anti-Terrorism Act 2004*, which require the accused to prove they were not involved in training or related activities with terrorist organisations, and the *Security Legislation Amendment (Terrorism) Act 2002*, shift the evidential burden onto the defendant. This is also the case in relation to sedition offences.<sup>28</sup>
24. Further, under amended sections of the *Criminal Code* it is an offence to collect or produce documents linked to terrorist activities, or associate with a terrorist

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<sup>22</sup> *Dietrich v R* (1992) 109 ALR 385 per Toohey J at 429.

<sup>23</sup> Under the *National Security Information (Criminal and Civil Proceedings) Act 2004*.

<sup>24</sup> Senate Standing Committee on the Scrutiny of Bills, Alert Digest No. 3 of 2005 p 18; and Senate Standing Committee on the Scrutiny of Bills, Alert Digest No. 11 of 2004, p 30.

<sup>25</sup> *Dietrich v R* (1992) 109 ALR 385. See also *Frugtniet v Victoria* (1997) 148 ALR 320.

<sup>26</sup> See ss34TA, 34TB and 34U (4) of the *ASIO Act 1979*; See also Joo-Cheong Tham ‘Casualties of the Domestic ‘War on Terror’: A Review of Recent Counter-Terrorism Laws (2004) 28(2) *Melbourne University Law Review* 512, 520-3.

<sup>27</sup> For the classical assertion of this statement, particularly with reference to the presumption of innocence see *Woolmington v DPP* [1935] AC 462 at 481-482.

<sup>28</sup> Under the *Anti-Terrorism Act* (No.2) 2005.

organisation.<sup>29</sup> Under these provisions the accused must provide evidence indicating it was not their intention to collect or produce documents for such purposes. Once again, this legislation involves shifting the evidential burden away from the prosecution, and contravenes accepted principles of Australian criminal law. As Lynch and Williams emphasise, this is of particular concern given "the breadth with which these offences are expressed"<sup>30</sup> and the lack of connection to a specific terrorist act.

25. Essentially, through the drafting of broadly defined criminal provisions and defences, much of this legislation reverses the onus of proof, forcing the accused to meet the evidential burden in relation to defences.

### **Strict and Absolute Liability**

26. In brief, principles of criminal liability require the element of *mens rea*-exceptions to this include strict and absolute liability offences. Increasingly, the gravity of crimes which forgo the requirement of *mens rea* are of concern, and include the *Security Legislation Amendment (Terrorism) Act 2002* under which the provision of training, or the possession of objects or documents potentially connected with a terrorist act, is an offence of absolute liability. This expands criminal liability significantly and symbolise a "considerable departure from the general principle that criminal liability should depend on the accused having acted intentionally or recklessly."<sup>31</sup> These offences, combined with the strict liability attached to associating with a proscribed terrorist organisation, unnecessarily impose a standard based on morality rather than one based on law.<sup>32</sup>

### **Self-Incrimination**

27. The expanded scope of ASIO warrant-related powers associated with the provision of false and misleading information, "abrogate[s] the privilege against self-incrimination for a person from whom a 'prescribed authority' has sought information..."<sup>33</sup>
28. This is so under the *Anti-Terrorism Act (No.2) 2005*, which overrides the common law right of refusing to answer questions in order to avoid self-incrimination, articulated in *Sorby*.<sup>34</sup> However, this is not an absolute right, and the uses to which such incriminating information may be put are central in

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<sup>29</sup> S 101.5 and 102.8 of the *Criminal Code* as amended by the *Security Legislation Amendment (Terrorism) Act 2002*.

<sup>30</sup> Andrew Lynch and George Williams 'What Price Security?'(2006)UNSW Press, Sydney, p 20.

<sup>31</sup> Senate Standing Committee on the Scrutiny of Bills, Alert Digest No. 3 of 2002, p 170.

<sup>32</sup> See Standing Committee on the Scrutiny of Bills, Alert Digest No. 3 of 2002, p 175.

<sup>33</sup> Senate Standing Committee on the Scrutiny of Bills, Alert Digest No.4 of 2003, pp 5-11. Comments on the Australian *Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003[No.2]*.

<sup>34</sup> *Sorby v Commonwealth* (1983) 152 CLR 281.

determining whether the provisions strike a balance between the need for intelligence gathering and the right to avoid self-incrimination. Clearly this challenge has not been met, as the ASIO legislation fails to provide adequate safeguards in relation to admission of evidence extracted under such provisions in proceedings for terrorism related offences.<sup>35</sup>

## **Individual Rights**

### **Right to Liberty and Security of Person**

29. It is broadly accepted that the right to liberty and security of person incorporates a guarantee against arbitrary arrest and detention, and forms the fundamental basis of liberal democracy. This is confirmed by articulation of the right under Article 9 of the ICCPR and by the High Court in *Foster*, which emphasised that liberty and security of person is “the most elementary and important of all common law rights.”<sup>36</sup>
30. Whilst there is uncertainty in relation to the extent to which protections extend, examination of ASIO’s new powers, as well as those of other intelligence and law-enforcement agencies, indicate the new powers are disproportionate and contravene individual rights to liberty and security in order to secure the security of the state.
31. This unnecessary extension of ASIO’s powers, which goes beyond powers possessed by security agencies overseas, is highlighted in a response given to a Senate committee by past Director-General of ASIO, Dennis Richardson, who is now Australia’s Ambassador to the United States. Mr Richardson was asked whether he was “satisfied that the existing powers equip you to do the job you need to do?” His answer: “Yes.”<sup>37</sup> Regardless of this, legislation expanding ASIO’s powers was duly enacted.
32. ASIO’s powers were expanded under the *ASIO Legislation Amendment Act 2003*, which doubled the period of questioning time permitted under a warrant where interpreters are involved from 24 to 48 hours. The powers were also extended to enable ASIO to seek a warrant to question and detain persons for up to 24 hours, and up to 7 consecutive days for the purposes of investigating terrorism offences.<sup>38</sup> It must be noted that under this legislation the consent of the Attorney-General must be sought for the issue of a warrant, however warrants are granted for the purposes of collecting intelligence, not necessarily investigating a particular offence.

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<sup>35</sup> See Senate Standing Committee on the Scrutiny of Bills, Alert Digest No. 13 of 2005, p 15 and Senate Standing Committee on the Scrutiny of Bills, Alert Digest No.4 of 2003, pp 5-11.

<sup>36</sup> *Foster v R* (1993) 113 ALR 1.

<sup>37</sup> Chong, Emerton, Kadous, Pettit, Sempill, Sentas, Stratton and Tham ‘Laws for Insecurity? A Report on the Federal Government’s Proposed Counter-Terrorism Measures (2005), p 11.

<sup>38</sup> *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003*[No.2].

33. Scrutiny of Bills noted that the adverse impact of this legislation leads to determination of whether such trespasses on fundamental rights and liberties are “acceptable when weighed against the policy objectives of the bill...” noting that the contravention of rights and standards regardless of the threat may result in a community becoming dramatically “different in nature from that which currently exists.”<sup>39</sup>
34. The right to liberty or freedom of movement is most clearly diminished by provisions of *Anti-Terrorism Act (No.3) 2004* which allow ASIO to demand the surrender of foreign passports and to prevent overseas travel on the mere basis that the relevant officer has suspicions about the individuals documentation, provided such suspicion is based upon ‘reasonable grounds’.<sup>40</sup>
35. Finally, the *Anti-Terrorism Act (No. 2) 2005*, is the most draconian piece of legislation passed in relation to terrorism and includes provisions providing for the extension of ASIO’s stop, question, search and seize powers; but of most concern are the control order and preventative detention regimes.<sup>41</sup>
36. The preventative detention regime and the introduction of prohibited contact orders are provided for under Division 105 of the *Criminal Code*.<sup>42</sup> However, without the separate issue of a questioning warrant authorities are prevented from questioning the detainee. In the context of ASIO’s extensive powers to issue questioning and detention warrants, the preventative detention regime represents a significant interference with the liberty of individuals.
37. The introduction of control orders into Australia legislation, and the first issue of an order in 2006, represents the apex of interference with the right to liberty and security of person. Control orders may include restrictions on movement within the community; the wearing of a tracking device; the prohibition of contact with listed persons; and the limited use of technology, amongst other measures. This regime contravenes fundamental principles of liberal democracy without requiring the individual be convicted of any offence.
38. Both the control order and preventative detention regimes attempt to circumvent the exercise of judicial power, considerably lessen evidentiary requirements for the detention of suspects, and ultimately represent a substantial departure from the accepted rights and principles underlying the Australian legal system.

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<sup>39</sup> Senate Standing Committee on the Scrutiny of Bills, Alert Digest No.4 of 2003, p 7-8.

<sup>40</sup> Enabled under amendments to the *Passports Act 1938*.

<sup>41</sup> Regimes provided for under Schedule 4 of the *Criminal Code 1995*.

<sup>42</sup> Division 105 of the *Criminal Code* allows the detention of persons for up to 48 hours without charge for the purposes of preventing an imminent terrorist act from occurring, or gathering evidence in relation to a recent terrorist attack.

## Privacy

39. The central legislative regime which interferes with the right to privacy, yet another complex area which warrants further review, is the telecommunications interception regime.
40. The *Telecommunications (Interception) Amendment Act 2006* implements the recommendations of the Blunn Report and enables interception of the communications of a third person, about whom authorities have no suspicions, known to communicate with a 'person of interest'.
41. The Act also permits the issue of interception warrants in relation to specific pieces of telecommunications equipment. This permits the use of a warrant to "intercept all communications made to or from a specified computer terminal, whoever might in fact be using the terminal."<sup>43</sup> Such provisions not only represent an invasion of privacy in relation to suspects, but more importantly of third parties who inadvertently utilise the specific piece of technology under surveillance.

## Freedom of (Political and Religious) Association and Belief

42. Freedom of association and belief, specifically of a political and religious nature, are central to concepts of individual liberty and are at least partially guaranteed by s116 of the Constitution,<sup>44</sup> as well as Article 22 of the ICCPR. The Laws of Australia note, that any "criminal law enacted by the Commonwealth Parliament which interferes with the constitutional guarantee for freedom of religion is invalid."<sup>45</sup>
43. It is the proscription of organisations as terrorist organisations which clearly contravenes the right to freedom of association and belief, as evidenced by the *Security Legislation Amendment (Terrorism) Act* which created the framework under which the Attorney-General can proscribe an organisation.<sup>46</sup>
44. More significantly, the *Anti-Terrorism Act (No 2) 2004* further endangers this freedom by extending the application of offences to association with a listed terrorist organisation. Section 102.8 of the *Criminal Code* in particular, which criminalises informal or formal association with listed terrorist organisations, shifts the onus of proof and significantly interferes with the everyday associations of individuals. The Sheller Report indicated these offences

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<sup>43</sup> Senate Standing Committee on the Scrutiny of Bills, Alert Digest No. 2 of 2006, p 20.

<sup>44</sup> *Commonwealth of Australian Constitution Act 1900*, s116 provides: The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion...

<sup>45</sup> *Thompson's Laws of Australia Online* at 9.1.430.

<sup>46</sup> This process of proscription was amended by the Criminal Code Amendment (Terrorist Organisations) Act 2004 which removed references to reliance on UN definitions and listings of terrorist organisations.

“transgresses a fundamental human right - freedom of association - and interferes with ordinary family, religious and legal communication.”<sup>47</sup>

45. This is further illustrated by the limited operation of defences to this section under s 102.8(4),<sup>48</sup> which apply narrowly, and in the case of family members only where such an association is regarded as “a matter of family or domestic concern.”<sup>49</sup>

## The Legislative Process

46. “It is absolutely essential that balancing liberty and security should not be the exclusive responsibility of the executive and that, as a representative and guarantor of people’s rights, the parliament should exercise close oversight in this respect.”<sup>50</sup>

47. Increasingly, the anti-terrorism framework is centred on executive power, and essentially challenges the role of parliament both as a representative, and as a guarantor against arbitrary interference with the civil liberties and fundamental rights of citizens. Uhr suggests, “Parliament is unduly persuaded by the anti-terrorist drumbeat of the political executive and tends to delegate many of its own national security responsibilities to the executive.”<sup>51</sup> This is illustrated by the interaction of national security authorities involved in the coordination and implementation of national security and counter-terrorism strategies, largely to the exclusion of the legislature.

48. The first series of anti-terror legislation introduced in 2002 eventually passed the Senate in a substantially amended form from that outlined in the original Bills. Despite the exercise of political pressure from committees, minor parties and civil society in ensuring some of the most draconian provisions in the legislation were amended; weaknesses in the legislative process were highlighted by the circumstances involving the passing of the ASIO secrecy provisions on the last parliamentary sitting day in 2003, with little publicity.

49. Clearly, the legislative process prior to 2005 was by no means perfect; indeed much of the debate concerning the most draconian pieces of legislation was waged by the minor parties and civil society, rather than the opposition.

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<sup>47</sup> Report of the Security Legislation Review Committee, June 2006, p 4.

<sup>48</sup> The defences under s102.8 (4) of the *Criminal Code* include close family relationships, humanitarian assistance, religious worship and legal advice.

<sup>49</sup> Human Rights and Equal Opportunity Commission Submission to the Senate Legal and Constitutional Legislation Committee on the Provisions of the *Anti-Terrorism Bill (No.2) 2004* at 39.

<sup>50</sup> Hans Born (ed) *Parliamentary Oversight of the Security Sector - Principles, Mechanisms and Practices*, Geneva: Inter-Parliamentary Union and Centre for the Democratic Control of Armed Forces (2003) 111 in John Uhr *Terra Infirma? Parliament’s Uncertain Role in the ‘War on Terror’* (2004) *UNSW Law Journal* Vol 27, p 339.

<sup>51</sup> John Uhr, *Terra Infirma? Parliament’s Uncertain Role in the ‘War on Terror’* (2004) *UNSW Law Journal* Vol 27, p 341.

Consequently, many elements rejected from the original Bills were subsequently passed.

50. However, in July 2005 the Liberal/National coalition gained the majority in the Senate, and arguably this has dramatically reduced the effectiveness of the Senate's role as a house of review, ushering in a new period of law making in Australia. This is evidenced by the legislative progress of the 2005 anti-terrorism laws, which included provisions covering sedition and preventative detention, but were rushed through Parliament according to the Government's 'urgent' legislative program.
51. A large proportion of the anti-terrorism legislation was passed under the guillotine, amid tenuous claims of urgency, and as Lynch and Williams highlight, the government passed some of the pieces of legislation "within four days of the publication of the Senate committee report [incorporating] virtually none of the recommended safeguards."<sup>52</sup>
52. Increasingly, the cumulative effect of the Government's legislative program and limited parliamentary sitting periods, a lack of resources, the restructure of the Senate committee system, and the extensive demands placed on parliamentarians has resulted in the federal entrenchment of a worrying legislative style. This style is characterised by little public or parliamentary scrutiny or debate, limited acceptance of committee recommendations from committees with few resources (most notably time), and the demise of the 'checks and balances' approach which has traditionally been the hallmark of the Australian political and legal systems.
53. Fortunately, several institutions and mechanisms through which public and parliamentary scrutiny of proposed legislation may temper the effects of a government majority continue to exist. The Senate Committee system is one such mechanism. The public and parliamentary scrutiny involved in the committee process, however flawed, is a central mechanism in ensuring government accountability.

## **Avenues for Legislative Review**

54. The need for review of all legislation is undisputed, as legislative scrutiny ensures effectiveness and the ongoing relevance of legislation to the society within which it operates. Legislative review of the anti-terrorism legislation is vital for these reasons, but perhaps more so given the significant impact of the legislation on the rights and civil liberties of citizens, as well as the complex interaction of numerous pieces of amending legislation.
55. Admittedly, many of the central tenets of the anti-terrorism framework are relatively recent additions; this is illustrated by the fact that by July 2006 only twenty-five people had been charged with terrorism related offences under the

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<sup>52</sup> Andrew Lynch and George Williams 'What Price Security?'(2006)UNSW Press, Sydney, p 89.

*Criminal Code* as enacted amended by the 2002.<sup>53</sup> Consequently, it is crucial that civil liberties and human rights organisations, academics, media, and the general public continue to demand governmental accountability and the systematic review of a legislative regime which threatens the fundamental principles underlying Australia as a democratic society.

56. This concern was emphasised in the Review of Security and Counter Terrorism Legislation report which indicated concern about the possibility that the "terrorism law regime may, over time, influence legal policy generally with potentially detrimental impacts on Australia's legal foundations."<sup>54</sup>
57. In relation to the anti-terror regime, there are several institutions and processes by which, either voluntary or compulsory review of the operation, effectiveness and legality of the regime occurs. These include the Inspector-General of Intelligence and Security; the Ombudsman; Senate estimates; and the Senate committee system, specifically the Scrutiny of Bills Committee, the Senate Legal and Constitutional Legislation Committee and the Parliamentary Joint Committee on Intelligence and Security (PJCIS). The central parliamentary reviews and inquiries in relation to the anti-terrorism legislation are listed at *Appendix C*.
58. Given the importance of sunset clauses in the process of legislative review, a list of anti-terrorism legislation containing sunset provisions is provided at *Appendix D*.

### **The Parliamentary Committee System**

59. The Australian Parliament is served by over 40 committees (listed at *Appendix E*), the work of which has enhanced the parliamentary system. They have done so by ensuring adequate scrutiny and debate of bills to supplement limited debate on the floor of Parliament; providing an opportunity for increased community participation in the legislative process; and informing Senators and Members of the policy context, intricacies and failings of proposed Bills. Indeed parliamentary committees "throw 'light in dark corners'".<sup>55</sup>
60. The importance of committees in supplementing scrutiny and debate during the sitting period is illustrated in *Diagram 1*, which compares the total meeting hours of the Senate committees with the total sitting hours of the Senate in 2005.
61. Scrutiny and review of the anti-terrorism legislation falls largely to the Senate Standing Committee on the Scrutiny of Bills (Scrutiny of Bills), and the Senate

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<sup>53</sup> Parliamentary Joint Committee on Intelligence and Security 'Review of Security and Counter Terrorism Legislation Report, December 2006, Parliament of the Commonwealth of Australia at 2.37, p 15.

<sup>54</sup> Parliamentary Joint Committee on Intelligence and Security 'Review of Security and Counter Terrorism Legislation Report, December 2006, Parliament of the Commonwealth of Australia at 2.48 p 17.

<sup>55</sup> Senate Brief No. 4, September 2006 'Senate Committees' The Department of the Senate, p 1.

Standing Committee on Legal and Constitutional Affairs, although the House of Representatives administers the Parliamentary Joint Committee on Intelligence and Security (PJCIS). Consequently, the focus of this work will be on the Senate committee system.

62. As discussed, in July 2005 the government gained a majority in the Senate, which has dramatically effected the operation of both the Senate and the Senate committee system. This is illustrated by the tendency of the government to reject non-government amendments, "regardless of whether the proposed amendment is one of sweeping policy or one of minor, technical amendment."<sup>56</sup> For example, *Table 1* indicates the number of amendments and requests moved in the committee of the whole; with statistics indicating the government rejected all but one non-government amendments.

### **Restructure of the Senate Committee System 2006**

63. In 2006 the Senate Committee system underwent substantial restructuring. In August 2006 the government parties in the Senate moved, without consultation or agreement from the other parties, to return to the original composition of the committee system, with one committee in each subject area, rather than both a references and legislation committee.
64. This restructure was a direct result of the government gaining the majority in the Senate, and reflected a move to alter the committee system to guarantee the government possessed the "majorities and chairs of all committees."<sup>57</sup> The coalition now effectively dominates the Senate committee system both through the chairpersonship of committees, and the resulting casting vote of the chair in the event of a deadlock. As Marinac comments, this severely limits the capacity of Senate committees to undertake impartial, critical and "accountability-based inquiries"<sup>58</sup> to the extent that they have traditionally been able to do so.
65. Unfortunately, whilst the most recent committee restructure supposedly streamlined the system, the broader effect of the government majority in both houses and the restructure is a limitation on the independence of Senate committees. This is unfortunate, as these committees have traditionally served as the last bastions of bipartisan accountability, acting as a final guarantor for the rights of all Australians. Instead, the effectiveness of the Senate committee system, particularly in a parliament controlled by a single party, now largely

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<sup>56</sup> Anthony Marinac 'The Year in the Senate - 2006' (2007) *Australasian Parliamentary Review* 23(1) Forthcoming.

<sup>57</sup> Procedural Information Bulletin No. 204 for 13-22 June (2006) (23 June 2006) Department of the Senate.

<sup>58</sup> Anthony Marinac 'The Year in the Senate- 2006' (2007) *Australasian Parliamentary Review* 23(1) Forthcoming.

relies on the degree to which government Senators and chairs are able to function in their committee roles independent of party politics and ministerial direction.<sup>59</sup>

### **Referral of Bills**

66. The reference of bills to committees was an original component of the Senate committee system in 1970, whilst prior to 1990 bills were referred on an ad hoc basis, since then a more systematic approach has emerged. As *Table 2* illustrates, the emerging trend is an increase in the number of bills referred to committees, particularly since the government gained the majority in the Senate in 2005.
67. According to *Table 2*, the referral of bills to committees has increased, however the proportion of rejected proposals for inquiries has also increased.<sup>60</sup> Arguably, this indicates that the increase in bill referrals, rather than reflecting an emerging government policy of referring bills to committees for the purposes of scrutiny and accountability, reflects government attempts to flood the committee system and avoid independent inquiries. If this is so, it is to the detriment of the committee system and its role as a mechanism of accountability within the Australian parliamentary system.

### **Submissions and the Length of Enquiries**

68. As discussed, the Senate committee system provides one of the central forums through which non-parliamentarians may access the process of legislative formation and review. The opportunity for interested parties to make submissions to parliamentary enquiries, outlined in *Diagram 2*, is crucial in ensuring balanced and authoritative committee reports are tabled in parliament.
69. Unfortunately, in many respects the participation of civil society in this process is somewhat limited, and numerous obstacles exist which tend to prevent participation by all but a handful of organisations and academics. These obstacles include public perceptions and awareness of parliamentary committee inquiries and parliamentary activities more generally; timeframes for making submissions; and the volume of committee inquiries requiring submission.
70. Given the vast number of committee inquiries often conducted on similar or amending legislation, the confinement of submissions to a small section of society, often referred to as the 'usual suspects,' in many cases leads to presumptions about the nature of submissions and their underlying agenda, contributing to a form of 'submission fatigue'.

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<sup>59</sup> See for example: Senate Procedural Information Bulletin No. 204 for 13-22 June (2006) (23 June 2006) The Department of the Senate; and Senate Procedural Information Bulletin No. 204 for 8-17 August (2006) (18 August 2006) The Department of the Senate.

<sup>60</sup> Senator Bartlett, Hansard, 8 November 2006, p 117 in Anthony Marinac 'The Year in the Senate-2006' (2007) *Australasian Parliamentary Review* 23(1) Forthcoming.

71. This fatigue, combined with the tight timeframes within which the committees are forced to function, as well as the limited resources of community organisations, has arguably resulted in the forced selective submission of organisations and academics. Sadly this leaves some committee inquiries with a diminished body of evidence from which to inform the Senate. Increasingly, governmental pressure to reduce the length of committee inquiries compounds this unfortunate consequence.
72. The tendency to limit the length of committee inquiries is illustrated in *Table 3*, which indicates a stark differentiation between government, opposition and minority parties in the average number of days proposed by each in referring bills to committee inquiry.
73. The committee inquiries conducted into much of the anti-terrorism legislation are a prime example of the minimisation of committee inquiry periods. Further, the scheduling of these inquiries over particularly inopportune periods of the year, whether deliberate or not, significantly diminished the capacity of civil society and the general public to make submissions.
74. The Senate Legal and Constitutional Committee inquiry into the *Telecommunications (Interception) Amendment Bill 2004* was permitted only 26 days to report and 12 days for submissions on the extensive bill which had been in drafting stages for six months. The inquiry into the *Anti-Terrorism Bill (No.2) 2005*, arguably the most draconian piece of legislation passed, was referred to the committee on 3 November 2005, and the report was tabled 24 days later. Despite the time constraints, the committee's scrutiny of the bill resulted in the passing of 74 government amendments and the rejection of 30 opposition and 24 Democrat initiated amendments.
75. Finally, the committee's inquiry into the *Telecommunications (Interception) Amendment Bill 2006* lasted 26 days in March 2006, and resulted in the passing of 19 government amendments and the rejection of 20 opposition and 23 Democrat initiated amendments.
76. The role of committees in the system of responsible parliamentary government cannot be underestimated. Unfortunately however, the current structure of the Senate committee system in particular; the inundation of committees with referrals; the inadequate time and resources provided to committees to adequately scrutinise legislation; as well as barriers to submission, have severely limited the capacity of parliamentary committees to perform the accountability role that has traditionally been bestowed upon them, to the detriment of both legislative and democratic processes in Australia.

## **Recommendations**

Following examination of the central pieces of federally enacted anti-terrorism legislation passed between 2001 and 2006, numerous recommendations for reforms to legislative and administrative provisions and processes arise. Consequently, the following central recommendations provide guidance to individuals, organisations and institutions in reforming areas of policy and legislative formulation, review, monitoring and criticism.

### **Legislative and Administrative**

- I. It is recommended that a system of automatic referral to the relevant subject area committee be established in cases where the Scrutiny of Bills committee deems that the bill unduly interferes with rights and liberties. The subsequent inquiry must be provided with adequate resources, and the duration of the inquiry should be of several months, allowing a full and proper inquiry; however the exact time frame should be set after negotiation between the political parties.
- II. Considering the ways in which rights and liberties are sidelined in policy considerations of the impact of legislation, it is recommended that a rights and liberties impact statement (similar to that provided in relation to finances) be introduced and included in Cabinet proposals by the sponsoring Minister.
- III. Following the restructure of the Senate committee system in 2006 it is recommended that any further changes re-establish the independence of committees by ensuring chairs of committees are held equally by both government and non-government members.
- IV. Acknowledging the central role played by parliamentary committees, it is recommended that a review of funding and staffing levels of parliamentary committees be conducted, particularly given the impact of funding cuts since 1996.<sup>61</sup>
- V. It is recommended, in line with drafting instructions provided to the Office of Parliamentary Counsel, that explanatory memorandum drafted by Departments are adequately detailed, and that any incursion on rights and liberties be explained and justified.
- VI. Recognising the limitations on parliament scrutiny and debate of legislation, it is recommended that a review of time limits and the use of

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<sup>61</sup> 'Committee System Cuts,' *Committee Bulletin* (1996) Vol. 7, No. 7, pp. 1, 5 and 7 in Kate Burton 'Community Participation in Parliamentary Committees: Opportunities and Barriers' Research Paper 10, 1999-2000, Department of the Parliamentary Library, Canberra.

the guillotine be conducted, with consultation of all political parties and with opportunity for submissions by non-parliamentary sources.

- VII. Following international comparison of parliamentary sitting times (with both houses of the Federal Parliament in Australia sitting for 62 days in 2005, compared to 160 days in both English Houses, and 97 in the New Zealand House of Representatives,<sup>62</sup>) it is recommended of a review of sitting days for both houses of the Federal Parliament be undertaken.

### **Monitoring and Review**

- VIII. In line with the recommendations of the Sheller report, it is recommended that an independent body mandated with reviewing and monitoring the legislative and administrative framework, as well as the practical implementation, of anti-terrorism legislation on the basis of a legislative-based timetable, be established.
- IX. It is recommended that additional safeguards be included within legislation including avenues for administrative and judicial review. Further, it is suggested that the right to lodge a complaint with HREOC in relation to ASIO's questioning or detention be provided, complimenting the role played by the Inspector-General of Intelligence and Security.

### **The Agenda of Civil Society**

- X. It is recommended that non-parliamentary parties begin submission documents to the PJCIS review of Division 102 of the *Criminal Code* to be conducted in 2007 in advance, and use the review to stimulate public interest and debate.
- XI. In 2015, the provisions under the *Legislative Instruments Act 2003*, requiring tabling of instruments due to sunset will come into effect. It is recommended that non-parliamentary parties use these lists as a framework for the monitoring of the government's program of legislative review.
- XII. It is recommended that the agenda of rights and liberties organisations should include consideration of a Federal Bill of Rights or Human Rights Act; and provision for further review and monitoring of:
- Privacy (Office of the Privacy Commissioner);
  - Border Control;
  - Customs (Audits of Custom's Passenger Analysis Unit and Censorship );

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<sup>62</sup> 'Sitting Times 2005' (2005) *The Table: The Journal of the Society of Clerks-of-the Table in Commonwealth Parliaments* Vol 73, House of Lords, London, p 211.

- Aviation Issues;
- Maritime Issues;
- Telecommunications (Particularly stored communications)
- AUSTRAC financial reporting; and
- ‘Identity’ security, including any national card system.

*XIII.* Having regard to the difficulties of submitting to parliamentary inquiries, it is recommended that a draft proposal be prepared suggesting amendments to the current Department of Education, Science and Training (DEST) point system. These amendments would include recognition of submissions to parliamentary inquiries, rather than general recognition of such submissions as a form of community service. A list of publications recognised by DEST is included at *Appendix F*.

## **Conclusion**

77. Overall, this paper indicates Australia’s legislative response to the threat of terrorism is disproportionate, and fundamentally abrogates the rights and liberties of Australians which existed before September 11 2001. More than this, the rights and capacity of the Parliament (and in particular the Senate) to limit executive excess in this area has also been severely compromised. Civil society groups, who under other circumstances would lend their efforts more rigorously to the development of legislation, have been denied this opportunity by near impossible timeframes, and the sheer volume of legislation. Consequently, this paper provides recommendations, the adoption of which may go some way to restoring civic rights and democratic processes without undermining national security.
78. Whether the current anti-terror regime is a Trojan horse of sorts, and will ultimately reveal itself to be more burdensome than is already apparent, or be the foundation upon which further incursions on rights will be built remains to be seen.
79. However, the future direction and scope of anti-terror and national security legislation is likely to depend on several factors including the results of the upcoming federal election; the occurrence of a terrorist-attack on Australia soil; and the extent to which draconian legislation and the increased interference of the executive are cloaked by a current political and social climate characterised by fear. Our challenge as a society is to influence these factors, to counter injustice, and to ensure history does not view us as complacent in the face of executive and legislative denial of fundamental human rights and civil liberties.

## **Appendices**

### **APPENDIX A- Chronological List of Central Pieces of Australian Commonwealth Anti-Terrorism Legislation Analysed in Report**

#### **Central Pieces of Existing Legislation:**

- *Criminal Code Act 1995*
- *Crimes Act 1914*
- *Criminal Code Regulations 2002*
- *Australian Security and Intelligence Organisation Act 1979*
- *Telecommunications (Interception and Access) Act 1979*

#### **Legislation Passed Since 2001:**

- *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2002*
- *Criminal Code Amendment (Suppression of Terrorist Bombings) Act 2002*
- *Security Legislation Amendment (Terrorism) Act 2002*
- *Suppression of the Financing of Terrorism Act 2002*
- *Telecommunications Interception Legislation Amendment Act 2002*
- *ASIO Legislation Amendment Act 2003*
- *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003*
- *Criminal Code Amendment (Terrorism) Act 2003*
- *Anti-Terrorism Act 2004*
- *Anti-Terrorism Act (No.2) 2004*
- *Anti-Terrorism Act (No.3) 2004*
- *National Security Information (Criminal and Civil Proceedings) Act 2004*
- *National Security Information (Criminal Proceedings) (Consequential Amendments) Act 2004*
- *Telecommunications (Interception) Amendment Act 2004*

- *Anti-Terrorism Act 2005*
- *Anti-Terrorism Act (No.2) 2005*
- *Intelligence Services Legislation Amendment Act 2005*
- *National Security Information Legislation Amendment Act 2005*
- *ASIO Legislation Amendment Act 2006*
- *Telecommunications (Interception) Amendment Act 2006*

## **APPENDIX B- Chronological List of All Australian Commonwealth Anti-Terrorism Legislation 2001-2006**

### **2002**

- *Border Security Legislation Amendment Act 2002*
- *Charter of the United Nations Amendment Act 2002*
- *Crimes Amendment Act 2002*
- *Criminal Code Amendment (Anti-Hoax and Other Measures) Act 2002*
- *Criminal Code Amendment (Espionage and Related Matters) Act 2002*
- *Criminal Code Amendment (Offences Against Australians) Act 2002*
- *Criminal Code Amendment (Suppression of Terrorist Bombings) Act 2002*
- *Security Legislation Amendment (Terrorism) Act [No. 2] 2002*
- *Suppression of the Financing of Terrorism Act 2002*
- *Telecommunications Interception Legislation Amendment Act 2002*

### **2003**

- *ASIO Legislation Amendment Act 2003*
- *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act [No. 2] 2003*
- *Australian Protective Service Amendment Act 2003*
- *Crimes (Overseas) Amendment Act 2003*
- *Criminal Code Amendment (Hamis and Lashkar-e-Tayyiba) Act 2003*
- *Criminal Code Amendment (Hizballah) Act 2003*
- *Criminal Code Amendment (Terrorism) Act 2003*
- *Criminal Code Amendment (Terrorism) Act 2003 (Constitutional Reference of Power)*
- *Maritime Transport and Offshore Facilities Security Act 2003*

### **2004**

- *Anti-Terrorism Act 2004*
- *Anti-Terrorism Act (No. 2) 2004*

- *Anti-Terrorism Act (No. 3) 2004*
- *Australian Federal Police and Other Legislation Amendment Act 2004*
- *Australian Security Intelligence Organisation Amendment Act 2004*
- *Aviation Transport Security Act 2004*
- *Aviation Security Amendment Act 2004*
- *Aviation Transport Security (Consequential Amendment and Transitional Provisions) Act 2004*
- *Crimes Legislation Amendment (Telecommunication Offences and Other Measures) (No.2) Act 2004*
- *Criminal Code Amendment (Terrorist Organisations) Act 2004*
- *International Transfer of Prisoners Amendment Act 2004*
- *National Security Information (Criminal and Civil Proceedings) Act 2004*
- *National Security Information (Criminal Proceedings) (Consequential Amendments) Act 2004*
- *Surveillance Devices Act 2004*
- *Surveillance Devices Act (No. 2) 2004*
- *Telecommunications Interception (Amendment) Act 2004*
- *Telecommunications (Interception) Amendment (Stored Communications) Act 2004*

## **2005**

- *Anti-Terrorism Act 2005*
- *Anti-Terrorism Act 2005 (No. 2)*
- *Crimes Amendment Act 2005*
- *Intelligence Services Legislation Amendment Act 2005*
- *Law and Justice Legislation Amendment (Video Link and Other Measures) Act 2005*
- *Maritime Transport Security Amendment Act 2005*
- *National Security Information (Criminal Proceedings) Amendment (Application) Act 2005*

- *National Security Information Legislation Amendment Act 2005*

## **2006**

- *Anti-Money Laundering and Counter-Terrorism Financing Act 2006*
- *ASIO Legislation Amendment Act 2006*
- *Australian Security Intelligence Organisation Amendment Act 2006*
- *Aviation Transport Security Amendment Act 2006*
- *Maritime Transport and Offshore Facilities Security Amendment (Maritime Security Guards and Other Measures) Act 2006*
- *Maritime Transport and Offshore Facilities Security Amendment (Security Plans and Other Measures) Act 2006*
- *Telecommunications (Interception) Amendment Act 2006*

## **APPENDIX C- Central Parliamentary Reviews and Inquiries on Anti-Terrorism Legislation**

- The Report of the Security Legislation Review Committee (Sheller Report), convened on an ad hoc basis in 2006;
- The Flood Inquiry and Report into Australian Intelligence Agencies, commissioned in 2004, which reported on the operation and accountability of the central intelligence agencies;
- In 2005, the PJCIS, formerly the Parliamentary Joint Committee on ASIO, ASIS and DSD, conducted a review required under the *Intelligence Services Act 2001*, of the *ASIO Act 1979* compulsory questioning and detention provisions. This followed the expiration of an original three-year sunset clause. This report was required to be cleared by the Attorney-General before tabling in Parliament, so perhaps unsurprisingly the relevant provisions were re-enacted in June 2006, and the review has proposed the next review be conducted in 2016;
- The *Anti-Terrorism Act 2005 (No 2)* will be reviewed by COAG in 2010 under an agreement providing for 5 year review. In the meantime, Schedule 7 of that act which revised the law of sedition, as well as Part IIA of the *Crimes Act 1914*, were referred to the Australian Law Reform Commission (ALRC) for inquiry. The ALRC reported in mid-2006, however the Attorney-General is yet to respond to this 'urgent' report;
- In 2007, the PJCIS will review provisions governing the listing of terrorist organisations under Division 102, specifically s102.1A(2) of the *Criminal Code*.

## APPENDIX D- Legislative Sunset Clauses

- The *Criminal Code Amendment (Terrorist Organisations) Act 2004* provides that regulations proscribing terrorist organisations are subject to a two year sunset clause;
- The *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003[No.2]* contains a sunset clause providing for a review of the legislation by the Parliamentary Joint Committee on ASIO, ASIS and DSD. The *ASIO Legislation Amendment Act 2006* enacted after the committee report re-enacted ASIO's questioning and detention powers provisions, extending the sunset clause until 2016 despite recommendations that this period be reduced;
- The *Anti-Terrorism Bill 2005* and the *Anti-Terrorism Bill (No.2) 2005* require a COAG review of the preventative detention and control order provisions after 5 years. The second bill also contains a 10-year sunset clause.
- Section 52 of the *Legislative Instruments Act 2003* provides for the sunseting of legislative instruments, and requires that the Attorney-General lay lists of instruments due for sunseting within the next 18 months before each House of the Parliament on 'list tabling day', which is defined as the first sitting day of parliament. The Act commenced on 1 January 2005; however the requirements under the sunseting provisions are not applicable until either 1 April or 1 October of the tenth anniversary of the day on which registration was required. Consequently, the Attorney-General is not bound to produce the lists of instruments due for sunseting until 2015. However, in proceeding years these lists may serve as a useful framework upon which civil society may monitor the government's program of legislative review.

## **APPENDIX E- List of House of Representatives, Senate and Joint Parliamentary Committees**

### **Senate Committees**

#### Senate Standing Committees:

- Appropriations and Staffing
- Community Affairs
- Economics
- Employment, Workplace Relations and Education
- Environment, Communications, Information Technology and the Arts
- Finance and Public Administration
- Foreign Affairs, Defence and Trade
- Legal and Constitutional Affairs
- Privileges
- Procedure
- Regulations and Ordinances
- Rural and Regional Affairs and Transport
- Scrutiny of Bills
- Selection of Bills
- Senators' Interests

#### Joint Committees Administered by the Senate:

- Australian Crime Commission (Formerly National Crime Authority)
- Corporations and Financial Services

### **House of Representatives Committees**

#### House Standing Committees:

- Aboriginal and Torres Strait Islander Affairs
- Agriculture, Fisheries and Forestry
- Communications, Information Technology and the Arts
- Economics, Finance and Public Administration
- Education and Vocational Training
- Employment, Workplace Relations and Workforce Participation
- Environment and Heritage
- Family and Human Services
- Health and Ageing
- Industry and Resources
- Legal and Constitutional Affairs
- Members' Interests
- Privileges
- Procedure
- Publications

- Selection
- Science and Innovation
- Transport and Regional Services

Joint Committees Administered by the House:

- Broadcasting of Parliamentary Proceedings
- Electoral Matters
- Foreign Affairs, Defence and Trade
- Intelligence and Security
- Migration
- National Capital and External Territories
- Public Accounts and Audit
- Public Works
- Treaties

## **APPENDIX F- Publications Recognised by the Department of Education, Science and Technology**

### **DEST PUBLICATIONS COLLECTION**

#### **As sole author**

5.0 points	= A1 Book - Authored research
1.0 point	= B Book Chapter
1.0 point	= C1 Journal article published in a scholarly refereed journal
1.0 point	= E1 Conference publication - Refereed, full-written paper

#### **As joint author with one other author (total team of 2)**

2.5 points	= A1 Book - Authored research
0.5 point	= B Book Chapter
0.5 point	= C1 Journal article published in a scholarly refereed journal
0.5 point	= E1 Conference publication - Refereed, full-written paper

#### **As joint author with two other authors (total team of 3)**

1.66 points	= A1 Book - Authored research
0.33 point	= B Book Chapter
0.33 point	= C1 Journal article published in a scholarly refereed journal
0.33 point	= E1 Conference publication - Refereed, full-written paper

#### **As joint author with three other authors (total team of 4)**

1.25 points	= A1 Book - Authored research
0.25 point	= B Book Chapter
0.25 point	= C1 Journal article published in a scholarly refereed journal
0.25 point	= E1 Conference publication - Refereed, full-written paper

#### **As joint author with four other authors (total team of 5)**

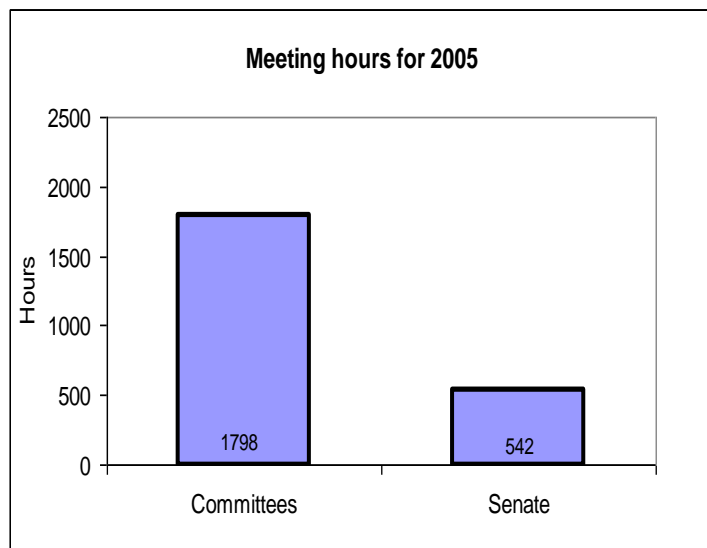
1.00 points	= A1 Book - Authored research
0.2 point	= B Book Chapter
0.2 point	= C1 Journal article published in a scholarly refereed journal
0.2 point	= E1 Conference publication - Refereed, full-written paper

### **EXTERNAL RESEARCH INCOME:**

1 point	= grant of \$20,000 or over per investigator per year
0.75 point	= grant of \$15,000 per investigator per year
0.5 point	= grant of \$10,000 per investigator per year
0.25 point	= grant of \$5,000 per investigator per year
0.125 point	= grant of \$2,500 per investigator per year
0.1 point	= grant of \$2,000 per investigator per year

## Diagrams and Tables

**Diagram 1: Senate and Senate Committee Meeting Hours for 2005**



Source: Senate Brief No. 4, September 2006: Senate Committees.

**Table 1: Amendments, Requests etc moved in Committee of the Whole (2006)**

Moved by	Agreed to	Negatived
Government	81	0
Opposition	1	168
Australian Democrats <sup>1</sup>	0	149
Australian Greens	0	41
Family First	0	12
Opposition/Australian Democrats	0	9
Senators Barnett and Humphries	0	12
Senators Colbeck and Scullion	0	3
<b>Total</b>	<b>82</b>	<b>394</b>

<sup>1</sup> One amendment was moved and subsequently withdrawn

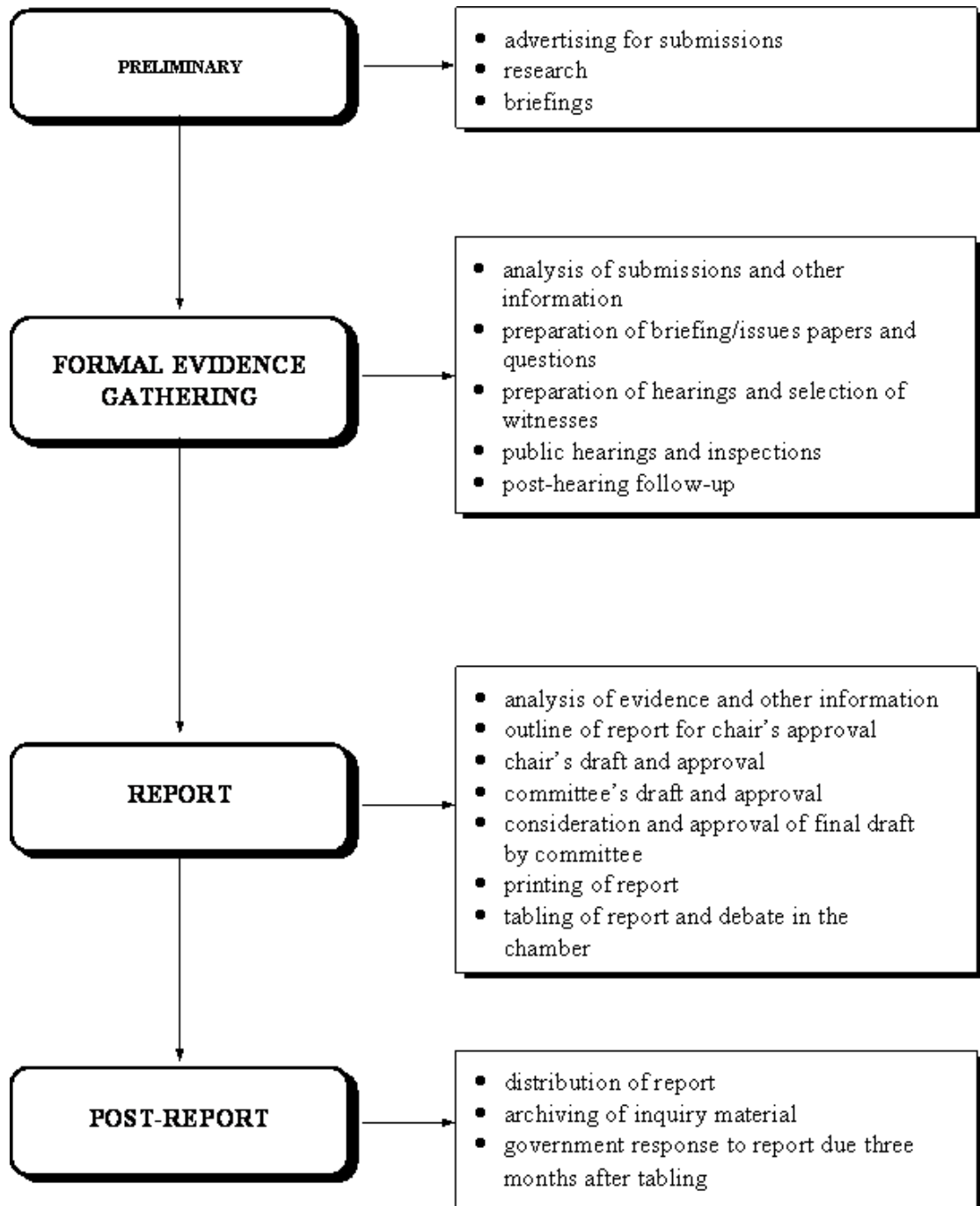
Source: Business of the Senate 2006

**Table 2: Bills Referred to Committee 2001-2006**

<b>Year</b>	<b>Number of Bills Referred to Committees</b>
2001	44
2002	55
2003	68
2004	68
2005	65
2006	100

*Source: Senate Business 2001-2006, Bills, or Provisions of Bills, Referred to Committees*

*Diagram 2: Stages of a Committee Inquiry*



Source: Harry Evans (ed) *Odgers' Australian Senate Practice (11<sup>th</sup> ed) (2004) The Department of the Senate, p 412.*

*Table 3: Length of Committee Enquiries*

<b>Proposals to Refer Bills to Committees</b>			
	<b>Government</b>	<b>Opposition</b>	<b>Minor/Ind</b>
Average number of days for inquiry	30.72	42.38	52.20
Highest number of days for inquiry	58	125	130

*Source: The Department of the Senate Statistics September 2005-December 2006.*

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