

Accountability Measures

Introduction

- 4.1 A constant theme that arose in the evidence was the lack of accountability measures in the Bill and the consequent possible diminution of civil liberties. The powers contained in the Bill are significant and it is essential that a balance is struck between these powers and accountability mechanisms which provide transparency and help to provide greater levels of public confidence.
- 4.2 In 1999 the then Parliamentary Committee on ASIO, in an advisory report to the Parliament, commented that it 'is important that a balance be achieved and that mechanisms be established to give the community confidence that ASIO is performing its functions in a way that is lawful and respects individual rights and liberties.'¹ The Committee considers that the current Bill requires that the balance between secrecy and accountability be reviewed.
- 4.3 In chapter 3, recommendations were made regarding the need for protocols which govern the detention process. In addition, it was proposed that penalty clauses be applied to key sections of the Bill. In particular, penalties should apply to officers who fail to comply with proposed section 34J requiring that persons specified in a warrant be treated humanely.

1 Parliamentary Joint Committee on the Australian Security Intelligence Organisation, *An Advisory Report on the Australian Security Intelligence Organisation Legislation Amendment Bill 1999*, May 1999, p. 43.

- 4.4 This chapter focuses on the need for higher level accountability measures which focus on the overall operation and timeframe of the Bill. For example, annual reporting of the total number of warrants for questioning and detention will provide the Parliament and the public with greater insight into the operation of this Bill. A further measure is the need for the inclusion of a sunset clause which will terminate the Bill at a predetermined time.
- 4.5 In addition to these measures, this chapter will discuss the need for enhancements to Parliamentary scrutiny by this Committee and greater powers for the Inspector-General of Intelligence and Security.

Annual Reporting

- 4.6 The Australian Security Intelligence Organisation (ASIO), under section 94 of the ASIO Act, must provide the Minister with an Annual Report as soon as practicable after each year ending 30 June. The Minister must then table a copy of the report, minus any deletions, in the Parliament within 20 days. In practice, the Minister receives a classified report and will then table an unclassified version in the Parliament. A copy of the classified Annual Report is also provided to the Leader of the Opposition. The 2000-2001 report includes information about ASIO's:
- corporate governance;
 - people, information and building management;
 - security of ASIO;
 - purchasing practices;
 - use of consultants and contractors; and
 - accountability.
- 4.7 In relation to accountability, ASIO states that 'investigations can be intrusive, so we adhere to a range of accountability measures and safeguards that govern the way we operate'.²
- 4.8 During the inquiry, the issue of reporting the number of warrants sought and granted for questioning or detention was debated. ASIO indicated that the classified Annual Report provided to the Minister and the Leader

2 Australian Security Intelligence Organisation, *Annual Report, 2000-2001*, p. 46.

of the Opposition would 'include details regarding the issuing of any warrants under the new powers.'³

- 4.9 ASIO indicated that its public Annual Reports do not include the number of warrants issued. The prospect of aggregated reporting of the number of Ministerial warrants issued was raised in an inquiry by the previous Parliamentary Committee on ASIO.⁴ ASIO presented reasons why the number of warrants generally are not publicly reported. However, in relation to public reporting of warrants issued for questioning and or detention under the current Bill, ASIO was less concerned about providing details on these warrants. ASIO stated:

I would accept in terms of logic that, if this proposed legislation is enacted by the parliament, clearly the secret part of it relates to someone being brought in and questioned. After that is completed—or when an annual report comes around or whatever—the confidentiality of whether you had detained one person or two people or no people during the course of that year I would have thought would have dissipated.⁵

- 4.10 The prospect that ASIO will report the total number of proposed section 34C warrants was welcomed by a range of groups. The NSW Council for Civil Liberties supported the proposal but suggested that the measure should be extended to all types of warrants.⁶ Similarly, Professor Williams agreed that while the proposal for reporting 34C warrants was an advance, he 'would prefer a far higher degree of scrutiny of every case.'⁷
- 4.11 The Victorian Council of Social Services acknowledged the proposal for public reporting of 34C warrants but commented that 'just having an annual report that documents how many times it was used in a year is still not good enough.'⁸ The Castan Centre for Human Rights Law was positive about the prospect of comparing the number of warrants sought with the number of warrants issued. The difference between the number of warrants sought and the number of warrants granted will reveal broad information about the decision making powers of the prescribed authorities. The Castan Centre for Human Rights Law stated:

3 Mr Dennis Richardson, Director-General of Security, ASIO, *Transcript*, p. 24.

4 Parliamentary Joint Committee on the Australian Security Intelligence Organisation, *An Advisory Report on the Australian Security Intelligence Organisation Legislation Amendment Bill 1999*, May 1999, pp. 40-44.

5 Mr Dennis Richardson, Director-General of Security, ASIO, *Transcript*, p. 44.

6 Mr Cameron Murphy, NSW Council for Civil Liberties, *Transcript*, p. 107.

7 Professor George Williams, *Transcript*, p. 140.

8 Mrs Dimity Fifer, CEO, Victorian Council of Social Services, *Transcript*, p. 204.

That information would be very useful in at least giving the public some impression of the extent of the use as well as the extent of, for want of a better word, acquiescence of the prescribing authority.⁹

Conclusions

- 4.12 ASIO does not currently report aggregate number and type of warrants that are issued. Certain security matters have been raised defending this position. This information is provided in a classified report to the Minister and the Leader of the Opposition.
- 4.13 The warrants proposed in the current Bill are more intrusive than existing warrants because they affect an individual's personal liberty and therefore greater accountability is required. ASIO has agreed to publish the aggregate number of section 34C warrants issued. The aggregate number should show the total number of warrants sought, the total number of warrants issued for questioning and the total number issued for questioning and detainment under proposed subsection 34D(2).
- 4.14 While some groups consider this to be a minimum requirement, the value of scrutinising this information should not be underestimated. The public will have a greater understanding of the use of the measures in this Bill. This Committee scrutinises, on an annual basis, the administration and expenditure of ASIO. The number of section 34C warrants issued will a focus of examination.

Recommendation 11

- 4.15 **The Australian Security Intelligence Organisation must include in its declassified Annual Report the total number of warrants issued under proposed section 34C of the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002.**

The Annual Report should show the total number of warrants sought, the total number of warrants issued for questioning and the total number of warrants issued for questioning and detainment.

9 Ms Sarah Joseph, Castan Centre for Human Rights Law, *Transcript*, p. 162.

Sunset clause and Parliamentary review

4.16 A sunset clause is a legislative instrument that places a fixed time frame on the duration of an Act. It serves the purpose of terminating an Act when it is considered that the purpose of an Act will expire and not be necessary. In addition, a sunset clause can serve as a significant accountability mechanism. A controversial piece of legislation which has a sunset clause will need to be publicly debated and the Government will need to defend its continuation. It is in the context of the latter point that a sunset clause was debated during the inquiry into the ASIO Terrorism Bill.

4.17 The views of a range of groups were sought on the merits of a sunset clause. There was wide ranging support for this proposal. The Islamic Council of Victoria fully supported the proposal.¹⁰ The Castan Centre for Human Rights Law supported the proposal and stated:

It certainly would give us the opportunity to see how it works and it puts the Attorney on his mettle. Are you going to use this only as a matter of last resort because it will only be there for three years?¹¹

4.18 The Law Institute of Victoria commented that 'given the nature of the threat and the reasons for the development of this legislation, we would certainly say to this committee that the legislation ought to be the subject of a sunset clause.'¹² The Victorian Council of Social Services agreed with the need for a sunset clause but argued that ongoing monitoring should continue. The Victorian Council of Social Services stated:

On the sunset clause: yes, we would agree with anything that increases the accountability of this bill. Even more than that, I do not want to see three years go past without monitoring all the way along, which is why we have made a number of these suggestions. Even three years is a window of opportunity that we would say is totally inappropriate without increased transparency and accountability, which is why we are suggesting the concurrent monitoring to occur. There is too much left behind closed doors, we are saying.¹³

10 Mr Bilal Cleland, Islamic Council of Victoria, *Transcript*, p. 154.

11 Professor David Kinley, Castan Centre for Human Rights Law, *Transcript*, p. 162.

12 Mr David Faram, Law Institute of Victoria, *Transcript*, p. 166.

13 Mrs Dimity Fifer, Victorian Council of Social Services, *Transcript*, p. 204.

4.19 ASIO did note some reservations about the use of a sunset clause commenting that the 'the gap in existing powers, which we are seeking to fill is not time specific.'¹⁴ ASIO stated:

The sort of situations that I think are likely to lead to detention warrants being sought are September 11 type situations. It is not possible to predict when such situations might arise. For instance, you could put in place a three- to four-year sunset clause, have the act expire and have a major incident six to 12 months later. Practicalities would likely prevent the act being resuscitated quickly, for instance, if we were in the middle of an election period.¹⁵

4.20 In relation to Parliamentary review, the Attorney-General in his second reading speech introducing the Bill, indicated the Committee 'will be asked to review the new powers and provide a report on their operation twelve months after their commencement.'

Conclusions

4.21 The inclusion of a sunset clause in the ASIO Terrorism Bill, in addition to public reporting on the number of warrants sought and granted, is the most powerful accountability mechanism that the Committee can recommend. It is simple in design but sends a confidence boosting message to the Australian public that the Australian Government will need to account and argue the case for the continuation of these powerful laws.

4.22 From a comparative perspective, a sunset provision operates in the US Patriot Act. The Committee was advised by Mr George B Lotz II, Assistant to the Secretary of Defense for Intelligence Oversight that a sunset provision acts to expire certain authorities by 31 December 2005.

4.23 The use of a sunset clause and the proposed review of the Act by this Committee in 12 months, as indicated in the Attorney-General's second reading speech, should be linked to maximise the quality of the review. There should be a three year sunset clause. That is, at the end of three years, the Act will terminate.

4.24 This Committee should review the provisions in the Bill 24 months after the Bills commencement and not 12 months as proposed by the

14 Mr Dennis Richardson, Director-General of Security, ASIO, *Transcript*, p. 225.

15 Mr Dennis Richardson, Director-General of Security, ASIO, *Transcript*, p. 225.

Attorney-General. This will ensure that the findings of the Committee's review is a critical part of the consideration of the relevant parts of the Act shortly before they expire as set out under the provisions of the sunset clause.

- 4.25 It will be up to the Government of the day to argue for the continuation of proposed Part III, Division 3 of the ASIO Act which will be inserted by the Bill. The timing of the Committee's review will ensure that the Government could, if necessary, prepare and introduce a replacement Bill when the relevant part of the Act expires.

Recommendation 12

- 4.26 **The Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 be amended to include a sunset clause which will terminate the legislation three years from the date of commencement.**

The Inspector-General of Intelligence and Security

- 4.27 The Inspector-General of Intelligence and Security (IGIS) has wide ranging powers of oversight and scrutiny of the Australian Intelligence Community as set out under the *Inspector-General of Intelligence and Security Act 1986*.

- 4.28 The ASIO Terrorism Bill refers to the right of a person, who is subject to a warrant, to make a complaint orally or in writing to the IGIS. The IGIS has the power to review all files relating to any cases of the agency and make determinations about compliance with relevant legislation. The concern was raised during hearings that this may not be a sufficient accountability mechanism because the work of the IGIS is considered to be ex-post facto. Dr Greg Carne stated:

The more practical issue then would simply be: when is the review going to take place? This is the problem with this sort of window-dressing aspect, where you can communicate with the Inspector-General, you can communicate with the Ombudsman, but all of that is ex-post facto. It is all after the event.¹⁶

- 4.29 The IGIS indicated that proposed section 34T of the Bill states that 'this Division does not affect a function or power of the Inspector-General of

16 Dr Greg Carne, Faculty of Law, University of Tasmania, *Transcript*, p. 94.

Intelligence and Security under the *Inspector-General of Intelligence and Security Act 1986*.' The IGIS has interpreted this to mean that he 'could attend these interrogations and assure myself that they were being conducted with propriety.'¹⁷ However, there was less clarity on what action the IGIS could take if he observed non compliance with the legislation or an impropriety occurring during the interrogation. In response to the possible actions that the IGIS could take during an interview, he stated:

As I have said, my initial intention would be to attend those interrogations. It would also be my intention, between now and when this legislation comes into operation, to discuss with the Director-General of Security procedures that would enable me to do that.¹⁸

- 4.30 The IGIS indicated, in a supplementary submission, that while most inspection work is carried out ex post facto, some inspection work is carried out on current activities. The IGIS commented that conducting real time inspection work in relation to the section 34C warrants 'is particularly desirable given the powers that would be conferred by the legislation and the public interest in having reassurance as to their responsible exercise.'¹⁹
- 4.31 The IGIS indicated that he would at the start of the operation of the warrant provision seek to attend the first series of interviews. However, he considered that it may not be necessary to make legislative provision for his attendance at all interviews.
- 4.32 More importantly, however, was the opportunity for the IGIS to attend any interview and have sufficient warning to make that decision. The IGIS suggested that a procedure could be developed whereby he was made aware of any impending activity at the earliest possible time. The IGIS suggested that this would make it unlikely that questioning could begin before he arrived. The IGIS suggested that this process could be achieved through agreements between him and the Director-General of ASIO 'along the lines of agreements we already have for the conduct of inspection activity by the Inspector-General.' Alternatively, the IGIS suggested that the notification regime could be required by the legislation.

17 Mr Bill Blick, Inspector-General of Intelligence and Security, *Transcript*, p. 14.

18 Mr Bill Blick, Inspector-General of Intelligence and Security, *Transcript*, p. 15.

19 Inspector-General of Intelligence and Security, *Submission No. 164*, p. 1.

Conclusions

- 4.33 The Inspector-General of Intelligence and Security (IGIS) performs an essential role in the oversight of the Australian Intelligence Community. Under the ASIO Terrorism Bill, persons who are the subject of warrants will be able to make complaints orally or in writing to the IGIS. However, the evidence to the inquiry suggested that much of the work of the IGIS is ex-post facto and in practice may be of little use to a person who is subject to a process that does not comply with the law or if some other impropriety occurs. This is a fair observation and therefore the powers and rights of access of the IGIS need to be clarified in the Bill.
- 4.34 First, the ASIO Terrorism Bill must contain a provision which ensures that as soon as the Director-General seeks the Minister's consent to request a warrant then the IGIS must be informed immediately and provided with the details of the warrant.
- 4.35 Second, the IGIS must have the power to intervene immediately at any stage of an interview if the IGIS is of the view that there is non-compliance with the law or any form of impropriety has occurred. The IGIS should have the power to suspend the interview and refer these matters to the Director-General who would then have to take appropriate ameliorative action.
- 4.36 Both these measures should provide additional reassurance and confidence to the Australian public.

Recommendation 13

- 4.37 **The Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 be amended to ensure that when the Director-General seeks the Minister's consent to request a warrant, under proposed section 34C(1), the Director-General must immediately provide details of the warrant to the Inspector-General of Intelligence and Security.**

Recommendation 14

- 4.38 The *Inspector-General of Intelligence and Security Act 1986* be amended to provide the Inspector-General of Intelligence and Security with the power to suspend, on the basis of non-compliance with the law or an impropriety occurring, an interview being conducted under the warrant procedures in the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002.
- The Inspector-General of Intelligence and Security should immediately report the nature of such cases to the Committee.

Judicial review

- 4.39 During hearings, it became evident that the Bill is not clear on what opportunities a person would have for judicial review of their detention. For example, as discussed previously in this report, a person could be held incommunicado indefinitely with no apparent opportunity for judicial review. The proposal was raised during hearings that a person should have the right to judicial review after 24 hours detention and after every subsequent attempt to renew the warrant. If a person is detained incommunicado and it is ASIO's view that secrecy should be maintained then it is proposed that the court session be closed.
- 4.40 The Castan Centre for Human Rights Law commented that this 'would alleviate some of the problems because it would guarantee some level of judicial intervention after 24 hours.'²⁰
- 4.41 The Federation of Community Legal Centres (FCLC) acknowledged that this proposal would provide 'minor improvements' but there are still problems that remain. The FCLC warned that it would still be the responsibility of the person to request the right to go to the Federal Court. The problem was that the types of people that could be detained might 'have no experience of the court system in any way except in a very disempowered way.'²¹

20 Ms Sarah Joseph, Castan Centre for Human Rights Law, *Transcript*, p. 157.

21 Mr Damian Lawson, Federation of Community Legal Centres, *Transcript*, p. 186.

Conclusions

- 4.42 The proposal to provide persons who are the subject of a warrant with the opportunity of judicial review would provide further reassurance to the public of the accountability measures applying to the Bill. This would help to remove concerns about executive government control over the process of detention. The Committee has already made recommendations about the maximum duration of detention that should be permitted and the right to legal representation. The measure of judicial review will reinforce the accountability measures already recommended by the Committee.
- 4.43 The process would place a discipline on ASIO and ensure that the reason for detention was not frivolous, because at a later stage ASIO may need to defend their decision in court.
- 4.44 Some concerns were raised during evidence that a person may not understand their rights or opportunities for judicial review. This problem is offset by the Committee's recommendation that a person should have access to legal representation. In addition, the Committee proposes that the right to judicial review after 24 hours and at every subsequent attempt to renew a warrant should be included as an item in proposed section 34E. Under proposed section 34E, the prescribed authority must explain the warrant and certain rights of the person. Under the Committee's proposal, the PA will need to advise the person that they can seek judicial review after 24 hours of detainment.

Recommendation 15

- 4.45 **That proposed section 34E of the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 be amended to include a requirement that the prescribed authority must advise the person that they have the right to seek judicial review after 24 hours of detention and at every time a subsequent warrant is sought.**

DAVID JULL, MP

Chairman

30 May 2002