5

Implications for democratic and liberal processes

Public perceptions

5.1 As with most inquiries, the overwhelming majority of submissions either opposed or were critical of aspects of the legislation. Most of the submissions received by the Committee expressed concerns that the questioning and detention powers eroded democracy and civil rights. The overriding message in submissions was that Australia has a duty to preserve the integrity of its liberal democracy. Many people and organisations expressed concern that, although ASIO has so far been judicious in its use of its extended powers, it is the scope for abuse of those powers which is of concern.

> It is important in examining legislation such as this that one considers not only how it has been used but how it could be used.[1]

5.2 Many of the 109 submissions were from citizens who have no stated affiliation with advocacy groups or other organisations, but who, despite some inaccuracies in their knowledge of the Act, clearly felt concerned about the consequences of ASIO's increased powers. For example, a brief and to the point handwritten submission stated, in part:

> I believe the ASIO Act as amended in 2003 is destructive of civil liberty in Australia. It permits detention of citizens on mere suspicion, so that mere rumour could be enough to cause an indefinite imprisonment. This is the kind of law which permitted

1 AMCRAN transcript public hearing, 6 June 2005, p.53.

> the secret police of past totalitarian states to oppress the citizenry. It was to save us from this that we fought World War II.[2]

5.3 The powers given to ASIO by the legislation under review drew a lot of comment in the submissions. There is a perception among some in the community that ASIO's powers are now inconsistent with or pose a threat to the operation of democracy.[3] Central to these concerns was the inclusion of the secrecy provisions. It was argued that, if ASIO abused its powers, the secrecy provisions would allow the abuse to be concealed.

> A system of open and accountable government and government agencies is a prerequisite for true and meaningful democracy. These laws open the door for abuses of power and, of even greater concern, the concealment of these abuses. The secrecy provisions contained in the Act are unreasonable in an open, democratic society and should be amended.[4]

5.4 ASIO was described as a 'necessarily clandestine organisation' which has been given an extremely wide-ranging discretion to decide what sort of political activity will be investigated and what sort will not. It was argued that in a democracy, the legitimacy of political activity must be determined in the open, not by an organisation which, by its very nature, is difficult to subject to democratic processes.[5] Other submissions argued that the legislation might turn ASIO into a coercive agency which could enforce what are, in effect, the political and foreign policy imperatives of the government of the day.

> [I]f a small group in a democracy poses a threat of violence to the rest, the policing of this threat must be undertaken in a way that is not seen simply to be an attack upon the dissent and diversity that is always a legitimate part of a democracy. If that small group is located within a broader community, it is not open to a democratic authority – which is committed to the legitimacy of political, religious and cultural pluralism – simply to exclude that broader community and make it in its entirety an object of coercive investigation and policing.[6]

5.5 Concern was also expressed about the removal of the right to silence[7] and the removal of the privilege against self-incrimination.[8] If detained:

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2 Ms R. Dunlop submission no.46, p.1.

3 Mr P. Emerton transcript public hearing, 7 June 2005 p. 23.

4 Uniting*Care* NSW.ACT submission no.53, p.1.

5 Mr P. Emerton transcript public hearing, p. 23.

6 Mr P. Emerton, submission no.86, p. 5.

7 Under subsection 34 G (3) the failure to answer any questions put to a person in custody under a warrant is an offence punishable by 5 years of imprisonment.

> … the onus of proof should be upon the investigating body to prove that a 'defendant' is in possession of information etc. rather than that person having to prove that they are not in possession of matters in connection with a 'terrorist' act.[9]

5.6 Many submissions made the point that while it is in Australia's national interest to protect and promote peace and security we must also maintain our commitment to fundamental human rights.

> Security measures should not infringe the fundamental civil and political rights of Australian citizens and permanent residents of our country.[10]

5.7 A repeated comment was that, as our legal system is based on the presumption of innocence, people who are detained for questioning must continue to be seen as innocent until proven otherwise.

5.8 The secrecy provisions under the legislation drew a lot of comment in both the submissions and at the hearings, particularly in regard to the impact of the provisions on detainees and their families and employers, but also with respect to the future of free press. These specific concerns are discussed in more detail below.

Secrecy provisions

5.9 The secrecy provisions, or section 34VAA, were not part of the original bill introduced into the Parliament in 2002. They were introduced on 27 November 2003 as a result of 'operational and practical limitations that have arisen in the use of these new powers by ASIO.'[11] The Attorney-General stated that the purpose of the provisions was to protect 'the effectiveness of intelligence gathering operations in relation to terrorist offences' and that they were demanding, but 'this was because we are dealing with information that could result in the loss of life.'[12] The Attorney stressed at the end of his second reading speech that, as the law was reasonably adapted to serve a legitimate purpose, it did not infringe

8 Under subsection 34 G (8)

9 Ms P. Finegan submission no.7, p.2.

10 Mr J Stanhope MLA, submission no. 93, p.1.

11 Attorney-General, Hon Philip Ruddock, MP, House of Representatives Hansard, 2 December 2003, p. 23481-2.

12 Attorney-General, Hon Philip Ruddock, MP, House of Representatives Hansard, 2 December 2003, p. 23483.

upon implied constitutional freedom of political communication.[13] At the time, the Labor opposition acknowledged that the change wrought by section 34VAA would be 'the most controversial of areas'.[14] However, it accepted the amendments as 'reasonable' and 'balanced' and consistent with provisions applying to the Australian Crime Commission in its investigations into serious criminal activity.[15] The provisions were opposed by the Democrats and the Greens.

5.10 The secrecy provisions under section 34VAA create new offences which criminalise the unauthorised disclosure of information relating to questioning and detention warrants. The Attorney-General's Department described the provisions in the following way:

> While subjects are permitted to contact persons, they must not reveal information to those persons contrary to section 34VAA titled 'Secrecy relating to warrants and questioning'.
>
> Section 34 VAA protects the effectiveness of intelligence gathering operations by prohibiting:
>
> - while a warrant is in force, disclosure without authorisation of the existence of the warrant and any fact relating to the content of the warrant or to the questioning or detention of a person under the warrant; and
> - while a warrant is in force and during the period of two years after the expiry of the warrant, disclosure without authorisation of any ASIO operational information.
>
> Operational information (subsection 34VAA(5)) is information that indicates one or more of the following:
>
> (a) information that ASIO has or had;
>
> (b) a source of information that ASIO has or had;
>
> (c) an operational capability, method or plan of ASIO.
>
> While section 34VAA imposes restrictions on the type of information that can be disclosed, exceptions exist where, among other things, a disclosure is:
>
> - made for the purpose of obtaining legal advice in connection with a warrant or obtaining representation in legal proceedings seeking a remedy relating to such a warrant or the treatment of a person in connection with a warrant;
> - permitted by a prescribed authority;
> - permitted by the Director-General of ASIO;

13 Attorney-General, Hon Philip Ruddock, MP, House of Representatives Hansard, 2 December 2003, p. 23484.

14 Mr McClelland, MP, House of Representatives Hansard, 2 December 2003, p. 23465.

15 Mr McClelland, MP, House of Representatives Hansard, 2 December 2003, p. 23465-6.

- made by a person representing the interests of a minor or made by a parent, guardian or sibling of a minor when the representation is made to a parent, guardian or sibling, or person representing the interest of a minor, or to the IGIS, Ombudsman, prescribed authority, or person exercising authority under the warrant.[16]

5.11 Opposition to the secrecy provisions was a dominant theme of submissions to this review. Complaints were wide-ranging, covering legal principle, the limitations on scrutiny, the lack of accountability, freedom of speech and the press, the difficulty of family and community members in providing support to those questioned, and the inconsistent and, at times, impractical application of the provisions.

5.12 It was of concern to many that section 34VAA meant that no one could monitor ASIO or express concern, if need be, about how ASIO executed warrants. Advocacy groups and others stated that they are unable to monitor the process or the effectiveness of the interrogations because they are not a matter of public record.

> These secrecy provisions violate the rule of law. One aspect of the rule of law is to provide the accountability of all arms of government and government bodies. The secrecy provisions clearly raise accountability issues. It is recognised safeguards are included in the legislation, making it an offence for ASIO to act ultra vires. However, the effectiveness of these safeguards is undermined. A complaint by an individual who has been detained under a compulsory questioning and detention warrant is obviously required to set the complaint procedure in motion. However, because of the secrecy provisions, this will not occur for at least 2 years. The evidentiary trail will run cold, as will the political and social impact of the complaint. The capacity for individuals to hold ASIO accountable for its actions is therefore seriously eroded.[17]

5.13 The ICJ concurred. They argued that 'because of [the 2-year ban], there is little public scrutiny of the operation of the questioning powers. We have really no way of knowing what is going on. In this way, Australia's laws are even more oppressive than those in the US and the UK'.[18]

16 Attorney-General's Department submission no. 84, p.18.

17 Civil Rights Network (Melbourne) submission no. 78, p. 4.

18 ICJ submission no.60, p. 5.

Implications for the Press

5.14 Numerous submissions from the media and the public took up the concerns about scrutiny, but expressed them in terms of freedom of the press, the right to know within a liberal and democratic process.

5.15 A typical submission stated:

> I am particularly concerned that the legislation leaves open the possibility of third parties, such as journalists, facing hefty jail terms for disclosing information connected to or in relation to a warrant issued under the Act, for a full two years after the warrant's issue. … I believe the current legislation unduly sacrifices media freedom. It is important that our public institutions are open to public scrutiny and are accountable. To inoculate them from such scrutiny is the first step on a slippery slope to autocracy.[19]

5.16 The need to keep public institutions accountable and the role of the media in this function was raised in many submissions. One journalist stated:

> Independence of a society means an ability to self-assess and freedom to question its functions. If a government warrant is carried out in entire secrecy, then the system tends to lean towards politics clearly separated from democracy. … Prohibition of information publication for two years compromises immediacy. Those 24 months become a period of inaction and a tool of silencing.[20]

5.17 Under the Act's secrecy provisions, it is illegal to report or disclose any operational information about ASIO including anything about ASIO's capabilities, practices or plans. Breaching this provision carries a penalty of up to five years' imprisonment[21] and a number of submissions objected to this section of the Act. Several submissions noted the discrepancy between a maximum two-year prison sentence for an official breaking the safeguards in the Act (section 34NB) and a journalist disclosing information about ASIO facing up to five years' gaol. A five year gaol term for revealing 'operational information' seemed to many to be too harsh, particularly in comparison to certain criminal offences where penalties are less severe. Mr Ryan stated:

19 Mr J. Purnell submission no.63, p.1.

20 Ms M Edmonds submission no. 36, p.1.

21 Subsection 34VAA (5)

> [a] person who reports on the activities of another is subject to a longer period of gaol than the person who does the wrong thing in the first place.[22]

5.18 The Attorney-General's Department argued that the penalty of five years was consistent with the penalties for section 34G offences and were in recognition of the seriousness of passing on operational information. The Committee recognises the importance of protecting operational information, but notes that public's confidence in its operations is also significant.

Recommendation 15

The Committee recommends that the penalty for disclosure of operational information be similar to the maximum penalty for an official who contravenes safeguards.

5.19 The effect of the severity of the punishment for breaches of section 34VAA and the duration of the prohibition was to prevent all reporting about the agency. Mr Emerton noted that the secrecy provisions rendered ASIO's conduct 'virtually immune from public scrutiny'.[23] Mr Wolpe from Fairfax stated:

> Clearly, there are fundamental values and principles at stake in these debates. In a democracy, it is imperative to reconcile the interests of the protection of national security and the exercise of the rights of freedom of the press – we have a responsibility, jointly, to try to do so. In our judgment …. the ASIO legislation enacted so far has failed to satisfactorily reconcile these issues.[24]

5.20 In its submission to the Committee, the Attorney-General's Department stated that there are no specific examples of journalists not publishing stories because of the secrecy provisions.[25] The Attorney-General's Department stated that the restrictions are necessary as disclosing operational information might jeopardise an investigation, even to the extent of severely damaging ASIO's ability to perform its duties. However, the Department noted that it would be impossible to successfully prosecute a person for disclosing operational information unless they had obtained such information as a result of a warrant being

22 Media, Entertainment and Arts Alliance transcript, 6 June 2005, p.3.

23 Mr P. Emerton submission no. 86, p. 26.

24 Fairfax Holdings submission no.73, p.1.

25 AGD supplementary submission no.102, p.5.

issued. A journalist who disclosed operational information, having obtained it by any other means, could not be prosecuted.[26] This might be strictly true; that a prosecution under section 34VAA might not be readily achieved.

5.21 The breadth of the definition of 'operational matters' was a further cause for concern. Fairfax Holdings acknowledged that paragraph 34VAA(5)(c) was necessary to protect ASIO's operations and allow it to perform its duties. However this submission and the Media, Entertainment and Arts Alliance both believed that subsection (a) in particular – restricting the disclosure of 'information that the Organisation has or had' – completely removed from scrutiny all discussion of ASIO's activities in relation to terrorism.[27] The breadth of the definition was arguably unconstitutional as it was 'potentially grossly disproportionate to the goal of protecting national security.'[28]

5.22 In response, the Attorney-General's Department said that, although previous submissions suggested that the term 'operational information' used in the secrecy provisions was too broad[29], it must be read:

> … in context with the other elements of the offence. In order to commit an offence for the disclosure of operational information, a person must have obtained the information as a direct or indirect result of a warrant being issued, or as a result of anything authorised under the ASIO Act in connection with the warrant.[30]

5.23 This argument is similar to that put forward by the AGD in relation to the severity of penalties. It does not address the objection of the breadth of the definition. If it is possible to protect sources and operational capabilities, methods and plans, and yet preserve some transparency, the Committee suggests that would be in the interests of the integrity of the system to find a middle course on this question.[31]

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26 AGD supplementary submission no.102, pp.4-5

27 Fairfax Holdings submission no 73, p. 3.

28 Fairfax Holdings submission no 73, p. 4.

29 It referred to '(a) information ASIO has or had, (b) a source of information or (c) ASIO's operational capabilities, methods or plans.

30 AGD supplementary submission no. 102, pp. 4-5

31 One submission made the point that if the press were allowed greater disclosure of ASIO's role and activities that this may engender more public support for ASIO. The Media, Entertainment and Arts Alliance submission no.65, p.5.

Recommendation 16

The Committee recommends that the term 'operational information' be reconsidered to reflect more clearly the operational concerns and needs of ASIO. In particular, consideration be given to redefining section 34VAA(5).

5.24 With respect to the overall regime under section 34VAA, Fairfax believed that there was scope for the use of a more flexible system which kept in mind the public interest and dealt with each case on its merits. They believed that, in rare and exceptional circumstances where an extended period of non-disclosure was needed, a suppression order in the interests of national security would be warranted.[32] The Media Entertainment and Arts Alliance argued that there should be a reference to public interest in the permitted public disclosures under the Act.[33] The process used by the Australian Crime Commission was cited as a model that might be adopted.

5.25 Mr Joo-Cheong Tham and Mr Stephen Sempill argued for the repeal of the whole section to be replaced by a provision of a power for the prescribed authority or the issuing authority to issue orders for non-disclosure.[34]

5.26 Professor Williams thought the secrecy provisions were overly strict and the definition of operational matters very broad. They were likely to prevent people who wished to report inappropriate use of the powers and they cast doubt on the process and undermined public confidence. He did not believe that strict liability should be applied as

> they apply a very strict test in circumstances where such a test is not reasonable. They may catch people in circumstances where people ought not to be caught. There should be an intention element involved as there would normally be in crimes, particularly when we are dealing with something that extends for such a long period after the warrant and then a five year penalty applies.[35]

5.27 In recognition of the difficulty of defining in generality what is appropriate, Professor Williams' preference, was to investigate the models of the Australian Crime Commission and such bodies where the prescribed authority has the ability to make determinations about whether

32 Fairfax Holdings submission no 73, p. 3.

33 Media, Entertainment and Arts Alliance submission no 65, p.2.

34 Joo-Cheong Tham and Sempill, submission no 35, p.23.

35 Williams transcript, public hearing 20 May 2005, pp. 35-36.

the very strict secrecy provisions should apply. This decision, he said, would be made at the conclusion of a period of questioning or detention. The decision would be made by an independent person and, therefore, both the public interest and national security could be protected.[36]

5.28 The AGD rejected these suggestions on a number of grounds. ASIO needed a strong, effective and workable regime. ASIO investigations were fast moving and complex. Alerting other members of a terrorist network could be dangerous. It was unclear who would or could make a determination of the status of information – the issuing authority or the prescribed authority. The suggestion was, therefore, impractical and unworkable.

> It would require ASIO to make an assessment, and then the independent party to make a determination, as to what information may or may not be disclosed at each step of the process. This would require additional procedural time while a person is being questioned or a break in the questioning to go back to the issuing authority, who may or may not be available. … It would add a further layer of administrative complexity … and detract from the objective of the regime which is to get important information in relation to a terrorism offence.[37]

5.29 The Attorney-General's Department did not accept that the provisions were a blanket prohibition of disclosure and pointed to both the limits on the time (subsections 34VAA(1) and (2)) and the permitted disclosures under the act (subsection 34VAA(5)).

5.30 The Committee notes, however, that these permitted disclosures are, with the exception of minors, almost all related to people involved in the questioning process. Other disclosures can be made with the permission of the prescribed authority or the Director-General of Security. [38] None appears to address the question of scrutiny.

5.31 The matters with which the ACC deals are likely to be as complex and serious as those facing ASIO. The secrecy provisions of the ACC have proved to be effective and manageable to implement. It is the Committee's view that the model of the ACC is worth consideration.

Unauthorised disclosure

5.32 Other issues raised concerned contradictions and absurdities in the operations of the secrecy provisions of the Act. One submission expressed

36 Williams transcript, public hearing 20 May 2005, p. 36

37 AGD supplementary submission no 102, p. 3.

38 AGD supplementary submission no 102, p. 5.

concern that the press may be used to print stories favourable to the government agenda through information leaked presumably from government sources, about the execution of warrants, raids, etc. In such a case, the person who becomes the subject of the media articles has no power to tell his side of the story because of the secrecy provisions. In a confidential submission, a lawyer who appeared for the subject of a warrant stated:

> … it appeared material was briefed or leaked to the media to create sensational stories about the matter, often with aspects that appeared favourable to the government agenda. … any person who seeks to correct such stories by giving the full information or even a proper explanation to the media would face the serious risk of prosecution under these provisions.[39]

5.33 This case occurred in 2003. At the time this material occurred in the media there were no secrecy provisions. It was cited by the Attorney-General's Department as illustrative of the need for 'strong and broad secrecy provisions'[40].

5.34 During the course of this review, a similar circumstance arose. Searches were conducted on houses in Sydney and Melbourne on 22 and 27 June 2005. There was considerable publicity given to the 'raids', photographs of the houses and significant details about the purposes of the search warrants. Subjects were described as 'known extremists'[41] or a 'radical Islamic network'[42] belonging to a 'cell'[43] and had 'attended training camps'[44] and talked about carrying out attacks similar to those overseas. They 'cased'[45] the Melbourne Stock Exchange. The sources of the information, directly quoted, were described variously as 'surveillance officers', 'authorities' 'counterterrorism agencies'. The reports contained considerable detail of operations – the fact that homes had been bugged, particular movements that had been under surveillance, the assessments and intentions of the authorities. However, most reports dissolved into 'plenty of talk … but no specific intent'[46] and insufficient evidence for charges.

5.35 The Inspector-General of Intelligence and Security, Mr Carnell, was also critical. He said:

39 Confidential submission.

40 AGD supplementary submission no 102, p.5.

41 Martin Chulov & Cameron Stewart, Australian, Thursday 23 June 2005

42 Keith Moor, Herald Sun, Friday 24 June 2005.

43 Keith Moor, Mark Dunn, Paul Anderson, Herald Sun, 23 and 24 June 2005

44 Martin Chulov , Australian, 23 June 2005 and Keith Moor, Herald Sun 23 June 2005.

45 Keith Moor, Herald Sun, Friday 24 June 2005.

46 Keith Moor, Herald Sun, Friday 24 June 2005.

> I'm uncomfortable with so much material appearing in the media, and I'm uncomfortable with the residence of one person alleged to have been caught up in these things appearing in the media. The first concern is … if these are matters of national security, they shouldn't be bandied about freely and in apparent detail in the media. … Secondly, it's a matter of intrusiveness and privacy rights. And the capacity of these people to respond is relatively limited, I think.[47]

5.36 The perceived lack of natural justice was a matter of concern to the Committee.

> They could be vilified in the media but have no chance under these current provisions to respond, unless of course the Director-General authorises some sort of response.[48]

> It was asserted publicly that they could speak – it was only a search warrant – but we know with regard to at least some of these people, and presumably the ones who are identified and located and whose houses were photographed, whose lives were put into a circumstance where they are now in the public mind seen as persons suspected of gross disloyalty to their own country, that they cannot respond … because it may be … an offence under a questioning regime which contemporaneously occurred.[49]

5.37 The information in 2005, similar to that in 2003, appeared to be 'a quite inspired set of leaks that were published on the same day in several different newspapers under different by-lines as exclusives, obviously put into the public domain by somebody in authority.'[50] ASIO's view was that the reporting of the raids was speculative rather than a correct representation of the events.

5.38 The Committee was informed that investigations were being carried out into the unauthorised disclosures.

Community support and welfare

5.39 The Islamic Councils and other Muslim welfare organisations also expressed concern that secrecy provisions hampered their work.

> It is our mission to assist members of the community in times of uncertainty or instability such as would be caused by detention under the Act, and to provide support to them and their family

47 Mr Ian Carnell, Dateline, 23 August 2005.

48 Transcript, classified hearing 8 August 2005, p.11.

49 Transcript, classified hearing 8 August 2005, p.13.

50 Transcript, classified hearing 8 August 2005, p.13.

> members. Yet how can we possibly provide assistance to our members when they are prohibited from approaching our organisation or anyone for help, counselling or other assistance?[51]

5.40 The two year period prohibiting a detained person from speaking to family, friends or employers about the detention was also of concern to many people.

5.41 A number of witnesses suggested that the prohibition on subjects stating where they were was not just potentially a difficulty in explaining themselves to employers and family, but reached farcical levels when the refusal to say had the effect of indicating what had happened to them anyway. Lawyers had similar problems in explaining their whereabouts in normal conversations with colleagues.[52]

5.42 In its submission to the Committee, the Attorney-General's Department told the Committee that the perception that detainees cannot inform their employer or family members is incorrect:

> [t]hese provisions are flexible enough to allow such contact in appropriate circumstances. … there are cases where it is against the objectives of the legislation for the employer or other people to be advised. But in cases where a warrant subject has good reasons for contacting their employer or another person and there are no genuine security concerns about such contact, the current provisions would allow such a disclosure to be permitted.[53]

5.43 The Committee understands that there are disclosures permitted under the Act. However, the problems and objections raised in this chapter deserve consideration. It is clear that the content of the questioning will need to be protected. The Committee accepts that there are circumstances where urgency and potential danger would and should prohibit any disclosure of the fact that a warrant exists. These circumstances would be those which would trigger a detention warrant. The Committee is satisfied that strict secrecy provisions might still apply to detention warrants. Any thorough re-consideration of secrecy surrounding detention warrants, however, can only be made in the light of the operation of detention warrants when, and if, they are used in future.

5.44 However, the Committee believes that changes to the secrecy regime for questioning-only warrants should be considered. It has asked ASIO and the AGD to consider ways in which a level of disclosure, particularly as to

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51 Mr A. Roude, Islamic Council of NSW Inc. submission no. 89, p.3.

52 Lawyers transcript, classified hearing 7 June 2005, p. 3.

53 AGD supplementary submission no.102, p.5.

the existence of the warrant, can be achieved. The Department declined the Committee's request but made the following suggestion:

> One possibility is to require the relevant decision-maker to take into account certain factors in deciding whether to permit a particular disclosure. These factors could include requiring the Director-General, the Attorney-General, and the prescribed authority to take into account the person's family and employment interests, the public interest, and the security risk of the information being disclosed. In addition to addressing the notification issue, requiring the decision-maker to take into account the public interest may assist a person who wishes to defend themselves where information is leaked about that person being questioned under an ASIO warrant.[54]

5.45 The Committee notes the views of the AGD.

Recommendation 17

The Committee recommends that:

- **consideration be given to amending the Act so that the secrecy provisions affecting questioning-only warrants be revised to allow for disclosure of the existence of the warrant; and**
- **consideration be given to shifting the determination of the need for greater non-disclosure to the prescribed authority.**

ASIO's public reporting on warrants

5.46 ASIO currently reports on the number of warrants and the total number of hours of questioning and detention in its Annual Report to the Parliament. These requirements were included as a result of this Committee's earlier recommendations on the original Bill.[55]

5.47 Despite this reporting, the level of concern in the community and among representative and interest groups about the length of questioning periods is significant and strong. A number of submissions indicated that there was a real perception in the community that ASIO now lacks accountability. The International Commission of Jurists and the Federation of Community Legal Services reflected the general view expressed in submissions:

54 AGD supplementary submission no.111, p.2.

55 Recommendation 11, *An Advisory Report on the Australian Security Intelligence Organisations Legislation Amendment (Terrorism) Bill 2002*, May 2002, p.xvi.

> Because of the [two year ban] there is little public scrutiny of the operation of the questioning powers. We have really no way of knowing what is going on.[56]
>
> The coercive nature of ASIO's special powers is exacerbated by the secrecy that surrounds them. The capacity of individuals and communities to express concern about the exercise of powers and to keep ASIO accountable is curtailed. … A system of open and accountable government is a pre-requisite for true and meaningful democracy. This system in turn requires that people are at liberty to divulge information regarding their treatment by government agencies to the media and to their communities.[57]

5.48 Public confidence in the performance of ASIO would be improved if more detailed reporting to the Parliament was provided. Information on the number and length of the questioning sessions within the total period of each warrant would assist. ASIO should also report whether there have been any formal complaints to the IGIS, the Ombudsman or appeals to the Federal Court. If charges are laid as a result of warrants issued, these should also be listed.

5.49 The IGIS has advised that he is satisfied that ASIO has adopted proper administrative practices to support the procedures. The information should therefore be readily available without any additional administrative burden.

5.50 It is the Committee's view that with increased powers, especially powers which infringe significantly on individual liberties, there are increased responsibilities for public accounting.

56 ICJ submission no. 60, p. 5.

57 Federation of Community Legal Services submission no.50, p. 10.

Recommendation 18

The Committee recommends that ASIO include in its Annual Report, in addition to information required in the Act under section 94, the following information:

- **the number and length of questioning sessions within any total questioning time for each warrant;**
- **the number of formal complaints made to the IGIS, the Ombudsman or appeals made to the Federal Court; and**
- **if any, the number and nature of charges laid under this Act, as a result of warrants issued.**