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Submission to the Senate Standing Committees on Legal and Constitutional Affairs

Inquiry into Independent National Security Legislation Monitor Repeal Bill 2014

1 This submission is made in the light of my experience of research into, and commentating upon, special laws against terrorism over a period of more than thirty five years. Further details of my research into review mechanisms can be found in my book, *Terrorism and the Law* (Oxford University Press, Oxford, 2011). A full list of my publications can be found at http://www.leeds.ac.uk/law/staff/law6cw/cv.pdf.

2 The proposal to terminate the office in Australia of the Independent National Security Legislation Monitor ('INSLM') would in my opinion be significantly counter-productive in terms of the effectiveness and fairness of anti-terrorism laws in Australia. Every country must make its own choices within its unique constitutional framework as to suitable mechanisms of accountability and governance. However, the first point which should be taken into account by the Senate Standing Committees on Legal and Constitutional Affairs is that the Australian INSLM model of independent review is more thoroughly and appropriately designed than equivalents elsewhere, including the system in the United Kingdom, which will now be described. This difference results from the fact that the Australian INSLM has had the benefit of various inquiries[1] as well as specific, comprehensive legislation.[2] Thus, it would be an imprudent waste of that time and effort to jettison such a well-designed system which actually represents one of the few aspects of Australian anti-terrorism legislation which can be said to be innovative and which garners international admiration.

3 By comparison, the independent review schemes under the anti-terrorism legislation in the

[1] See Security Legislation Review Committee, *Report of the Security Legislation Review Committee* (2006) 6; Parliamentary Joint Committee on Intelligence and Security, *Review of Security and Counter Terrorism Legislation* (2006) para 2.42 et seq.; *Report of the Clarke Inquiry into the Case of Dr Mohamed Haneef – Vol I* (2008) 16.
[2] *Independent National Security Legislation Monitor Act 2010* (Cth).

United Kingdom are muddled in design, though the efforts of the appointed Independent Reviewers of Terrorism Legislation (Lord Alex Carlile, QC, from 2001 to 2011, and David Anderson, QC, from 2011 onwards) have managed to overcome in practice many of the design flaws. Under the former Terrorism Act 2000, s 126, there was a duty to 'lay before both Houses of Parliament at least once in every 12 months a report on the working of this Act' but without explanation of its provenance. Six years later, the office of the Independent Review of Terrorism Legislation was specified by the TA 2006, s 36, but the details, powers, and reaction to review are still left largely unelaborated. As for the latter, it has recently been specified that on receiving a report, the Secretary of State must lay a copy before Parliament 'as soon as the Secretary of State is satisfied that doing so will not prejudice any criminal proceedings'.[3]

4 The remit of the United Kingdom reviews remains patchy and disjointed compared to the Australian model. Under s 36, the Terrorism Act 2000 is fully reviewed, as well as Pt I (only) of the Terrorism Act 2006. The Terrorism Prevention and Investigation Act 2011 is distinctly reviewed by the same Independent Reviewer. Next, a separate reviewer (Robert Whalley, CB, until 2014 and now David Seymour, CB) oversees the Justice and Security (Northern Ireland) Act 2007, but only for the special police and military powers under ss 21-32 and complaints against the military.[4] The Terrorism Act Independent Reviewer can also be commissioned to undertake thematic reviews and has reported on specific legislative proposals in 2005 and 2007, on the 2011 review of the *Prevent Strategy*, and on specific policing operations in 2009 and 2011. Following the Coroners and Justice Act 2009, s 117, the arrangements for the detention under special powers under the Terrorism Act 2000 of suspected terrorists must be reviewed; (if in force in exceptional circumstances), any

[3] The proviso was inserted by the PFA 2012, s 115(1), Sch 9, Pt 5, para 32(b).
[4] See s 40. Specified issues in the annual review can be requested but not specific reports: s 40(5).

extended detention going beyond 14 days must also be reviewed under the Protection of Freedoms Act 2012, s 58(3) as must any application of the (Draft) Enhanced Terrorism Prevention and Investigation Measures Bill (cl 6), assuming it is ever brought into force. However, there is currently no review specific to the Anti-terrorism, Crime and Security Act 2001, non-jury trials under the Justice and Security (Northern Ireland) Act 2007, or any aspects of the Counter Terrorism Act 2008. The Government has accepted that review should apply to the Anti-terrorism, Crime and Security Act 2001 and Counter Terrorism Act 2008,[5] but, without the resources, it has not in fact been undertaken. Only one out of four asset-freezing regimes is reviewed (under the Terrorist Asset Freezing etc Act 2010). The result is that some aspects of the United Kingdom anti-terrorism laws are kept under close, thorough and very helpful scrutiny, and the reports by the Independent Reviewers are unfailingly accurate, informative, and increasingly detailed. But some aspects are wholly ignored, even though they might be just as controversial and problematic (such as non-jury trials in Northern Ireland). A contrast may be made, for example, with the *Annual Report for 1 July 2012 to 30 June 2013* of the INSLM, in which he reviews the full gamut of terrorism financing measures in a way which raised many points of concern. Such a thorough review is beyond the remit of the United Kingdom reviewer, despite the importance of subjecting such extraordinary powers to full scrutiny.

5 Independent review systems, whether in Australia and the United Kingdom, are justified by the exceptional nature of the anti-terrorism laws, by their extent and complexity, and by the sensitivity of their implementation which often limits public transparency. It follows that particular strengths of the reviewers reside in their accumulation and depth of detail and reflection, their

[5] See Anderson, D., *Report on the Operation in 2011 of the Terrorism Act 2000 and Part I of the Terrorism Act 2006* (Home Office, London, 2012) para 1.34 and Home Office, Letter of 12 March 2013 p 1.

openness to representations not only from state agencies but also from NGOs, community groups and academic researchers, their willingness to explain briefings, observations, and assessments of the working of the legislation, and their ability to act as catalysts for public and Parliamentary debates. The systems in the United Kingdom show no signs of being hampered by lack of independence or information,[6] but limited time and resources curtail how many issues can be pursued in depth and also securing the attention of Parliament. Nor have there been any official complaints that the Independent reviewers have compromised security or have simply wasted public money by examining unimportant issues or baseless complaints. One commentator has been claimed that the impact of the system is 'negligible'.[7] However, this view is not shared by most other observers, including the author whose vantage point in recent years has been enhanced by being appointed in 2011 by the Home Office as Special Adviser to the Independent Reviewer. From my observations and research, one can point to several important positive indicators in process and substance arising from the work of the Independent Reviewers in the United Kingdom. In process, the facts disclosed by, and policy analysis of, the independent reviewers are regularly, and sometimes prominently, relied upon in governmental papers, in Parliamentary debates and reports, and in key judicial decisions. There have been 32 instances of judicial reliance (including two at European Court of Human Rights level). Prominent issues have been control orders and port controls. One instance or Parliamentary and executive reliance on the work of the Independent Reviewer arose during the passage of the Justice and Security Act 2013, whereby the Independent Reviewer was commissioned to conduct a survey of sensitive case files in order to assist the

[6] Anderson, D., 'The independent review of terrorism legislation' [2011] *European Human Rights Law Review* 544 at p 547.
[7] Blackbourn, J., 'Evaluating the Independent Reviewer of Terrorism Legislation' (2012) 65 *Parliamentary Affairs* 1 at p 10. For alternative views, see Anderson, D., 'The independent review of terrorism laws: searchlight or veil?' available as a working paper on SSRN http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2400656 and to be published as an article in *Public Law*, July 2014.

ongoing debates.[8] Next, the Independent Reviewer's negotiations with the Joint Committee on Human Rights helped to prompt a thorough review of Terrorism Prevention and Investigation Measures in the session 2013-14,[9] findings from which then fed into a Parliamentary debate in early 2014.[10] As for substantive results, the reviewers are accorded much discretion as to what to focus to take and the nature of the questions asked – including, as time passes, the 'necessity' for the legislation. On this basis, decisive impact might include the various recommendations by Lord Carlile in his Operation Pathway report, including access to mobile phones and notification of families, as well as his endorsement of a provisional time limit on control orders which was taken up in the Terrorism Prevention and Investigation Measures Act 2011. David Anderson can claim credit, *inter alia*, for: detailed changes within the Terrorist Asset Freezing etc Act 2010 regime (such as written statements explaining why designation has ended); the placing of proscription under the spotlight (aided by the House of Commons Home Affairs Committee); and pressuring the Home Office to conduct a review of port controls which has resulted in major changes in the Anti-Social Behaviour, Crime and Policing Act 2014. That most reports have been at most times supportive of the legislation and its implementation should not alone be a reason for denunciation by critics. Provided worthy information and explanations are furnished, Parliament and the government rightly have the final say, but the reviewers' watchdog function undoubtedly increases pressure on the state to provide adequate information and explanations. The investigation and reporting by an Independent Reviewer can also provide vital assurance and an outlet for communities and even families or individuals who feel threatened or abused by the application of special powers.

[8] Supplementary Memorandum to the Joint Committee on Human Rights, *The Justice and Security Green Paper* (2010-12 HL 286 / HC 1777) JS12A.
[9] Joint Committee on Human Rights, *Post-Legislative Scrutiny: Terrorism Prevention and Investigation Measures Act 2011* (2013-14 HL 113/HC1014).
[10] Hansard (HC) vol 574 col 221 21 January 2014.

6 Many of the shortcomings in the design of the United Kingdom system have been overcome by the more thorough engineering of the Australian equivalent system. The main problem in Australia seems to be a lack of political will to take the system seriously. The main fault can be attributed to the executive branch in Australia which has failed to provide the detailed responses to reports which are expected in the United Kingdom. This expectation does not mean that the government must accept the views of the reviewer – giving an account means engagement and explanation, not necessarily submission. Yet, special anti-terrorism laws must be viewed as a threat to democracy and liberty, and governments which treat them in this cavalier manner should be criticised rather than endorsed. However, the blame for not taking the reviewer seriously in Australia can also be attributed to Parliament, including the Parliamentary Joint Committee on Intelligence and Security. Independent reviewers must be accorded attention within the constitutional firmament if the system is to operate effectively since their independence demands that they are essentially outsiders without implementation powers.

7 Overall, the need for effective independent review cannot be doubted on the foregoing evidence. Its value has been confirmed by two august international authorities in recent years. One is the Eminent Jurists Panel on Terrorism which issued a report in 2009, *Assessing Damage, Urging Action*,[11] in which it firmly supported the need for adequate oversight mechanisms of anti-terrorism measures:

> 'One of the most serious shortcomings, reported from many jurisdictions, was the tendency of the authorities to broaden discretionary powers, without ensuring corresponding forms of

[11] (Geneva, 2009) p 43.

> accountability. States have often used the seriousness of risk – and the heightened level of fear in the general populace – to accrue more powers. Sometimes this increase in power might be objectively justified, but even in such cases, there is no obvious excuse for not increasing the role of oversight and accountability structures in monitoring the new situation. All the experience of the past is that, when the risk from terrorism is at its greatest, accountability is at its most necessary.'

The Eminent Jurists Panel on Terrorism consequently recommended 'in particular, reviewing and strengthening the mechanisms of governance, independent oversight, and complaints systems to ensure effective accountability, provide reassurance that any abuses that arise are expeditiously tackled and to counter impunity'.[12] Next the former UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, (Martin Scheinin) has also championed review mechanisms. Towards the end of his tenure in office, he compiled what he considered to be 'Ten areas of best practices in countering terrorism'.[13] His view was that:[14]

> 'If compelling reasons require the establishment for certain authorities of specific powers necessary to combat terrorism, (a) such powers should be contained in stand-alone legislation capable of being recognized as a unique exception to customary legal constraint;24 (b) the provisions under which such powers are established should be subject to sunset clauses and regular review ....

[12] *Ibid.* p 157.
[13] *Annual report to the Human Rights Council* (A/HRC/16/51, 22 December 2010).
[14] *Ibid.*, paras 17, 19.

> Many States include mechanisms for the regular review of counter-terrorism laws and practices ...The review should include (a) annual governmental review of and reporting on the exercise of powers under counterterrorism laws; (b) annual independent review of the overall operation of counter-terrorism laws; and (c) periodic parliamentary review. To be effective, it is important that independent review mechanisms be based on statutory terms of appointment, linked to the work of relevant parliamentary committees and accompanied by adequate resourcing. Review mechanisms should enable public consultation and should be accompanied by publicly available reports.'

This standard-setting exercise was followed up by the request from the Special Rapporteur for written submissions from Governments as to their implementation of the 'Ten areas of best practices in countering terrorism'. It is surprising, and in current circumstances ironic, to learn that Australia's report to the Special Rapporteur gave pride of place to the Independent National Security Legislation Monitor:[15]

> 'In March 2010, the Commonwealth Independent National Security Legislation Monitor Act 2010 was passed to establish a new Independent National Security Legislation Monitor. The Monitor will review the operation, effectiveness and implications of Australia's counter-terrorism and national security legislation to ensure it contains appropriate safeguards, remains consistent with Australia's international human rights obligations and remains necessary. The Monitor will be an independent statutory officer who will be required to report findings and recommendations regarding counter-terrorism and national security legislation to the Prime Minister each year. The Monitor will be appointed on the

[15] (A/HRC/16/51/Add.4, 2010) p 7.

Prime Minister's recommendation (in consultation with the Leader of the Opposition).'

What seems to have changed in Australia since these claims were submitted in 2010 is not the worth of independent review of anti-terrorism legislation but the political will to subject that legislation to proper scrutiny and to treat democracy and individual rights with the seriousness that they deserve. Australia has more extensive anti-terrorism legislation than many comparable countries, including, in several respects, the United Kingdom. The removal of the Independent National Security Legislation Monitor will be viewed by many as an endorsement of the faults and excesses in these laws and will do nothing to avert future mistakes and crises which then demand the appointment of *ad hoc* reviewers.[16]

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3 May 2014

[16] See especially *Report of the Clarke Inquiry into the Case of Dr Mohamed Haneef – Vol I* (2008)