

INDEPENDENT NATIONAL SECURITY LEGISLATION MONITOR REPEAL BILL 2014

SUBMISSION TO THE SENATE LEGAL AND CONSTITUTIONAL AFFAIRS COMMITTEE

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Introduction

1. I am the United Kingdom's Independent Reviewer of Terrorism Legislation ("IRTL"), having succeeded Lord Carlile QC in that part-time role in February 2011. The review of UK anti-terrorism legislation by an independent security-cleared person began at the height of the Troubles, in 1977, and has been conducted annually by the IRTL since 1984.¹ It has never, so far as I am aware, been suggested that the office is unnecessary or should be abolished. On the contrary, its value is frequently asserted both in Parliament and in the courts, as well as by NGOs, academics, community groups and Government.
2. The proposed abolition of the office of Independent National Security Legislation Monitor "INSLM" has been widely noted in the United Kingdom, and a number of Australian contacts have suggested that I respond to the Committee's call for evidence.
3. In accepting that suggestion, it should be very clear that I do not presume to offer advice on how the effectiveness, appropriateness and proportionality of Australian anti-terrorism law should best be ensured. These are matters which the Australian Parliament is uniquely equipped to decide. There are, however, many close similarities between the terrorism laws in our two countries; and though I was not involved in the process, I believe that the INSLM was in part modelled on the office of the IRTL. I hope that the Committee may be assisted by these brief observations, offered from the perspective of an office of independent oversight with similar aims and functions to that of the INSLM.

First observation: Special powers, exercised in secrecy, need independent review.

4. In robust democracies such as those of Australia and the United Kingdom, Parliament and the courts are of course primarily responsible for reviewing the actions of Government, police and other public authorities. The needless duplication of such functions by appointed persons or quangos, and the proliferation of red tape, are rightly resisted.
5. Review by an independent person may nonetheless be appropriate where potential conflicts between state power and civil liberties are acute, and yet information is tightly rationed. Commentators without access to national security secrets are not fully equipped to determine whether the balance between liberty and security has been correctly struck; and the UK experience at least is that those who *do* have access to those secrets – because they are associated with "the establishment" – will not necessarily have the time for thorough enquiry and are not universally perceived as critical, independent participants in the debate.

¹ For a recent account of the history, functions and influence of the Independent Reviewer, see D. Anderson, "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.

6. In the field of intelligence, both our countries have long recognised that parliamentary and judicial supervision, though vitally important, are not enough on their own. The Inspector-General of Intelligence and Security in Australia, and the Intelligence Commissioners in the UK, are witness to that. A public-facing role for a person of unquestioned independence who sees the classified information to which Ministers are privy is widely acknowledged to be both a check on abuse and a valuable means of reassuring the public.
7. The same logic applies to review of the counter-terrorism powers of Ministers, executive agencies and police: the responsibility of the IRTL and INSLM. Because of the exceptional nature of those powers, and the secrecy that surrounds their exercise, public curiosity is often tinged with suspicion and even fear. Hence the desirability of independent review. A person of unquestioned independence, who is known to have access to all relevant secret material, who travels and consults widely, and who publishes his conclusions in unredacted form, has a significant and useful role to play.

Second observation: Review may directly influence the authorities.

8. The IRTL and INSLM may legitimately hope that their conclusions will be considered with particular care by Government: for their assessments are informed by full knowledge both of the threat and of the capacity available to counter it. But it cannot be presumed that their recommendations will simply be adopted by Governments which have the same knowledge and which are additionally subject to constraints of a financial and political nature.
9. Although the UK Government has always replied to recommendations of the IRTL, it has by no means accepted all of them. My experience has been that relatively technical and unobtrusive proposals on such matters as the operation of asset-freezing legislation stand a better chance than those which would upset a domestic political consensus, or which could have significant ramifications for foreign policy. Politically controversial changes, including the reduction to two years of the maximum time that can be spent on the equivalent of a control order,² have however had their origins in the recommendations of the IRTL. There is also the possibility of indirect influence (third observation, below).
10. Direct influence may in addition be exerted privately and so undisclosedly, for example through meetings with civil servants, comments on a draft Code of Practice, discussions with intelligence chiefs or conversations with a Minister about the likely practical consequences of a clause being contemplated for inclusion in a Government Bill. Nor is such influence confined to Government; opposition spokespersons for example may quiz the IRTL in order to help inform their own policy positions, particularly on legal or operational issues with which they have little familiarity, and successive IRTLs have participated in the training of counter-terrorism police and custody visitors.

² Under the Terrorism Prevention and Investigation Measures (“TPIMs”) Act 2011, which replaces control orders with TPIMs.

Third observation: Indirect influence may come via the courts, Parliament and media.

11. Rejection of a recommendation by Government does not mean that the reviewer's work is wasted. In a complex democracy, recommendations may achieve results by other routes.
12. The influence of the IRTL cannot compare with that of Parliament or of the courts – and nor should it. But the IRTL may, independently of any influence that he may be able to exert in his own right, be able to contribute to the work of both. The UK experience has been that:
 - (a) Opinions reached on the basis of the IRTL's interviews and researches, crucially including access to classified material, can influence the conclusions of parliamentary committees – particularly those which are not privy to the same material – and the content of parliamentary debates.
 - (b) The IRTL's ability to look at the operation of anti-terrorism laws in a non-contentious atmosphere, and without restricting himself to such cases as may happen to be brought and such facts as the parties to those cases may have chosen to place in evidence, can similarly be of assistance to the courts in forming or confirming their own conclusions.
13. Some detailed examples of such indirect influence are given in the working paper referred to at footnote 1. As there recorded, more than 30 court cases since 2003 have referred to statistics, evidence or opinions published by the IRTL, sometimes giving them considerable weight. During recent parliamentary debates on the proposals for dealing with national security evidence in civil proceedings, 31 parliamentarians made a total of 87 references to the evidence of the IRTL. That evidence was publicly credited by both Government and Opposition for influencing their approach to the Bill that became the Justice and Security Act 2013.
14. Nor is the influence of the IRTL restricted to public authorities, politicians and judges. Lord Carlile in the UK pioneered the use of mass media in order to reach large numbers of people who are interested or potentially interested in the reach of anti-terrorism law. Though lacking his political background I have attempted to follow suit, in particular by assisting journalists off the record to achieve accuracy in their reporting and by giving interviews to current affairs programmes on days when my reports are published or terrorism is in the news. An unexpected by-product of this has been to increase my profile with Members of Parliament, with whom I am always willing to discuss terrorism-related issues. I appear from time to time on channels aimed at particular ethnic or religious communities, speak to universities, schools and community groups, and maintain an active website and twitter account.³ The consistent objective is to inform the public and political debate on terrorism and civil liberties.

³ <https://terrorismlegislationreviewer.independent.gov.uk/>; @terrorwatchdog.

Fourth observation: An independent reviewer can reassure as well as warn.

15. Most of the IRTL's recommendations, like those of the INSLM, have been for change. Evidently, an important part of the function of both offices is to warn of ways in which the public could be better protected, or in which their liberties have been needlessly restricted by the law or by its heavy-handed operation.
16. That is as it should be. Tensions between state power and individual freedoms are at their highest in the national security field. Because much of what is done must be kept secret, there is a degree of understandable suspicion towards the authorities and their motives, especially but not only in communities that may perceive themselves as targets. The IRTL must be sensitive to this, and alert to the possibility that powers are being overused.
17. It would be quite wrong however to see the office as no more than an irritant to Government. In well-functioning democracies, policy-makers and public servants generally act from the best of motives, and fair results are the norm. In the circumstances, there can be value not only in pointing out the authorities' mistakes, but in drawing attention to those areas where the law works well and is applied in a responsible and considerate manner. Where praise is merited and received, the Government benefits from the presence of the IRTL, for example in its dealings with international bodies. More intangibly, the IRTL may help provide a measure of reassurance to the population at large.

Fifth observation: The INSLM is a source of international respect.

18. Unlike my previous observations, which are grounded in the experience of the IRTL, my last one relates specifically to the INSLM.
19. The repeal Bill was introduced shortly after I had referred to the INSLM Act 2010, in oral evidence to a UK parliamentary committee, as a model for the establishment of independent statutory review.⁴ The 2010 Act indeed has superior qualities in a number of respects to the more *ad hoc* arrangements that govern my own office. In my opinion it establishes a global benchmark for the independent supervision of counter-terrorist activity.
20. More substantively, the reports of the INSLM have secured an appreciative readership not only in the UK but across the English-speaking world. I have discussed the UK-Australian model of independent review with officials, NGOs and others in Denmark, the Netherlands, Israel, Canada and the United States. Some have shown interest in that model; all have respected the openness and good faith of two Governments that have been willing to appoint a wholly independent person, give that person access to classified material and require him to report his conclusions to Parliament and to the public. Their interest, respect, and even admiration have been greater for the fact that this model is not unique to one country.

⁴ Evidence to Parliamentary Joint Committee on the Draft Modern Slavery Bill, 6 March 2014: <https://terrorismlegislationreviewer.independent.gov.uk/joint-committee-on-draft-modern-slavery-bill-2014/>

21. On a personal note, I will miss the considered and perceptive observations of the current INLSM, as will the many commentators with whom I have discussed them. They bring Australian thinking on globally important issues to an international audience, and have a respected place in academic and governmental debate on anti-terrorism powers in the United Kingdom and elsewhere.

Conclusion

22. Many of the points made in this submission are amplified in the working paper referred to at footnote 1, above. I am grateful to have had the opportunity to contribute to the Committee's work, and would be happy to assist in any other way that it would find helpful.

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