

Chapter 1

Introduction

The inquiry

1.1 On 25 June 2009 the Senate, on the recommendation of the Selection of Bills Committee (Report No. 10 of 2009), referred the National Security Legislation Monitor Bill 2009 (the bill) to the Finance and Public Administration Legislation Committee (the committee) for inquiry and report by 7 September 2009.

1.2 The inquiry was advertised in *The Australian* and through the Internet. The committee invited submissions from the Australian Government and interested organisations and individuals.

1.3 The committee received 15 public submissions. A list of organisations that made public submissions to the inquiry, together with other information authorised for publication, is at Appendix 1.

1.4 The committee held a public hearing in Canberra on 14 August 2009. Appendix 2 lists the names and organisations of those who appeared. Submissions and the Hansard transcript of evidence may be accessed through the committee's website at www.aph.gov.au/senate/committee/fapa_ctte/index.htm.

The bill¹

1.5 The bill establishes the statutory position of the National Security Legislation Monitor (the Monitor). The standing function of the Monitor will be to review the operation, effectiveness and implications of the counter-terrorism and national security legislation and report his or her comments, findings and recommendations to the Prime Minister. In addition, the Monitor must consider whether Australia's counter-terrorism and national security legislation contains appropriate safeguards for protecting individual rights, and whether the legislation remains necessary.

1.6 In reviewing the legislation, the Monitor must give particular emphasis to that legislation which has been used or considered in the previous financial year to ensure that the Monitor reviews the laws which have been used in a practical scenario. In conducting the review, the Monitor must have regard to Australia's international obligations as well as the agreed national counter-terrorism arrangements between the Commonwealth, states and territories.

1 Much of this section is based on the Explanatory Memorandum, p. 1.

1.7 The Monitor will be able to initiate his or her own reviews. The Prime Minister may also refer matters relating to counter-terrorism or national security to the Monitor for report directly back to the Prime Minister.

1.8 The Monitor must also prepare, and give to the Prime Minister, an annual report on the performance of his or her statutory functions. An edited report will be tabled in each House of Parliament.

1.9 The bill provides the Monitor with the power to compel the giving of sworn testimony, to hold both public and private hearings and to summon a person and to compel the production of documents and things. These powers are supported by criminal offences for conduct in the nature of contempt.

1.10 The bill requires that before a recommendation on appointment is made to the Governor-General, the Prime Minister must consult with the Leader of the Opposition.

1.11 The Minister, in the second reading speech, noted that:

The proposals in this Bill reflect the Government's commitment to ensure that Australia has strong counter-terrorism laws that protect the security of Australians, while preserving the values and freedoms that are part of the Australian way of life.²

Background

National security legislation

1.12 In its December 2006 report, the Parliamentary Joint Committee on Intelligence and Security (PJCIS) observed that:

Since 2001, a series of terrorist events have served as a reminder of the risk and consequences of terrorist violence. Australia is not immune from these influences... [The PJCIS has] concluded that a special terrorism law regime is justifiable and forms an important, although not exclusive, tool in Australia's counter-terrorism strategy...

It is clear that Australia now has a highly developed legal framework and stronger institutional capacities to deal with the threat of terrorism. The terrorism law regime is, essentially, a preventive model, which differs in many respects from our earlier legal traditions. Bearing in mind the significance of these changes and the importance of terrorism policy into the future, we have recommended the appointment of an Independent Reviewer to provide comprehensive and ongoing oversight. The Independent Reviewer, if adopted, will provide valuable reporting to the

2 Senator the Hon Penny Wong, Minister for Climate Change and Water, *Senate Hansard*, 25 June 2009, p. 4260.

Parliament and help to maintain public confidence in Australia's specialist terrorism laws.³

1.13 The PJCIS also noted that since 2001 the Parliament has passed over thirty separate pieces of legislation dealing with terrorism and national security that extend the criminal law and expand the powers of intelligence and law enforcement agencies. This has coincided with the approval of very significant budget increases to fund new security measures. The PJCIS noted that the new terrorism law regime carries heavy penalties and introduces significant changes to the traditional criminal justice model.⁴

Calls for an independent reviewer

1.14 A number of inquiries into different aspects of terrorism and security legislation have recommended the establishment of an independent reviewer of national security legislation. The June 2006 report of the Security Legislation Review Committee, (the Sheller Committee, which was chaired by the Hon Simon Sheller AO QC), found that it was important that the ongoing operation of security legislation be closely monitored, and that Australian governments have an independent source of expert commentary on the legislation. The Sheller report discussed a number of models of future review including the appointment of an independent reviewer.⁵

1.15 In December 2006 the PJCIS noted that post enactment review of national security legislation had been sporadic and fragmented with a focus on specific pieces of legislation rather than the terrorism law regime as a whole. The PJCIS concluded that there was a need for an integrated approach to ensure ongoing monitoring and refinement of the law where necessary and recommended that the government appoint an Independent Reviewer of terrorism law in Australia. It was further recommended that the Independent Reviewer be free to set his or her own priorities, have access to all necessary information and that the Independent Reviewer report annually to the Parliament.⁶

1.16 In the 2007 report on its inquiry into the proscription of 'terrorist organisations' under the Australian Criminal Code, the PJCIS reiterated its view that an Independent Reviewer would provide a more integrated and ongoing approach to monitor the implementation of terrorism law in Australia.⁷

3 Parliamentary Joint Committee on Security and Intelligence, *Review of Security and Counter Terrorism Legislation*, December 2006, p. vii.

4 Parliamentary Joint Committee on Security and Intelligence, *Review of Security and Counter Terrorism Legislation*, December 2006, p. 21.

5 Security Legislation Review Committee, *Report of the Security Legislation Review Committee*, June 2006, p. 6.

6 Parliamentary Joint Committee on Security and Intelligence, *Review of Security and Counter Terrorism Legislation*, December 2006, p. 22.

7 Parliamentary Joint Committee on Security and Intelligence, *Inquiry into the proscription of 'terrorist organisations' under the Australian Criminal Code*, September 2007, p. 52.

1.17 More recently, the Hon John Clarke QC, in his November 2008 report on the case of Dr Mohamed Haneef, recommended that consideration be given to the appointment of an independent reviewer of Commonwealth counter-terrorism laws. The Clarke report supported:

..the notion of ensuring that the system is balanced between the need to endeavour to prevent terrorism and the need to protect an individual's rights and liberties. An independent reviewer could play an important part in striking this necessary balance.⁸

1.18 In October 2008, the Senate Legal and Constitutional Affairs Committee reported on its inquiry into a private Senators' bill; the Independent Reviewer of Terrorism Laws Bill 2008 [No. 2]. The bill sought to establish an 'Independent Reviewer of Terrorism Laws' to ensure ongoing and integrated review of the operation, effectiveness and implications of laws in Australia relating to terrorism. In its report the committee gave in-principle support to the bill and recommended a range of amendments to the bill including that the role of Independent Reviewer be carried out by a panel of three people with relevant expertise, whose terms of service be staggered where possible; and that, in addition to reporting to Parliament on inquiries undertaken by the Independent Reviewer in respect of terrorism legislation, an Annual Report on the activities of the Independent Reviewer is tabled in Parliament.⁹ The bill was passed in the Senate on 13 November 2008 and was introduced into the House of Representatives on 24 November 2008.

1.19 On 23 December 2008, the Attorney-General, the Hon Robert McClelland MP announced the establishment of the National Security Legislation Monitor:

The Government will establish a National Security Legislation Monitor to review the practical operation of counter-terrorism legislation on an annual basis. The Monitor will be an independent statutory office within the Prime Minister's portfolio and will report to Parliament... The Government will progress this proposal as a priority.¹⁰

Proposed amendments to National Security Legislation

1.20 On 12 August 2009, the Attorney-General released a discussion paper on proposed legislative reforms to Australia's counter-terrorism and national security legislation.¹¹ Addressing the House of Representatives the Attorney-General stated:

8 The Hon John Clarke, *Report of the Inquiry into the Case of Dr Mohamed Haneef, Volume One*, November 2008, pp 255–56.

9 Senate Constitutional and Legal Affairs Committee, *Independent Reviewer of Terrorism Laws Bill 2008 [No. 2]*, October 2008, p. ix.

10 The Hon Robert McClelland MP, Attorney-General for Australia, 'Comprehensive Response To National Security Legislation Reviews', Press Release, 23 December 2008.

11 The Hon Mr Robert McClelland MP, Attorney-General, *House of Representatives Hansard*, 12 August 2009, pp 73–74.

The amendments proposed in this discussion paper seek to achieve an appropriate balance between the government's responsibility to protect Australia, its people and its interests and to instil confidence that our laws will be exercised in a just and accountable way.¹²

1.21 The Attorney-General noted that the release of the discussion paper was a separate process to the establishment of the Monitor, which will 'be independent and will consider whether legislation adequately protects public safety, without reducing cherished public freedoms.'¹³

12 The Hon Mr Robert McClelland MP, Attorney-General, *House of Representatives Hansard*, 12 August 2009, p. 73.

13 The Hon Mr Robert McClelland MP, Attorney-General, *House of Representatives Hansard*, 12 August 2009, p. 73.

