

Australian Greens Additional Comments

National Security Legislation Monitor

1.1 The Australian Greens support the establishment of an office to review the operation of the many pieces of interlocking legislation dealing with offences relating to terrorism.

1.2 This function is essential to address the 30 new laws and more than 80 amendments to the Criminal Code and the Crimes Act introduced in the name of the 'war on terror', which dramatically increased state powers of surveillance and detention in the absence of the countervailing protection of a bill of rights.

1.3 This office has the potential to play an essential accountability role in making clear to the Government and the broader public whether these laws are necessary, proportionate and effective at meeting their stated objective. It is therefore an alarming sign of the Government's priorities that the office will be headed by a part time position with only two staff, with scant reporting obligations, and the ability for the executive to sanitise those reports which do become public. This is against the backdrop of \$8 billion forecast spending on billion national security out to 2012 for rapidly expanding agencies operating without many of the accountability checks which apply to other Commonwealth agencies. It is hoped that at a bare minimum this Committee's recommendations will be heeded and that in the course of the Senate debates we can set a more appropriate mandate for this office.

1.4 The National Security Legislation Monitor Bill and the inquiry into it has benefited from several previous Private Members and Senator's Bills and inquiries regarding the establishment of a mechanism to review Australia's anti-terrorism laws. The UK included such a review mechanism when anti-terrorism laws were passed there. Australia did not follow this model, although such an office has been recommended by:

- the Security Legislation Review Committee chaired by the Hon Sheller AO QC, June 2006;
- Parliamentary Joint Committee on Intelligence and Security in Dec 2006 and again in 2007;
- Senate Legal and Constitutional Committee in October 2008;
- The Senate through passage of a Private Senator's Bill in November 2008;
- The government's response to various reviews issued on 23 December 2008.

1.5 The enactment of some of the terror laws resulted in significant departures from established principles of Australian law and should be repealed rather than reviewed. This review mechanism should be run in parallel with efforts to repeal the more egregious components of the terror laws as outlined in the *Anti-Terrorism Laws Reform Bill (2009)*.

There are some laws which are so extreme, so repugnant, redundant or otherwise inappropriate that should be abolished and do not deserve the dignity of being subject to review. These laws include those that allowed the Haneef scandal to unfold, and include excessive 'dead time', undue surveillance and invasion of privacy. The laws relating to sedition and the 'reckless possession of a thing' are also amongst the laws that should be abolished.

1. Resources

1.6 The Committee's fourth recommendation draws attention to the fact that the government propose one part time Reviewer with two support staff. Given that the reviewer is to conduct analysis of the array of complex terror laws, review them every time they are used, or when the PM requests, or when the Reviewer so chooses, this is clearly a very modest staffing arrangement. As the demands on the Monitor increase so too should resources. The Monitor will require resources to facilitate advice from high-level and often very expensive legal minds, and means to travel to hold hearings and attend gatherings to report on the activities of the office.

2. Independence

1.7 The independence of this office is vital if this exercise is to increase public confidence in balanced terror laws, which is why the Greens have argued that it should contain the word 'independent' in the title. The Greens would prefer the term Independent Reviewer of Terrorism Laws, not only because the word 'monitor' evokes high school scenarios, but also because the laws should be reviewed and changed, not minded.

1.8 The Greens believe that the Explanatory Memorandum for this Bill should clarify that the Monitor is empowered to vet and appoint staff. Evidence provided by the Department of Prime Minister and Cabinet that they already had specific staff "in our minds" for the Monitor's office, does not bode well for the independence of the Monitor, thus clarification is needed in the Explanatory Memorandum.

3. Human Rights

1.9 In many respects this exercise is about human rights, an attempt to answer the enduring question about whether the anti-terrorism laws strike a balance between security and the protection of civil and political rights. The Australian Greens have consistently sought to link the efforts of this review mechanism to Australia's human rights obligations under the Treaties and Covenants we have signed, and also believe that the Human Rights Commissioner should be able to make references to the Monitor in addition to the Parliamentary Joint Committee on Intelligence and Security.

4. Scope

1.10 The scope of what the Reviewer can examine needs to be clarified by the government. It is essential that the Reviewer is not unduly limited to having regard to related and consequential impacts on legislation that may not at first appear to be strictly related to national security legislation, but which are considered relevant and utilised in connection with terrorism offences. In addition, we propose that the Monitor / Reviewer be given a specific mandate to examine whether the terror laws have been used in other contexts, whether they be industrial, environmental or organised crime contexts, to identify whether 'scope creep' is occurring.

5. Penalties

1.11 It is appropriate that the Monitor has been conferred powers to compel people to a hearing and to produce documents and information. However, all of the penalties for failure to comply do not apply if the person has a "reasonable excuse" which includes not having to "answer a question, produce a document or thing or provide information on the grounds that to do so might tend to incriminate the person or expose the person to a penalty." This represents a gaping hole in possible sources of evidence the Reviewer might draw from.

6. Limitations on the Reviewer

1.12 The Reviewer is not to review the priorities or use of resources by agencies. This poses a difficulty when the means to implement the laws and the safeguards within institutions are very much pertinent to the evaluation/assessment task assigned to the Reviewer. The Reviewer is also not to consider any individual complaints. This becomes blurred when each individual use of the laws triggers a review. High profile terrorism cases will invariably link the Monitor's work to the cases of individuals.

7. Annual Report

1.13 It should be noted that there is a lengthy list of things that may not be referred to in the annual report (in Section 29 (3) a, b, c, d, and e), each beginning with *any information* that might prejudice national security, the function of any agency, that would endanger a person's safety, from a document or deliberations of Cabinet of a Committee of the Cabinet or Commonwealth or State, about which the Monitor has to get advice from Minister/s. Several of these provisions can be interpreted very broadly, making for possibly extremely brief annual reports. It is essential that the annual reports are not vetted in advance by Ministers including the Prime Minister; such editing as is necessary to remove operationally sensitive information should be undertaken by the Monitor – not the Government - prior to the reports being tabled in Parliament.

8. Prime Minister's Referrals

1.14 In addition to making references, the Prime Minister can currently determine the order in which the Reviewer attends to the workload, which could overburden and divert the efforts of the office. For this reason, the number of references by the Prime Minister and their subject should be made public.

9. Reporting

1.15 As the bill stands currently, the only reporting obligations of the Monitor to Parliament may be heavily edited annual report. We believe it is essential that the Monitor be required to table a report (subject to the same conditions described in 8, above) with the Government required to provide a response within a period of 6 months.

1.16 The laws that were hastily created in Australia following the crimes of 11 September must be reviewed to determine which merit retention and modernisation. Mistakes were inevitable when the government of the day did not allow the parliament to debate each bill individually even though the anti-terrorism legislative package constituted some of the most dramatic changes ever made to Australia's security and legal environment.

1.17 Two hundred pages of legislation and explanatory memoranda were introduced into the House of Representatives at 8pm and were expected to be debated at 12 noon the next day, leaving entirely inadequate time for review and analysis. Amendments were made available to the Senate less than 24 hours before the commencement of debate in that Chamber, effectively stripping the parliament of the time necessary to ensure that the laws were adequate to prevent, deter and pursue terrorists while ensuring that any limits on free speech or association struck an acceptable balance. The parliament was set up to fail, and fail it did. While the establishment of the Reviewer's office is overdue, proper time should be taken to consider amendments so that this office can enjoy cross-party support.

1.18 The Australian Greens are deeply committed to the principle of nonviolence. Nonviolence is one of the four interconnecting pillars that are the foundation of our party's policy and practice. We condemn the violent crime of terrorism, and view nonviolence as a creative, planned, positive force to resolve conflict, believing it to be the best way to transform oppressive power, symbols and behaviour. While some leaders and commentators deeply fear the accusation of being "soft on terrorism" believing it to be corrosive of their public perception, standing and masculinity, the Greens believe that to maintain the anti-terrorism laws in their current form is corrosive of democracy itself and the rule of law upon which it is based. The benefit of hindsight and the passage of time have revealed many of the laws as irrational, unworkable or extreme. It is high time they were reviewed.

Senator Scott Ludlam