



public interest
ADVOCACY CENTRE LTD

**A step in the human rights direction:
Submission on the National Security Legislation
Monitor Bill 2009**

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1. Introduction

1.1 The Public Interest Advocacy Centre

The Public Interest Advocacy Centre (PIAC) is an independent, non-profit law and policy organisation that works for a fair, just and democratic society, empowering citizens, consumers and communities by taking strategic action on public interest issues.

PIAC identifies public interest issues and, where possible and appropriate, works co-operatively with other organisations to advocate for individuals and groups affected. PIAC seeks to:

- expose and redress unjust or unsafe practices, deficient laws or policies;
- promote accountable, transparent and responsive government;
- encourage, influence and inform public debate on issues affecting legal and democratic rights;
- promote the development of law that reflects the public interest;
- develop and assist community organisations with a public interest focus to pursue the interests of the communities they represent;
- develop models to respond to unmet legal need; and
- maintain an effective and sustainable organisation.

Established in July 1982 as an initiative of the Law Foundation of New South Wales, with support from the NSW Legal Aid Commission, PIAC was the first, and remains the only broadly based public interest legal centre in Australia. Financial support for PIAC comes primarily from the NSW Public Purpose Fund and the Commonwealth and State Community Legal Services Program. PIAC also receives funding from the NSW Government Department of Water and Energy for its work on utilities, and from Allens Arthur Robinson for its Indigenous Justice Program. PIAC also generates income from project and case grants, seminars, consultancy fees, donations and recovery of costs in legal actions.

1.2 PIAC's work on anti-terrorism legislation

PIAC has repeatedly expressed strong reservations about the counter terrorism and national security legislation that has been introduced in Australia since 2001.¹

¹ See for eg, Patricia Ranald, *Submission to the Inquiry into the Security Legislation Amendment (Terrorism) Bill 2002 [No 2] and Related Bills* (2002) <http://www.piac.asn.au/publications/pubs/antiterr_20020924.html> at 7 August 2009; Annie Pettitt, *Submission to the Inquiry into the Anti-Terrorism Bill 2004* (2004) <<http://www.piac.asn.au/publications/pubs/PIACATsubmission%20April04.pdf>> at 20 July 2009; Annie Pettitt, *Supplementary Submission to the Inquiry into the Anti-Terrorism Bill* (2004) <[http://www.ag.gov.au/agd/WWW/rwpattach.nsf/VAP/\(153683DB7E984D23214BD871B2AC75E8\)~04.05-Supp+Sub+re+Anti-Terror+Bill1.PDF/\\$file/04.05-Supp+Sub+re+Anti-Terror+Bill1.PDF](http://www.ag.gov.au/agd/WWW/rwpattach.nsf/VAP/(153683DB7E984D23214BD871B2AC75E8)~04.05-Supp+Sub+re+Anti-Terror+Bill1.PDF/$file/04.05-Supp+Sub+re+Anti-Terror+Bill1.PDF)> at 20 July 2009; Annie Pettitt and Robin Banks, *Submission to the Senate Legal and Constitutional Committee Inquiry into the Anti-Terrorism Bill (No 2)* (2004) <http://www.piac.asn.au/publications/pubs/submission_anti-terrorism_bill.pdf> at 20 July 2009; Annie Pettitt and Robin Banks, *Submission to Parliamentary Joint Committee on ASIO, ASIS and DSD Review on the listing of Al Qa'ida, Jemaah Islamiyah, the Abu Sayyaf Group, the Armed Islamic Group, the Jamiat ul-Ansar, the Salafist Group for Call and Combat as terrorist organisations under section 102.1A of the Criminal Code* (2005) <<http://www.piac.asn.au/publications/pubs/Submission%20to%20PJC%20re%20terrorism%20groups.pdf>> at 20 July 2009; Robin Banks and Jane Stratton, *Submission to the Parliamentary Joint Committee on ASIO, ASIS and DSD Review of Division 3, Part III of the ASIO Act 1979 (Cth) – Questioning and Detention Powers* (2005) <<http://www.piac.asn.au/publications/pubs/Submission%20to%20PJC%20on%20ASIO%20question%20detain>

The rationale for the significant range of 'national security' legislation at both state and federal level has been that, as a result of the attacks in the USA, Bali and London, we are now living in a 'new security environment'. PIAC has in the past, and continues to challenge this characterisation.

However, even if we are to accept that there is a 'new security environment', this does not, in PIAC's view, justify the measures that have been introduced. PIAC continues to have significant concerns about the constitutionality of various aspects of the counter terrorism regime, the lack of necessity and proportionality for these measures, the extent to which the legislation complies with Australia's obligations under international human rights treaties including the International Covenant on Civil and Political Rights² and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment³, and its potential to lead to discrimination and vilification. Furthermore, PIAC has consistently argued that the counter terrorism legislation suffers from a lack of transparency and fails to establish adequate mechanisms of accountability, oversight and review. PIAC is not alone in raising these concerns.

The need for an independent reviewer who is able to regularly and comprehensively review the national security legislation has, over the last few years, gained general acceptance in Australia. For example, the Security Legislation Review Committee chaired by the Hon Simon Sheller QC (**Sheller Committee**) recommended that the government 'have an independent source of expert commentary on the legislation'.⁴ Similarly, the Parliamentary Joint Committee on Intelligence and Security (**PJCIS**) in its December 2006 report recommended

[pdf](#)> at 20 July 2009; Robin Banks & Jane Stratton, *Submission to the Senate Legal and Constitutional Committee on the inquiry into the provisions of the National Security Information Legislation Amendment Bill 2005* (Cth) (2005) <<http://www.piac.asn.au/publications/pubs/Submission%20on%20the%20National%20Security%20Information%20Legislation%20Amendment%20Bill.pdf>> at 20 July 2009; Robin Banks & Jane Stratton, *Supplementary submission – Review of Division 3, Part III of the ASIO Act 1979* (Cth)(2005) <<http://www.piac.asn.au/publications/pubs/supplementary.pdf>> at 20 July 2009; Robin Banks and Jane Stratton, *Submission to the Parliamentary Joint Committee on ASIO, ASIS and DSD on the relisting of Hizballah External Security Organisation, HAMAS' Izz al-Din al-Qassam Brigades; Lashkar-e-Tayyiba; and the Palestinian Islamic Jihad* (2005) <http://www.piac.asn.au/publications/pubs/terrorgsub_20050729.html> at 20 July 2009; PIAC, *Submission to the Senate Legal and Constitutional Legislation Committee on the Anti-Terrorism Bill (No 2) 2005* (Cth) (2005) <http://www.piac.asn.au/publications/pubs/anti-terrorism_bill.pdf> at 20 July 2009; Robin Banks, *Inquiry into the provisions of the Anti-Terrorism Bill (No 2) 2005: Response to Questions on Notice and Transcript for proofing* (2005) <<http://www.piac.asn.au/publications/pubs/Senate%20re%20questions%20on%20notice.pdf>> at 20 July 2009; Robin Banks and Vijaya Rahman, *Review of the Listing Provisions of the Criminal Code, Submission to the Parliamentary Joint Committee on Intelligence and Security* (2007) <<http://www.piac.asn.au/publications/pubs/07.01.15%20PIAC%20Sub-PJCIS.pdf>> at 20 July 2009; Robin Banks and Natasha Case, *The case for repeal: Submission to the Review of Parts 2A and 3 of the Terrorism (Police Powers) Act 2002(NSW)* (2007) <http://www.piac.asn.au/publications/pubs/sub2007071_20070703.html> at 20 July 2009.

² International Covenant on Civil and Political Rights, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ratified by Australia on 13 August 1980 (entered into force for Australia on 13 November 1980, except article 41, which entered into force for Australia on 28 January 1993).

³ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) ratified by Australia on 8 August 1989 (entered into force for Australia on 7 September 1989, except articles 21 and 22, which entered into force for Australia on 28 January 1993).

⁴ Security Legislation Review Committee in the House of Representatives, Parliament of Australia (**the Sheller Committee**), *Report of the Security Legislation Review Committee* (2006) <[http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/\(03995EABC73F94816C2AF4AA2645824B\)~SLRC+Report+Version+for+15+June+2006\[1\].pdf/\\$file/SLRC+Report+Version+for+15+June+2006\[1\].pdf](http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(03995EABC73F94816C2AF4AA2645824B)~SLRC+Report+Version+for+15+June+2006[1].pdf/$file/SLRC+Report+Version+for+15+June+2006[1].pdf)> at 28 July 2009, 6.

the appointment of an independent reviewer.⁵ Similarly, PIAC supports the creation of an independent reviewer who is able to report to the Commonwealth Parliament about Australia's counter-terrorism legislation.

⁵ Parliamentary Joint Committee on Intelligence and Security (**PJCIS**) Commonwealth Parliament, *Review of Security and Counter Terrorism Legislation* (2006), <<http://www.aph.gov.au/house/committee/pjcis/securityleg/report.htm>> at 28 July 2009, 21-22.

2. General comments about the bill

PIAC welcomes the opportunity to make a submission on the National Security Legislation Monitor Bill 2009 (the **Bill**).

While there has been a number of reviews and inquiries into the national security legislation⁶, PIAC is of the view that these reviews have tended to be fragmented and somewhat ad-hoc. PIAC considers that it is vital that there is an independent reviewer of the national security legislation who is able to undertake inquiries into the legislation on a regular and continuous basis. PIAC further submits that the Monitor should view his/her functions in broad terms and consider the cumulative effect of the counter-terrorism legislation on Australian communities as well as reviewing the terms of the legislation itself.

PIAC regards the creation of an independent monitor as the first step towards ensuring that existing anti-terrorism legislation complies with Australia's human rights obligations and improving the transparency and accountability of Australia's counter-terrorism measures. Other commentators and committees have also suggested that the creation of the Monitor will provide an impartial review mechanism and improve public confidence.⁷

PIAC particularly supports the references in the Bill to Australia's international obligations, including its human rights obligations.⁸ PIAC is also pleased that the Bill allows the Monitor to consider whether the anti-terrorism legislation remains necessary.⁹

2.1 A national human rights framework

The proposals for the creation of a Monitor contained in the Bill are closely modelled on the United Kingdom Independent Reviewer.

However, as PIAC has previously indicated¹⁰, there is a danger in using comparative models without transposing the entire framework within which those models operate.

⁶ See for example Parliamentary Joint Committee on ASIO, ASIS and DSD, Parliament of Australia, *Review of Division 3 Part III of the ASIO Act 1979 - Questioning and Detention Powers* (2005) <http://www.aph.gov.au/house/committee/pjcaad/asio_ques_detention/report.htm> at 30 July 2009; Sheller Committee report, above n 4; PJCIS Report, above n 5; Australian Law Reform Commission, *Fighting Words: A Review of Sedition Laws in Australia*, ALRC Report 104 (2006) <<http://www.austlii.edu.au/au/other/alrc/publications/reports/104/>> at 30 July 2009; Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Inquiry into the Terrorist Organisation Listing Provisions of the Criminal Code Act 1995* (2007), <<http://www.aph.gov.au/house/committee/pjcis/proscription/report.htm>> at 30 July 2009.

⁷ See for example, PJCIS, *Inquiry into the Terrorist Organisation Listing Provisions*, above n 6, 52; Human Rights Law Resource Centre, *Submission to the Senate Legal and Constitutional Affairs Committee Review of the Independent Reviewer of Terrorism Laws Bill 2008 (No 2)*, (2008) <<http://www.hrlrc.org.au/files/A4P5ZSMWFQ/Submission%20to%20the%20Independent%20Reviewer%20of%20Terrorism%20Laws%20Bill%202008.pdf>> at 14 July 2009, 4; Dr B Saul, *Submission re Inquiry into the Independent Reviewer of Terrorism Laws Bill 2008[No 2]*, (2008), Sydney Centre for International Law, University of Sydney, <http://www.aph.gov.au/SENATE/committee/legcon_ctte/terrorism/submissions/sub21.pdf> at 14 July 2009.

⁸ The Bill, ss 3(c), (d), & 6(1)(b)(i).

⁹ *Ibid*, sub-s 6(1)(b)(ii).

For over ten years, all public authorities in the United Kingdom have been subject to the *Human Rights Act 1998* (UK)(**the HRA**), as well as the *European Convention on Human Rights*. The HRA imposes a duty on all 'public authorities' to act in accordance with the Act.¹¹ The HRA also gives people recourse to seek remedies if they are subject to human rights violations.¹²

Furthermore, the HRA has led to the appointment of a Parliamentary Joint Committee on Human Rights, which advises Parliament on whether a Bill is compatible with the HRA. The UK Joint Committee on Human Rights has regularly reviewed anti-terrorism legislation and has offered useful analysis and criticism of the extent to which proposals comply with the HRA.¹³

Thus, while PIAC regards the Monitor as an important first step, it should be recognised that the Monitor will be a lone body charged with the daunting task of reviewing and providing reports as to whether Australia's national security legislation is effective, necessary and consistent with human rights. PIAC is of the view that Australia should enact Commonwealth human rights legislation that would provide an accessible and clear framework within which the Monitor (and any Parliamentary Committee on Human Rights) could consider whether the counter terrorism legislation is consistent with Australia's human rights obligations and adequately safeguards the rights of individuals.¹⁴ The same point was made by the United Nations Special Rapporteur on Counter-Terrorism, Mr Martin Scheinin, in his report on Australia's counter terrorism legislation¹⁵ and the United Nations Human Rights Committee in its concluding observations on Australia's reports under the International Covenant on Civil and Political Rights.¹⁶

Recommendation:

1. ***That the government enact comprehensive human rights legislation that gives legal protection to human rights.***

¹⁰ PIAC, *Submission to the Senate Legal and Constitutional Legislation Committee on the Anti-Terrorism Bill (No 2) 2005 (Cth)*, above n 1, 21-23.

¹¹ *Human Rights Act 1998* (UK), s 6(1).

¹² *Ibid*, s 7. For examples of the impact of the HRA on the use of national security legislation in the United Kingdom see, *A and others v Secretary of State for the Home Dept* [2004] UKHL 56.

¹³ See for eg, Joint Committee on Human Rights, Parliament of the United Kingdom, Second Report, *Anti-Terrorism, Crime and Security Bill*, Session 2001-2002, <<http://www.publications.parliament.uk/pa/jt200102/jtselect/jtrights/037/3702.htm>> at 14 July 2009.

¹⁴ See Robin Banks with Hugh O'Neill and Lizzie Simpson, *Realising Rights: submission to the National Human Rights Consultation* (2009) <<http://www.piac.asn.au/publications/pubs/09.06.15-PIAC%20Human%20Rights%20Sub.pdf>> at 30 June 2009.

¹⁵ See M Scheinin, *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism. Australia: Study on Human Rights Compliance while Countering Terrorism*, UN General Assembly, Human Rights Council, Fourth Session, 14 December 2006, A/GRC/4/26/Add.3

¹⁶ Human Rights Committee (Australia), CCPR, A/38/40 (1983), para. 140. **See also** UN Human Rights Committee *Review of Australia's Compliance with the International Covenant on Civil and Political Rights: Concluding Observations* April 2009 reported by the Human Rights Law Resource Centre <<http://www.hrlrc.org.au/content/topics/civil-and-political-rights/human-rights-committee-concluding-observations/>> at 20 July 2009.

2.2 Reviewing state & territories' anti-terrorism legislation

The national security legislation expressly covered by the Bill is only a part of the existing raft of anti-terrorism legislation in force in Australia at the moment as all the states and territories have enacted their own counter-terrorism legislation.

PIAC strongly submits that if the Monitor is to fulfil his functions of providing thorough reports of existing national security legislation he/she should be in a position to consider the entirety of the national security regime in Australia. PIAC is not convinced that clause 8(b) of the Bill, which provides that the Monitor may have regard to arrangements between the Commonwealth, the States and the Territories will enable the Monitor to do so. PIAC therefore recommends that the Bill be amended to enable the Monitor to consider all levels of the national security system.

Alternatively, PIAC recommends that the Commonwealth government should negotiate with the States and territories so that they enact similar legislation to ensure that there are equivalent independent reviewers operating in each state and territory.

Recommendation:

2. *That clause 6(1) of the Bill be amended by adding: "(iii) any other law of a State or Territory to the extent that it relates to Australia's counter-terrorism and national security legislation", or alternatively that the Commonwealth government negotiate with the states and territories so that they enact equivalent legislation to ensure the creation of independent monitors throughout Australia.*

3. Specific comments about the bill

3.1 Functions of the Monitor

In addition to reviewing existing anti-terrorism legislation, PIAC considers that it is essential that the Monitor is able to consider all proposed changes, additions and amendments to counter-terrorism legislation before they become law. This is consistent with the powers of the UK Independent Reviewer.¹⁷

Recommendation:

3. *That clause 6 of the Bill be amended to add (1)(d) "to review the operation, effectiveness and implications of any proposal in respect of Australia's counter-terrorism and national security legislation".*

3.2 The Monitor's annual reports

PIAC supports clause 9 of the Bill, which says that when performing functions relating to Australia's counter-terrorism and national security legislation in a financial year, the Monitor must give particular emphasis to provisions of that legislation that have been applied, considered or purportedly applied. In addition to this clause, PIAC suggests that it would be helpful to spell out a number of matters that should be included in each annual report of the Monitor such as the number of control orders and preventative detention orders issued in that financial year.

PIAC is aware that some of these issues are already included in other reports, such as the requirement that the Commonwealth Attorney-General's must prepare an annual report on the operation of Divisions 104 (control orders) and 105 (preventative detention orders) of the *Criminal Code Act 1995* (Cth). However, for the same reasons that PIAC believes that existing reviews of Australia's counter-terrorism legislation have been fragmented and would benefit from the more holistic and wide-ranging approach to reviews that is envisaged in the Bill, PIAC believes that including specific information about the use of control orders, preventative detention orders and the listing provisions should be included in the Monitor's annual reports.

Recommendation:

4. *That the Bill be amended to specify that the Monitor's annual report must include the following:*
 - (i) *the number of control orders issued in that financial year and the conditions attached to the orders;*
 - (ii) *the total number of control orders in force in that year;*
 - (iii) *the number of preventative detention orders issued in the year and the conditions attached to the orders;*
 - (iv) *the number and details of organisations proscribed in that year.*

3.3 The creation of the office of the Monitor

PIAC notes that the Senate Standing Committee on Legal and Constitutional Affairs in its report on the Independent Reviewer of Terrorism Laws Bill 2009 [No 2]¹⁸, recommended that the role of the Independent

¹⁷ *Prevention of Terrorism Act 2005* (UK), s 14(5)(a).

¹⁸ That Bill and the Committee's report were the precursor to the current Bill.

Review be carried out by a panel of three people with relevant expertise.¹⁹ PIAC supports this view and recommends that the Monitor should be replaced with a Panel of three independent, part-time reviewers. The advantages of appointing a panel include reducing the risk of perceived lack of independence and increasing the expertise and range of skills and experience brought to the role.²⁰

Furthermore, it is not clear from the Bill what resources, staff and support the Monitor will be given. In order to fulfil its mandate it is vital that the Monitor be given adequate resources and support.

Similarly, PIAC notes that the Senate Legislative and Constitutional Affairs Committee recommended that the status and structure of the office of the Monitor should be clarified.²¹ However, the Bill fails to specify whether the Monitor will be a new independent office or part of an existing office or department. PIAC understands from press releases that the Monitor is to be located within the Department of Prime Minister and Cabinet. While there may be pragmatic considerations which favour the location of the Monitor in this department, or attaching the Monitor to the Ombudsman or the Inspector-General of Intelligence and Security, PIAC suggests that the Monitor should be a new, independent office to ensure that the Monitor is seen to be truly independent of government.

Recommendations:

5. *That the Bill provides for the creation of three part-time monitors who, as a committee, together perform the functions of the proposed Monitor;*
6. *That the Government ensure that the Monitor is provided with adequate resources and support; and*
7. *That the Bill is amended to clarify the legal status of the Monitor*

3.4 Maximising the independence of the Monitor

PIAC is concerned that, in relation to references from the Prime Minister, the Prime Minister can require an interim progress report from the Monitor. While this may not, in fact, compromise the Monitor's independence, there is a risk of this private progress report creating a perception that the Prime Minister can vet the report before it is finalised.

Furthermore, PIAC considers that the Monitor must operate at arm's length from the government, and so believes that the Prime Minister should not be able to set the Monitor's priorities.²²

PIAC also suggests that consideration be given to the suggestion by the Gilbert & Tobin Centre that the Monitor report directly to Parliament and that the Parliamentary Joint Committee on Intelligence and Security being able to refer matters to the Monitor.²³

¹⁹ Senate Legislative and Constitutional Affairs Committee, Commonwealth Parliament, *Inquiry into the Independent Reviewer of Terrorism Laws Bill 2008 [No 2]*, (2008), <http://www.aph.gov.au/senate/committee/legcon_ctte/terrorism/report/index.htm> at 28 July 2009, 20.

²⁰ Dr A Lynch, Prof G Williams & N McGarrity, *Submission into the National Security Legislation Monitor Bill 2009*, (2009), Gilbert & Tobin Centre of Public Law, University of NSW, <http://www.aph.gov.au/SENATE/committee/fapa_ctte/national_security_leg/submissions/sub1.pdf> at 30 July 2009, 8-9.

²¹ *Ibid*, recommendation 3.43,20.

²² This is consistent with the recommendations made by PJCS, above n 5, recommendation 2.

²³ Lynch, Williams, McGarrity, above n 17, 10.

Recommendations:

8. *That sub-sections (2) and (3) of clause 30 be deleted.*
9. *That clause 7(3) of the Bill be deleted.*

4. Summary of Recommendations

1. *That the government enact comprehensive human rights legislation that gives legal protection to human rights.*
2. *That clause 6(1) of the Bill be amended by adding: “(iii) any other law of a State or Territory to the extent that it relates to Australia’s counter-terrorism and national security legislation”, or alternatively that the Commonwealth government negotiate with the states and territories so that they enact equivalent legislation to ensure the creation of independent monitors throughout Australia.*
3. *That clause 6 of the Bill be amended to add (1)(d) “to review the operation, effectiveness and implications of any proposal in respect of Australia’s counter-terrorism and national security legislation”.*
4. *That the Bill be amended to specify that the Monitor’s annual report must include the following:*
 - (i) the number of control orders issued in that financial year and the conditions attached to the orders;*
 - (ii) the total number of control orders in force in that year;*
 - (iii) the number of preventative detention orders issued in the year and the conditions attached to the orders;*
 - (iv) the number and details of organisations proscribed in that year.*
5. *That the Bill provides for the creation of three part-time monitors who, as a committee, together perform the functions of the proposed Monitor.*
6. *That the Government ensure that the Monitor is provided with adequate resources and support.*
7. *That the Bill is amended to clarify the legal status of the Monitor.*
8. *That sub-sections (2) and (3) of clause 30 be deleted.*
9. *That clause 7(3) of the Bill be deleted.*