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27 July 2009

Ms Christine McDonald
Committee Secretary
Standing Committee on Finance
and Public Administration
PO Box 6100
Parliament House
CANBERRA ACT 2600

Dear Ms McDonald,

Inquiry into the National Security Legislation Monitor Bill 2009

Please find enclosed submission by the International Commission of Jurists (Australia) to the Standing Committee on Finance and Public Administration on the National Security Legislation Monitor Bill 2009.

Yours faithfully,
ICJ AUSTRALIA

The Hon John Dowd AO QC
President

SUBMISSION TO THE INQUIRY INTO THE NATIONAL SECURITY LEGISLATION MONITOR BILL 2009

The International Commission of Jurists (Australia) (ICJA) was established in 1958, under the chairmanship of the then Chief Justice of the High Court of Australia, Sir Owen Dixon, OM, GCMG. The International Commission of Jurists (ICJ), is based in Geneva and was established in 1952.

The current President of the ICJA is The Hon John Dowd AO QC. Justice Dowd is also Vice President of the Executive Committee of the ICJ in Geneva.

The ICJA was founded as an organisation through which the legal profession and others interested in human rights could protect and sustain the Rule of Law and promote the observance of human rights and fundamental freedoms.

The ICJA has been involved in supporting the rule of law domestically and internationally and scrutinising government action since its inception. Along with submissions to government the ICJA has been involved in international observer missions and legal development projects in the region and around the world.

The ICJA welcome the opportunity provided by the Standing Committee on Finance and Public Administration to comment on the National Legislation Monitor Bill.

At the outset the ICJA would first like to commend the Australian Government on creating such an office. The role of the Monitor is particularly important in light of the fact that over the past nine years there has been a proliferation of legislative activity concerning terrorism and national security. Such unprecedented new laws enacted in the so-called “war against terrorism” have begun to erode the building blocks of democracy in Australia. They have opened the door to arbitrary detention, searches without warrants, and departures from established fair trial procedures so that it is the situation today, in Australia, that an accused could conceivably be charged and tried without knowing what evidence is against him, or without having a lawyer of his choice present to defend him. The ICJA has in previous submissions to the Australian Government commented on the extent and content of such legislation and has questioned its rationale and purpose.

The ICJA generally supports the appointment of a National Security Monitor. The ICJA is pleased to see that the Australian Government has followed the recommendations of the Security Legislation Review Committee’s June 2006 (the Sheller Committee), the Parliamentary Joint Committee on Intelligence and Security and the Inquiry by the Hon. John Clarke QC into the Case of Dr Mohamed Haneef, that Commonwealth legislation is required to establish a mechanism for periodic review of terrorism laws.

The ICJA does however have a number of concerns about the proposed Bill that warrant further consideration. These concerns, which will be addressed below, deal with the title of the bill, the referral process, the reporting requirements and the reference to safeguarding the protection of “the rights of individuals.”

The title of the Bill

The ICJA notes that the establishment of a monitor in Australia is largely based on similar legislation in the United Kingdom, which established UK Independent Reviewer of Terrorism Laws. The ICJA is pleased to see that the role of the Monitor is that of an impartial and independent reviewer. It is disappointing that such was not recognized however in the title of the Monitor or the Bill. The ICJA submits that impartiality and independence would have been guaranteed further if

the word “independent” was included in both the title of the Bill and in the title of the Monitor as is the case in the United Kingdom. The ICJA recommends that the Committee might want to consider amending the title of the bill and the Monitor to more readily recognize its independence and to encourage the public to the view that it is independent.

The referral process

The ICJA notes that functions of the Monitor are to review the operation, effectiveness and implications of Australia’s counter-terrorism and national security legislation which has been specifically enacted to counter terrorism and related security threats as well as general Commonwealth criminal legislation. Reviews can occur, pursuant to the Bill, by way of two mechanisms. The first is at the initiation of the Monitor himself or herself and the second, is by referral from the Prime Minister. The ICJA is concerned that with only two avenues of referral that the referral process is unduly restrictive.

The ICJA submits that the Committee might want to consider widening the referral process to include relevant governmental organizations and persons, particularly those persons with whom the Monitor will be able to liaise (as per section 10). The ICJA submits that a broader referral process will ensure that all counter-terrorism and national security legislation and Commonwealth criminal legislation is considered rather than just those chosen by the Prime Minister or the Monitor himself or herself. The Committee may thus want to consider the inclusion of State and Territory Attorneys General in the referral process.

The ICJA is also concerned that on referring legislation to the Monitor the Prime Minister will provide the terms of reference and priorities for the review (section 7). The ICJA submits that this direction by the Prime Minister may influence and restrict the focus of the review. Further the direction by the Prime Minister does not leave the Monitor with much independence and discretion as to what should or should not be included in the review.

The reporting requirements

The reporting requirements are set out in Part 4 of the Bill.

The ICJA notes that in reviewing the legislation, the Monitor must report, prepare and give to the Prime Minister a report relating to the performance of the Monitor’s functions. The report is to be given to the Prime Minister on an annual basis. The Bill also provides that certain information, such as operationally sensitive information, can be excluded from the reports. The ICJA is concerned that reports are only to be given to the Prime Minister and not any other person or organisation.

There is some concern that if reports are only being made available to the Prime Minister there is a real risk that the reports may not be made publicly available. The ICJA submits that this restriction seems at odds with the Monitor’s information gathering functions and the whole purpose of the legislation.

The ICJA submits that the report should be made available to general public. There is no reason why the Monitor’s report should not be made available. Allowing the report to be made publicly available is consistent with the whole purpose of the legislation which is to ensure that that Australia’s counter-terrorism and national security legislation operates in an accountable manner, is consistent with Australia’s international obligations, including human rights, encourages public input and provides a mechanism for the regular review of Australia’s counter-terrorism and national security legislation.

The ICJA further submits that the report, if not made available to the public, should at least be made available to consulted parties. Section 10 of the Bill provides that the Monitor in performing his or her functions may consult with the head of any relevant agency, the Ombudsman, the Inspector General of Intelligence or Security or a person who holds any office or appointment under a law of the Commonwealth or of a State or Territory.

The ICJA submits that the consultation process should by logical conclusion entitle a consulted party to a copy of the report. The very purpose of the consultation process is to facilitate a thorough review of the legislation with the assistance of relevant parties. The ICJA submits that not providing a report to a consulted party may cause disinterestedness and apathy by that consulted party in the consultation process. The ICJA contends that a consulted party will always perform better if it knows it will be a beneficiary of a report. The ICJA submits that on this basis the report should at least be made publicly available to consulted parties and at the most the general public.

Power to exclude material from publication

The ICJA notes that section 29(3) of the Bill provides that certain information may be excluded from publication in the Monitor's annual report. The purpose of the provision is to ensure that the annual report does not include any information from Commonwealth and State and Territory Cabinet documents. This includes documents prepared for a meeting of the Cabinet or a Committee of the Cabinet as well as any information that would disclose the deliberations of the Cabinet. The ICJA is concerned that this provision has the potential to undermine one of the most important objectives of the legislation being, the provision of readily accessible information to the public.

The ICJA understands that on some occasions a report may contain information that is highly sensitive. We submit however that on those occasions the report could be worded to ensure that sensitive material is not at risk of publication. This is the approach in the UK, where the Independent Reviewer presents statistical and other sensitive information in a manner that does not threaten national security.

Protection of the rights of individuals

The ICJA notes that one of the function's of the Monitor is to assess whether Australia's counter-terrorism and national security legislation "contains appropriate safeguards for protecting the rights of individuals." Whilst the ICJA is pleased to see that the Monitor has this power, the ICJA is concerned with the reference to the "rights of individuals."

The ICJA questions which "rights of individuals" the legislation is referring to. The phrase "rights of individuals" is not defined in the Bill. This being so the phrase can be interpreted in numerous ways and can be defined both inclusively and exclusively. This is because in Australia we do not have a Bill of Rights or a Charter of Rights, which clearly set out what are "the rights of individuals."

The appointment of the National Security Monitor

The ICJA notes that pursuant to section 11, the National Security Monitor is to be appointed by the Governor General. Before that appointment can be made the Governor General must however consult with the Prime Minister who must in turn consult with the Leader of the Opposition. The ICJA has some concern about the independence of this appointment process.

The ICJA submits that having the government appoint the Monitor is not in the spirit of the purpose of the legislation. If the purpose of the legislation is to have an independent monitor then the

monitor should be appointed by an independent non-political body. The ICJA submits that the Human Rights and Equal Opportunity Commission would for example, be more credible as the appointer than the government, as it is an independent and unaffiliated organization.

The ICJA is also concerned that there is no independent consultation process of the Monitor's appointment. The concern is that there is no public consultation like there is for analogous appointments such as, for example, the appointment of judges and magistrates. The ICJA submits that a public consultation process is imperative to ensure that the most appropriate candidate is selected for the position and the selection process is given some sense of independence from the government.
