

27 February 2009

Committee Secretary
Standing Committee on Finance and Public Administration
Parliament House
PO Box 6100
Canberra ACT 2600

Dear Madam

Please accept the enclosed submission from the Castan Centre for Human Rights Law regarding the Inquiry into the National Security Legislation Monitor Bill 2009.

This submission was prepared on behalf of the centre by Dr Patrick Emerton.

We are glad, of course, to answer any questions you may have regarding the submission, and should you require, we would be happy to provide oral evidence to the Committee.

Yours sincerely

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Director

**Castan Centre for Human Rights Law
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**Submission to the Standing Committee on Finance and
Public Administration**

***Inquiry into the National Security Legislation Monitor Bill
2009***

Prepared by Dr Patrick Emerton

This Submission concerns the National Security Legislation Monitor Bill 2009 (Cth) (hereafter, the Bill). As the Castan Centre indicated in its submission and testimony to the Senate Legal and Constitutional Committee's Inquiry into the Independent Reviewer of Terrorism Laws Bill 2008 [No. 2] (Cth) (hereafter, the Independent Reviewer Bill), the Centre believes that the creation of a statutory office-holder with the power to review the operation and effect of Australian anti-terrorism laws has the potential to increase accountability for the administration of those laws, and to reduce their potential to adversely affect the human rights of those subject to them. This Submission therefore supports the Bill, just as that earlier Submission supported the Independent Reviewer Bill.

The Bill could be strengthened in certain respects, however, by drawing on certain key features of the Independent Reviewer Bill as that Bill passed the Senate (hereafter, all references to the Independent Reviewer Bill are to the version of that Bill which passed the Senate).

1. Independence of the National Security Legislation Monitor

Section 3 of the Bill identifies the object of the Bill as being the appointment of a National Security Legislation Monitor (hereafter, the Monitor) to "assist Ministers". In contrast, section 3 of the Independent Reviewer Bill identifies the object of the Bill as being the appointment of "an independent person". The experience of the use of Australia's anti-terrorism laws (eg the arrest of, subsequent charging of, and subsequent collapse of the case against, Dr Haneef) creates the impression that, from time to time, Ministers are more heavily involved in the use of those laws than is typical for Australian criminal law and related investigatory functions. Thus, the *Report of the Inquiry into the Case of Dr Mohammed Haneef* discusses the roles played by various government departments in the Haneef matter.¹ Just to take one example, the report indicates that,

During the course of the Haneef matter [the Department of the Prime Minister and Cabinet] played a lead role at the whole-of-government level

¹ Chapter 2; Chapter 3, section 3.6.

by convening meetings of various government representatives and managing, or contributing to, the preparation of 'talking points', information briefs and options papers. The aim of this was to ensure that the actions of relevant government departments and agencies were coordinated and to keep government informed of developments and possible options for action in connection with the investigation.²

This submission does not address the question of whether or not it is generally, or ever, appropriate for the Commonwealth executive to take this degree of interest in a particular criminal justice matter, concerning a particular individual suspected of, and ultimately charged with, an offence. As the events surrounding Dr Haneef show, however, where such an interest has been taken by the Commonwealth executive, and the criminal justice matter is then one which is shown to have been very badly mishandled, and which highlights systemic problems both in the law and the workings of agencies, then the conduct of the Commonwealth executive may well be itself a matter requiring scrutiny. In such circumstances, it would be essential that the Monitor act independently of those Ministers whose department was being scrutinised, not as their agent. The wording of section 3 in the Independent Reviewer Bill is thus to be preferred to the wording of section 3 in the Bill.

A related issue is whether or not the Monitor is to be able to initiate reviews of her or his own motion. Senator Wong's second-reading speech suggests an affirmative answer to this question,³ but there is no express provision made for this in the Bill. A provision similar to clause 8(1)(c) of the Independent Reviewer Bill ought therefore to be included in the Bill, in order to remove any doubt on this point.

2. Legislation subject to review by the National Security Legislation Monitor

The list of relevant legislation in clause 4 of the Bill is less extensive than that found in clause 4 of the Independent Reviewer Bill. It is true that the Bill contains a catch-all provision empowering the National Security Legislation Monitor to review any law

² Ibid, p 33.

³ *Senate Hansard*, Thursday, 25 June 2009, p 4260.

of the Commonwealth to the extent that it relates to the listed legislation. However, this only applies to the general review power granted under clause 6(1)(a). Thus, for example, where clause 6(1)(b) directs the Monitor to consider the necessity of legislation, and the adequacy of the safeguards it contains, various pieces of legislation appear to be excluded which ought not to be, such as certain powers enjoyed by the Australian Federal Police pursuant to the *Australian Federal Police Act 1979* (Cth) which are enlivened by reference to the offences created by Division 101 of the *Criminal Code* (Cth).⁴

It would therefore be preferable if the definition of “counter-terrorism and national security legislation” in clause 4 of the Bill were to either contain a more exhaustive list of legislation (as does the Independent Reviewer Bill), and/or if the catch-all provision was incorporated into this definition. This could be achieved by adding a further paragraph to that definition in the following terms:

any other law of the Commonwealth to the extent that it relates to one or more of the above-mentioned laws.

The Castan Centre supports both the incorporation of such a catch-all provision, *and* the inclusion of further legislation on the list, along the lines of the Independent Reviewer Bill. One piece of legislation in particular which should be included is Division 72 of the *Criminal Code* (Cth). This legislation is ubiquitously included in statutory definitions of “terrorism offence” within Commonwealth legislation,⁵ and as such would be better being expressly included in the list, rather than being left to be included on the grounds that it is “related to” certain provisions of the *Australian Security Intelligence Organisation Act 1979* (Cth) and the *Crimes Act 1914* (Cth).

⁴ *Australian Federal Police Act 1979* (Cth), s 4, definition of “protective service offence”.

⁵ For example, *Australian Security Intelligence Organisation Act 1979* (Cth), s 4; *Crimes Act 1914* (Cth), s 3(1).

3. Review functions of the National Security Legislation Monitor – criteria for review

The review functions of the Monitor are at the heart of the Bill. Unfortunately, as currently drafted, there are certain infelicities in the way these functions are set out and the criteria for review stated.

The criteria for review are set out partially in clause 3 (which refers to *deterrence effectiveness, response effectiveness, consistency with international obligations and individual safeguards*), partially in clause 6(1)(a) (which refers to *operation, effectiveness and implications*), partially in clause 6(1)(b) (which refers to *individual safeguards and necessity*), and partially in clause 8 (which refers to *Australia's obligations under international agreements and Australian intergovernmental agreements*). No priorities among these criteria are suggested. Nor is it clear why some are mentioned multiple times and others only once. In this respect the structure of the Independent Reviewer Bill is preferable, having in clause 3 a generic description of the Independent Reviewer's role ("review of the operation, effectiveness and implications"⁶ of anti-terrorism laws) followed, in clause 8(1)(d) and subsequent paragraphs, by a detailed specification of what exactly is meant by this generic phrase.

Furthermore, some of the criteria for review specified by the Bill are ambiguous. For example, is the phrase "international agreements" in clause 8 intended to refer to treaties under which Australia acquires obligations at international law, or also to various sorts of other agreements that Australia might have with other countries (such as MOUs governing intelligence-sharing) which impose obligations on Australia, although not international legally binding ones? The Castan Centre submits that, in undertaking review functions, the Monitor should have particular

⁶ This wording was used in the *Security Legislation Amendment (Terrorism) Act 2002*, which both established the Security Legislation Review Committee (section 4) and amended the *Intelligence Services Act 2001* to require the Parliamentary Joint Committee on Intelligence and Security to carry out a similar review of the new anti-terrorism legislation (schedule 1, item 19). The same wording was also used by the *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003* (schedule 1, item 27D) and the *ASIO Legislation Amendment Act 2003* (schedule 2, item 1) in requiring the Parliamentary Joint Committee on Intelligence and Security to carry out a review of the ASIO questioning and detention warrant regime.

regard to Australia's international legal obligations arising under multilateral treaties. This would include the United Nations Charter, the various human rights treaties to which Australia is a party, and also the various international conventions against terrorism to which Australia is a party. These multilateral treaties establish the key international legal framework against which the compliance of Australia's anti-terrorism laws ought to be evaluated.

In light of the remarks of this section, and also those above in section 1 (concerning the need for a degree of independence of the Monitor from the Commonwealth executive) and section 2 (that a catch-all provision for legislation to be reviewed ought to be included in the definition of that legislation in clause 4), this submission recommends that clauses 3 and 6(1) be redrafted along the following lines.

Clause 3 might read simply:

The object of this Act is to appoint a National Security Legislation Monitor to ensure ongoing review of Australia's counter-terrorism and national security legislation.

Clause 6(1) could then also be redrafted, perhaps to read:

The functions of the National Security Legislation Monitor are:

- (a) to review the operation, effectiveness and implications of Australia's counter-terrorism and national security legislation; and
- (b) if a matter relating to counter terrorism or national security is referred to the Monitor by the Prime Minister – to report on the reference.

In undertaking a review under paragraph (a), the Monitor is to have regard to:

- (c) Australia's international legal obligations, particularly international human rights obligations and international counter-terrorism obligations;

- (d) the need for counter-terrorism and national security legislation to contain appropriate safeguards for protecting the rights of individuals;
- (e) whether or not Australia's counter-terrorism and national security legislation is necessary to deter and prevent terrorism which threatens Australia's security;
- (f) whether or not Australia's counter-terrorism and national security legislation is necessary to respond to terrorism and terrorism-related activity;
- (g) arrangements agreed from time to time between the Commonwealth, the States and the Territories to ensure a national approach to countering terrorism.

Such a redrafting, while preserving more-or-less intact the criteria of review set forth in the Bill, would make it clear that the focus of the Monitor's reviews is on the law's compliance with international law, on its incorporation of safeguards, and on its necessity. This suggested consolidation of the criteria to govern the Monitor's review function also demonstrates that the Bill would benefit from further definition of key terms (in particular, the reference in clause 8 to those obligations "in force from time to time" is not very helpful). For example, it might be useful to identify, by way of definition in clause 4, the relevant international instruments giving rise to Australia's international human rights⁷ and counter-terrorism obligations.⁸ It would also probably be useful to define "terrorism", a notion which (unlike, for example, "terrorist act"⁹ or "terrorist offence"¹⁰) has no stable meaning in Australian law.

It would also be desirable to include certain of the features of clause 8(1) of the Independent Reviewer Bill that have not been included in the Bill. First, in addition to necessity of the law, proportionality should be made a subject of review. Second, the reviewer should be given the capacity to have regard not only to individual

⁷ These could be done by reference to section 3(1) of the *Human Rights and Equal Opportunity Commission Act 1986* (Cth).

⁸ These would include at least those obligations arising under the *International Convention Against the Taking of Hostages*, the *International Convention for the Suppression of Terrorist Bombing* and the *International Convention for the Suppression of the Financing of Terrorism*.

⁹ Defined in section 100.1 of the *Criminal Code* (Cth).

¹⁰ See note 5 above, and also text thereto.

safeguards but the social consequences of the operation of the laws under review. This suggests the following, amplified, version of a redrafted clause 6(1):

The functions of the National Security Legislation Monitor are:

- (a) to review the operation, effectiveness and implications of Australia's counter-terrorism and national security legislation; and
- (b) if a matter relating to counter terrorism or national security is referred to the Monitor by the Prime Minister – to report on the reference.

In undertaking a review under paragraph (a), the Monitor is to have regard to:

- (c) Australia's international legal obligations, particularly international human rights obligations and international counter-terrorism obligations;
- (d) the need for counter-terrorism and national security legislation to contain appropriate safeguards for protecting the rights of individuals;
- (e) the social consequences of counter-terrorism and national security legislation;
- (f) whether or not Australia's counter-terrorism and national security legislation is necessary to deter and prevent terrorism which threatens Australia's security, and proportionate to such threats;
- (g) whether or not Australia's counter-terrorism and national security legislation is necessary to respond to terrorism and terrorism-related activity, and proportionate in its response.
- (h) arrangements agreed from time to time between the Commonwealth, the States and the Territories to ensure a national approach to countering terrorism.

Such redrafting would render clause 8 of the Bill unnecessary.

4. Review functions of the National Security Legislation Monitor – scope of review

The Castan Centre supports the inclusion of clause 9 of the Bill, requiring the Monitor to have regard to that legislation which has been applied or considered or purportedly applied by agencies. There is a degree of tension, however, between this requirement, and the exclusion by clause 6(2)(a) from the Monitor's remit of agency priorities.

The Castan Centre strongly submits that this tension should be resolved in favour of giving clause 9 its full force, and thereby removing clause 6(2)(a) from the Bill. In place of that clause, a clause similar or identical to clause 8(2) of the Independent Reviewer Bill should be included, making it unambiguous that the Monitor's review function extends to the activities of agencies.

The Independent Reviewer Bill also includes (in clause 8(3)) as an element of its review functions participation in public inquiries into anti-terrorism laws. Given the continuing important role that such inquiries play in the development of Australia's anti-terrorism laws, and the understanding of their impact, it would be desirable for such a provision to be included in the Bill.

5. Relationship of the National Security Legislation Monitor to other agencies and office-holders

Clause 10 of the Bill differs from the similar clause 9(3) of the Independent Reviewer Bill in two respects. First, it appears not to give the Monitor the express power to consult with the Australian Human Rights Commission. Furthermore, it is unclear whether or not the Human Rights Commission is an agency "of a kind mentioned in paragraph (1)(a)" – that is to say, an agency that has functions relating to Australia's counter-terrorism and national security legislation. This should be corrected, by including an express reference in clause 10 to the Human Rights Commission as an agency with whom the Monitor may consult.

Second, the Independent Reviewer Bill states that

The Independent Reviewer *may*, before commencing a review of legislation, have regard to the functions of [other agencies and office-holders].¹¹

The Bill, by way of contrast, states that

the National Security Legislation Monitor *must* have regard to [the functions of other agencies and office-holders].¹²

The Castan Centre submits that the wording in the Independent Reviewer Bill is to be preferred. By making this provision permissive, rather than mandatory, it would prevent the functions of the Monitor from being either deliberately or inadvertently stymied by the operations of some other agency or office-holder – particularly one whose administration of the law might itself be the subject-matter of a review. To avoid unnecessary duplication across agencies and office-holders, a provision could be incorporated along the lines of that found in clause 9(3) of the Independent Reviewer Bill, requiring the Monitor to have regard to the desirability of “ensuring a cooperative and comprehensive approach [across various agencies and office-holders] and [of] avoiding inquiries being conducted unnecessarily by more than one of them.”

As indicated in section 4 above, the Castan Centre does support the notion that any effective review of Australia’s anti-terrorism law must go beyond the text of those laws to their practical operation in the hands of the agencies that administer and apply them. This is best done not in the somewhat oblique fashion that clause 10(1) might be taken to do it (although that clause refers to “functions”, not to “activities”), but rather by expressly incorporating such a review function into the Bill.

¹¹ Clause 9(3). Emphasis added.

¹² Clause 10(1). Emphasis added.

6. Reports by the National Security Legislation Monitor

Part 4 of the Bill requires the Prime Minister to present to Parliament the annual reports of the Monitor (this parallels clause 11B of the Independent Reviewer Bill). There is no provision, however, for the presentation to Parliament of the results of any other review work undertaken by the Monitor. This contrasts with clause 11 of the Independent Reviewer Bill, which does make provision for the presentation to Parliament of the conclusions of other reviews. It would strengthen the role of the Monitor in being able, where necessary, to provide ongoing scrutiny, to include in the Bill a provision parallel to clause 11 of the Independent Reviewer Bill.

The intended function of clause 30 of the Bill, when read in conjunction with clauses 6(1)(b) and 7, appears to be to permit the Prime Minister to direct the Monitor to undertake a review whose conclusions may well not be presented to the Parliament. This submission expresses no firm view on whether or not this is a desirable arrangement. On the one hand, it obviously risks capture of the Monitor by the Commonwealth executive. This is particularly so in light of clause 7(3), which allows the Prime Minister to direct the Monitor (to an extent at least) as to investigative priorities. On the other hand, given the many and evident problems with anti-terrorism law and policy in Australia (as noted above), it would seem to be desirable that the Prime Minister have access to a further avenue of advice on these matters.

7. Appointment of an Acting National Security Legislation Monitor

Clause 7(2) of the Independent Reviewer Bill requires that the Prime Minister, prior to the appointment of an Acting Monitor, must consult with the Leader of the Opposition. No such clause appears in the Bill. It would be a simple matter to insert such a provision into clause 20 of the Bill. Given the presence of clause 11(2) in the Bill, requiring such consultation as a pre-condition to a permanent appointment (paralleling clause 6(3) of the Independent Reviewer Bill), it would appear consistent with the overall scheme of the Bill to insert such a provision into it.