

CHAPTER 3

KEY ISSUES

3.1 This chapter begins by providing an overview of the evidence received by the committee, before examining four key areas of the Bill identified by submitters as benefiting from further attention. These areas include:

- the role and function of the Independent Reviewer (IR);
- the IR's reporting requirements;
- censorship of IR reports; and
- whether the IR should be an individual or panel.

3.2 The committee then briefly discusses administrative arrangements for the IR before making its conclusions and recommendations.

Overview of the evidence

3.3 Submitters generally supported the aims and objectives of the Bill. Typical among these was the Law Council of Australia, which acknowledged that the threat of international terrorism since 2001, bringing with it 'prolific legislative activity', posed significant challenges for law makers.¹ The Gilbert and Tobin Centre of Public Law submitted that more than 40 pieces of Australian statute have been enacted in relation to terrorism thus far.² Many legislative measures represented significant departures from established principles of Australian law, leading the Law Council to submit that:

...[t]he exceptional nature of these anti-terrorism measures – and the often disproportionate impact they have on the enjoyment of individual rights – should not become normalised within the Australian criminal justice system and must be subject to regular and comprehensive review.³

3.4 The Gilbert and Tobin Centre of Public Law took a similar view, submitting that:

Understanding how the many disparate parts of our anti-terrorism laws fit together is a bewildering task. It seems to suggest, in light of their complexity and number, these laws require on-going review.⁴

1 Law Council of Australia, *Submission 15*, p. 3.

2 Gilbert and Tobin Centre of Public Law, *Submission 4*, p. 2.

3 Law Council of Australia, *Submission 15*, p. 4.

4 Gilbert and Tobin Centre of Public Law, *Submission 4*, p. 2.

3.5 The Law Council acknowledged the contribution of past reviews of terrorism legislation, such as those conducted by the Sheller Committee and the Parliamentary Joint Committee on Intelligence and Security referred to in chapter two, but concluded that:

...[a] comprehensive, independent evaluation of Australia's terrorism laws – that considers the content and operation of such laws and explores their impact on the practices of law enforcement and intelligence officers, courts and the community more broadly – is urgently needed in Australia ... [F]or these reasons the Law Council supports thorough consideration by this Committee of models such as that proposed by [the Bill].⁵

3.6 The Gilbert and Tobin Centre of Public Law agreed, describing the post-enactment review that has occurred as 'markedly fragmented', and considered that the once-off nature of the reviews had not produced a unified picture.⁶ Another submitter considered current review mechanisms 'irregular and disconnected'.⁷ The Centre also made the point that an IR would examine laws as enacted, as distinct from some other scrutiny mechanisms (such as this committee) which do their work before enactment.⁸

3.7 In particular, the committee notes the submissions of the Commonwealth Ombudsman and the Inspector-General of Intelligence and Security, both of whom expressed support for enhanced review of security legislation.⁹

3.8 A different view was taken by the New South Wales Council for Civil Liberties, which argued that legislation to address terrorist activity was unnecessary and should be repealed in its entirety, rendering an IR unnecessary.¹⁰ While supporting the introduction of an IR, the Federation of Community Legal Centres of Victoria put its similar concerns this way:

In our view, the appointment of an Independent Reviewer is not a substitute for repeal of undemocratic and excessively harsh laws. When these laws were introduced, they were recognized as an extraordinary response to particular global circumstances, as departing from fundamental principles and as impinging on civil liberties. Consequently, sunset clauses were included in the various acts and the legislation provides for independent and parliamentary inquiries to assess the operation of the laws and their ongoing necessity. As these laws were introduced as extraordinary measures, we hope that the establishment of an Independent Reviewer is not an indication of the permanency of these laws. It should always be within the

5 Law Council of Australia, *Submission 15*, p. 6.

6 Gilbert and Tobin Centre of Public Law, *Submission 4*, p. 2.

7 Public Interest Law Clearing House, *Submission 10*, p. 4.

8 Gilbert and Tobin Centre of Public Law, *Submission 4*, p. 2.

9 Commonwealth Ombudsman, *Submission 12*, p. 2; Inspector-General of Intelligence and Security, *Submission 13*, p. 1.

10 New South Wales Council for Civil Liberties, *Submission 7*, pp 1–2.

scope of the Independent Reviewer's role to recommend full repeal of all of the laws.¹¹

3.9 Before embarking on a discussion of specific aspects of the Bill requiring further attention, the committee wishes to point out a more general flaw relating to its lack of detail. Even accounting for the differences in their role and function, a brief comparison of this Bill with the legislation governing the Inspector-General of Intelligence and Security highlights a number of shortcomings.

3.10 Put simply, the Bill fails to deal with significant aspects of the establishment and operation of a statutory office like an IR. Some of the matters ignored include the IR's immunity from civil liability, remuneration, the manner and method of inquiries, as well as administrative provisions relating to resourcing.¹² All of these are dealt with substantively in the *Inspector-General of Intelligence and Security Act 1986*.¹³

Legislative parameters: the role and function of the IR.

Coverage of legislation

3.11 The Castan Centre for Human Rights Law at Monash University expressed concern that the specific terms of Clause 4, which brings under the jurisdiction of the reviewer 'any law or part of a law directed to the prevention, detection or prosecution of a terrorist act' may not capture all the legislation it is intended to. Several examples are provided of provisions which might fall outside the limits of the Bill.¹⁴ The Inspector-General of Intelligence and Security identified the same issue, as did a number of other submitters.¹⁵

3.12 The Attorney-General's Department submitted that:

It may be desirable to include a list of legislation when defining the role of the independent reviewer. In formulating that list, one approach may be for the independent reviewer to focus on the laws specifically enacted for the purposes of terrorism...[R]egardless of which laws are the subject of review...the Department considers it important to emphasise that it would be desirable...to focus on those laws which have had practical application [which would] give the independent reviewer the opportunity to examine

11 Federation of Community Legal Centres of Victoria, *Submission 20*, p. 4.

12 The lack of practical detail was raised by Professor John McMillan, Commonwealth Ombudsman, *Submission 12*, p. 4.

13 Sections 4, 5, 8, 9, 9A, 9B, 17, 18, 19, 19A, 26, 27, 28, 29, 30, 32, 33 and 35.

14 These include provisions of the *Customs Act 1901* (Cth) and the Criminal Code. Please see Castan Centre for Human Rights Law, *Submission 14*, pp 1–3.

15 Inspector-General of Intelligence and Security, *Submission 13*, p. 5; and see, for example, Public Interest Law Clearing House, *Submission 10*, p. 5.

the effectiveness and implications of the laws, including any human rights implications.¹⁶

3.13 A number of submitters, including the Public Interest Law Clearing House¹⁷ and the Inspector-General of Security and Intelligence¹⁸ suggested non-exhaustive lists of legislation that might provide the basis for enumerating which laws are intended to be covered by the IR.

Specificity of focus

3.14 The Law Council was not alone in its view that the Bill should more specifically identify the required content or scope of any review undertaken by an IR, or should enumerate the matters to be addressed as a minimum in a review.¹⁹

3.15 The Gilbert and Tobin Centre of Public Law agreed, submitting that:

In its attempt to confer maximum flexibility upon the Independent Reviewer, the Bill risks creating an office which is not as useful as it might be. While we appreciate the value of ensuring that the Independent Reviewer should be responsive to the priorities as she or he identifies them ... it would still be beneficial for the Bill to specify essential areas to be addressed in the Independent Reviewer's annual reports. This would ensure a consistent level of review over at least the main components of the terrorism laws – such as the offences, the questioning and detention powers and control orders.²⁰

3.16 Various suggestions were put to address this lack of specificity. Many reflected a desire for the IR to explicitly consider the effect of terrorism legislation on the submitter's specific area of interest.²¹ Among those to offer suggestions was the Public Interest Law Clearing House, which submitted that the IR should, within the broad discretion afforded under section 8 of the Bill, be required to have regard to a non-exhaustive list of relevant considerations when determining review priorities, including but not limited to:

- Australia's international human rights obligations;

16 Attorney-General's Department, Answers to questions on notice, received 24 September 2008, p. 2.

17 Public Interest Law Clearing House, *Submission 10*, Annexure 1.

18 Inspector-General of Intelligence and Security, *Submission 13*, p. 6.

19 Law Council of Australia, *Submission 15*, p. 14. See also, for example, Office of the Privacy Commissioner, *Submission 6*, p. 3; Public Interest Law Clearing House, *Submission 10*, p. 5.

20 Gilbert and Tobin Centre of Public Law, *Submission 4*, p. 4.

21 See, for example, Office of the Privacy Commissioner, *Submission 6*, p. 4; Australian Human Rights Commission, *Submission 9*, p. 3; Australian Lawyers for Human Rights, *Submission 18*, p. 6.

- the extent to which the laws under review alter fundamental legal principles, including: habeas corpus; the right to silence; the right of a person to be notified of a charge in respect of which they are being held, or to be released from custody; the right to be informed of the nature of the charge in respect of which a person has been detained; and the right to legal representation during questioning;
- whether the relevant laws are effective and workable, both within their own terms, and in combination with other legislation;
- whether there are any less-restrictive means by which the objectives of the relevant legislation could be achieved;
- any other legislation which is relevant to a comprehensive consideration of the operation, effectiveness and implications of laws relating to terrorist acts.²²

3.17 Human rights was a topic that came up repeatedly among submitters as requiring specific consideration by an IR in the context of evaluating terrorism-related legislation.

Human rights

3.18 As well as recommending that the function of the IR be spelt out more precisely, the Gilbert and Tobin Centre of Public Law considered that laws relating to terrorist acts be reviewed for their effectiveness in achieving national security and their impact upon other relevant matters such as human rights and community relations.²³

3.19 Similar observations were made by, *inter alia*, the Castan Centre for Human Rights Law²⁴, the Human Rights Law Resource Centre²⁵, the Sydney Centre for International Law²⁶, the Public Interest Law Clearing House²⁷, Australian Lawyers Alliance²⁸ and the Australian Human Rights Commission.²⁹ Detention powers, in particular, were identified as being in need of urgent review.³⁰

3.20 The Federation of Community Legal Centres of Victoria expressed concern that the Bill contained no requirement that the IR conduct any reviews, but instead

22 Public Interest Law Clearing House, *Submission 10*, p. 23.

23 Gilbert and Tobin Centre of Public Law, *Submission 4*, p. 4.

24 *Submission 14*, pp 3–4.

25 *Submission 5*, p. 1.

26 *Submission 21*, p. 2.

27 Public Interest Law Clearing House, *Submission 10*, p. 4.

28 Australian Lawyers Alliance, *Submission 19*, p. 5.

29 *Submission 9*, p. 3.

30 Sydney Centre for International Law, *Submission 21*, p. 3.

confers on the reviewer complete discretion, and identified particular criteria on which it submitted terrorist laws should be evaluated. These include the discriminatory impact of the laws; the impact of the laws on civil liberties; community concerns about the laws; and the consistency of the laws with fundamental principles of criminal law.³¹

3.21 The committee notes that amendments relating to detention, and seeking to include in the Bill explicit reference to human rights have been tabled in the Senate by the Australian Greens.

Powers

3.22 The Human Rights Commission, among others, called for the IR to hold stronger information gathering powers, to be achieved primarily through the imposition of a penalty on failure to comply with requests from the IR for information.³²

Reporting

3.23 The absence in the Bill of any requirement to report on a regular or prescribed basis directly to Parliament drew criticism from a number of submitters, including the Sydney Centre for International Law³³, the Federation of Community Legal Centres of Victoria³⁴, and the Public Interest Law Clearing House.³⁵

3.24 Clause 11 of the Bill would see the IR report to the relevant minister, rather than to Parliament. Some submitters argued for reports to be made directly to Parliament, at least partly so that Parliamentary committees might have less fettered access to their contents.³⁶ To this end, the Law Council cited Professor Clive Walker as arguing that Parliament and its committees should not have to 'await the pleasure of the government as to the terms on which the debate takes place'.³⁷ The Gilbert and Tobin Centre of Public Law argued similarly, adding that where reports are requested by committees such as the Parliamentary Joint Committee on Intelligence and Security³⁸, the resulting document should be delivered directly to the committee.

31 Federation of Community Legal Centres of Victoria, *Submission 20*, p. 6.

32 *Submission 9*, p. 7. See also, for example, Victorian Council for Civil Liberties, *Submission 16*, p. 1.

33 Sydney Centre for International Law, *Submission 21*, p. 4.

34 *Submission 20*, p. 8.

35 Public Interest Law Clearing House, *Submission 10*, p. 26.

36 Law Council of Australia, *Submission 15*, p. 14.

37 Law Council of Australia, *Submission 15*, p. 14., drawn from C Walker, 'The United Kingdom's Anti-terrorism Laws' in Andrew Lynch, Edwina MacDonald and George Williams (eds) *Law and Liberty in the War on Terror*, The Federation press, Sydney, October 2007, p. 189.

38 Independent Reviewer of Terrorism Laws Bill 2008 (Cth), sub-clause 11(2), Clause 8.

Censorship of reports

3.25 The Bill makes provision for the IR to withhold from publication information contained in the report which might adversely affect national security or on other compelling grounds.³⁹ Some submitters expressed disquiet at the potential effect of the provision on the ability of the Parliament and the public to receive a full and accurate picture of the body of terrorism-related legislation, an objective which is at the heart of this Bill.

3.26 While submitters generally accepted that that the IR would come into contact with sensitive material, a number put the view that it ought to be possible for the information to be reflected, or at least referred to, in the report in a manner that does not prejudice security. The Law Council drew on the situation in the United Kingdom, reflecting that, in that country, the reviewer was able to represent statistical and other information regarding the operation and effectiveness of terrorism laws without threatening national security.

3.27 The Gilbert and Tobin Centre of Public Law took a very similar approach, submitting that:

While the Independent Reviewer will undoubtedly view sensitive material (we support the inclusion of s 10 to this end), it would seem preferable that she or he writes reports in such a way that neither risks disclosure of such information nor necessitates the suppression of any contents. This has been managed by earlier review committees in Australia and would go a long way to ensuring the perception of the office as truly independent and fully accountable to both arms of government.⁴⁰

Strength in numbers? A single IR, or a panel.

3.28 While the Bill provides for the appointment of an individual to the role of IR, a number of submitters call for the role to be undertaken by a committee or panel.⁴¹ The Law Council cited the situation in the United Kingdom, and observed that where an individual reviewer remains in the position for a considerable period, there is a risk that the value of his or her review function could be undermined by speculation regarding their real independence or their willingness to criticise the government of the day.⁴² The Gilbert and Tobin Centre of Public Law concluded that:

...[T]here would seem less risk of the office of Independent Reviewer being perceived as an 'advocate' of the Commonwealth's laws if it was

39 Independent Reviewer of Terrorism Laws Bill 2008 (Cth), sub-clause 11(2).

40 Gilbert and Tobin Centre of Public Law, *Submission 4*, p. 6.

41 See, for example, Law Council of Australia, *Submission 15*, p. 15; Gilbert and Tobin Centre of Public Law, p. 7; Civil Rights Defence, *Submission 2*, p. 2; Australian Lawyers for Human Rights, *Submission 18*, p. 6; Australian Lawyers Alliance, *Submission 19*, p. 5.

42 Law Council of Australia, *Submission 15*, p. 15.

comprised of a panel of three Reviewers of diverse backgrounds and relevant expertise.⁴³

3.29 In lieu of a panel, the Law Council suggests that individual reviewers be eligible to serve a single term only, with no opportunity for re-appointment.⁴⁴ Other submitters, such as the Gilbert and Tobin Centre of Public Law agreed.⁴⁵

Administrative matters

3.30 A number of submitters commented that the IR would need to be adequately resourced so that it could undertake its role effectively.⁴⁶

3.31 The submission from the Commonwealth Ombudsman, Professor John McMillan, pointed out the practical difficulties with establishing a completely new body, such as proposed in the Bill. Professor McMillan reminded the committee that there might be practical advantages to the office of the IR being attached to his office or that of the Inspector-General of Intelligence and Security, which are already established:

The Independent Reviewer will also have a need to establish an office and to obtain staff to assist in conducting the review. This can be a time consuming exercise, especially if the staff need to acquire a high level security clearance to be given access to documents and briefings. The efficient completion of a review can be hampered if there are staff movements during the course of the review.⁴⁷

3.32 The Inspector-General of Intelligence and Security, Mr Ian Carnell, submitted that in relation to assuming administrative responsibility for the IR, his office:

...is not resourced or structured to perform a continuing review of the body of terrorism laws from a policy perspective. My office could play a role in providing input to the work of an [Independent Reviewer], as could the Commonwealth Ombudsman. One of our offices could be given the role of (and resources for) administrative support to the [Independent Reviewer] (to avoid them having to establish their own office).⁴⁸

43 Gilbert and Tobin Centre of Public Law, *Submission 4*, p. 7.

44 Law Council of Australia, *Submission 15*, p. 15.

45 See, for example, Gilbert and Tobin Centre of Public Law, *Submission 4*, p. 7;

46 See, for example, Federation of Community Legal Centres of Victoria, *Submission 20*, p. 5.

47 Commonwealth Ombudsman, *Submission 12*, p. 4.

48 Inspector-General of Intelligence and Security, *Submission 13*, p. 5.

Committee view

3.33 In an opinion piece in the *Australian Financial Review*, Associate Professor Andrew Lynch outlined the advantages he saw to the introduction of an independent review mechanism:

First, continuing and integrated examination of how the complex body of anti-terrorism law works enables early identification of inherent problems. Second, it helps to depoliticise the very contentious debates about these laws and their importance overall to national security. Third, it reassures the community that a kind of watchdog exists to report publicly on laws that they fear might be used against them.⁴⁹

3.34 The committee concurs with each of these observations, and notes the widespread support for the establishment of an independent review mechanism for Australian terrorism-related legislation. While the committee considers the Bill to be sound in principle, its failure to address key aspects of the establishment and operation of the office of an IR mean that it should not be passed in its current form.

3.35 A common theme throughout many submissions was the need to more accurately spell out the role of the IR, and in particular which legislation fell under its purview and which criteria should be used by the reviewer to guide the review. The committee finds these observations to be well made, and recommends that the Bill be amended to clarify these matters, perhaps through the insertion of a list of legislation intended to be subject to scrutiny by the reviewer. The committee also sees potential merit in the legislation falling under the remit of the IR being benchmarked against Australia's international human rights obligations.

3.36 The Bill should also be amended to insert provisions requiring the production and tabling of an annual report of the IR's activities to Parliament, and convey greater information-gathering powers through the imposition of a penalty on failure to comply with requests from the IR for information.⁵⁰

3.37 Having regard to the censorship of reports, it seems to the committee that the solution turns largely on the degree of specificity employed by the reviewer. Where a report makes an observation about a particular law or its operation, reference might meaningfully be made to a generalised situation, or one that is hypothetical. Nonetheless, scenarios can easily be foreseen where reference is necessarily made to specific cases, not least because the law in relation to terrorism is invoked relatively rarely in comparison with other laws. Where such references pose a threat to security, the report provided by the minister to Parliament should be edited appropriately.

49 Andrew Lynch, 'Legislative tightrope needs constant review', *Australian Financial Review*, 19 September 2008.

50 *Submission 9*, p. 7. See also, for example, Victorian Council for Civil Liberties, *Submission 16*, p. 1. The committee also notes an apparent error in drafting of proposed sub-sections 10(3) and (4), which would currently see *original* documents held by the IR compulsorily destroyed after 6 months.

3.38 The committee would make the simple but important point that information should be certified for deletion only where that is reasonably and objectively found to be warranted. Both the IR and the relevant minister should remain mindful of the underlying objectives of this Bill to increase transparency in relation to terrorism laws. This objective may be substantially undermined by the injudicious use of provisions which allow for the suppression of material which might help inform debate.

3.39 The committee was impressed by arguments in favour of the role of IR being filled by a small panel, as opposed to an individual. While a single appointment offers administrative simplicity and possibly financial advantages, the committee can see merit in establishing a panel of three independent reviewers with relevant expertise. Such an arrangement offers the opportunity to stagger new appointments, therefore promoting continuity over time, but also reduces the risk of perceived lack of independence.

3.40 Having regard to the administrative arrangements to support the IR, the committee was again struck by the absence in the Bill of details relating to the corporate structure of the office of the IR, whether it constituted a Statutory Agency, under what legislation it would employ staff, and how it would be resourced. However, the committee notes the observations of a number of submitters, in particular the Commonwealth Ombudsman and the Inspector-General of Security and Intelligence, and the possibilities they raise of potential efficiencies through the use of existing resources. The committee makes no recommendation on this matter, other than to suggest that Government consider the advantages and disadvantages of establishing the office of the IR within an existing agency, such as one of those referred to above, with a view to maximising its effectiveness and efficiency in carrying out its role.

Recommendation 1

3.41 That the Bill be supported in principle, but that the following recommendations be implemented prior to it being passed.

Recommendation 2

3.42 That the Bill be amended to comprehensively describe the role and function of the IR, and enumerate the criteria by which legislation should be reviewed.

Recommendation 3

3.43 That the Bill be amended to detail:

- **the legal status of the Independent Reviewer;**
- **the legislation intended to fall under its purview;**
- **remuneration of the IR;**
- **resourcing of the IR; and**
- **the immunity or otherwise of the IR from civil liability.**

Recommendation 4

3.44 That the Bill be amended so that the role of Independent Reviewer is carried out by a panel of three people with relevant expertise, and that their terms of service be staggered where possible.

Recommendation 5

3.45 That the Bill be amended so 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.

Senator Trish Crossin

Committee Chair