Submission to the Parliamentary Inquiry into the proposed legislation for the appointment of an independent reviewer of anti terrorist laws.

There are three principle vices of the current Federal Terrorism legislation.

The first is the creation of crimes as terrorist crimes while the basic activities involved are, in many cases, identical to activities that are already sanctioned by our criminal laws. What these laws do is to create a separate category of offender who is defined according to the person's religious, political or ideological disposition. As pointed out in my paper, this creates a serious comparison with laws that lead to totalitarian states. By associating a person's acts with their religious, political or ideological disposition we do create an environment where people can be pursued because of these dispositions rather than because of the seriousness of their criminal conduct. It might at first sight sound absurd but the initial move to introduce owner onus for parking offenders has now lead to a plethora of situations where people don't have ready access to Tribunals. Just one example of many was that of the failure of the cameras on Melbourne's ring road.

The second is the power granted to the Federal Police in addition to those of charging and prosecuting to determine the extent to which the Attorney General and the Courts are to be advised of the matters upon which they rely to detain a person in custody.

The third is the power given to the Federal Police to exclude defendants and their lawyers absent from Court during the hearing of evidence (a state of affairs that was considered egregious by Justice Kennedy in the United States Supreme Court hearing of Hamden).

There are many other short comings of the legislation in the context of the Rule of Law and Human Rights but they do not approach the seriousness of the aforementioned cocktail.

In the proposed legislation, it is unclear as to the extent of the powers of the independent reviewer. I believe that there should be specific mention in the legislation of the necessity for the reviewer to be constantly aware of the dangers associated with the architecture of the legislation and the opportunity that can slowly develop to use the powers to silence opposition as has been the case in other countries where similar legislation has been enacted (South Africa is a case in point).

It is frequently the case when serious issues arise, such as that of conflict of interest, that politicians tend to respond to suggestions about conflict of interest on the basis that the person against whom the allegation is made is an honest person and can be trusted to handle any conflict with discretion. This of course avoids the point as it is the conflict, rather than the integrity of the individual that is the issue.

In the case of the terrorist legislation and, unfortunately, a plethora of other legislation such as apparently innocuous legislation relating to fishing (which confers upon members of the executive branch, powers of arrest and detention without Court supervision) the argument can be made that we all know why the legislation is there and there is no intention of extending its application. However, the fault in that argument is frequently demonstrated as in the case of Dr Haneef.

As pointed out in my paper, the anti terrorist laws have created a framework which enables the extension of Police powers in the field of religion, politics and ideology. This is a legislative fact and while it remains a legislative fact in our Country, the introduction of a bill such as the present is welcome. However, we should be brave enough to face up to the existence of this reality and make specific reference in the Act to its existence and emphasise that one of the responsibilities of

the independent reviewer is to be constantly vigilant to the risk of the powers in the Act being used to erode safeguards to civil society. Anti terrorist legislation already makes serious inroads to these safeguards and to the extent that we respond to the honest intention of parliament that the provisions are essential in our response to terrorism, then perhaps we have to momentarily tolerate these jurisprudential indecencies.

However, if we are to have an independent reviewer of the laws, then we would require some comfort that the reviewer would be aware of the necessity to be constantly vigilant to the risks associated with the divergent path we have taken with these laws. Given my concern about the risks of abuse for political, religious or ideological purposes, it is of concern that the appointment of the independent reviewer is to be a political one in that the person is to be appointed by the Prime Minister, albeit in association with the leader of the opposition. The leader of the opposition obviously only has to be consulted and her or his advice need not necessarily be taken by the Prime Minister.

The appointment of the independent reviewer ought not be a political appointment and should be made by an external body such as the Human Rights Commission. The fact that it is a political appointment and that while a review can be conducted on the initiative of the independent reviewer, the fact that the first instance quoted in the legislation for the initiating of a review is the request of the Minister, tends to emphasise the political management of the process. This problem is compounded by the requirement that the Independent Reviewer must advise the Minister before undertaking any review.

This is aggravated by the provision that the independent reviewer must consult with other agencies of government including intelligence agency before commencing any review. This requirement threatens to constrain the reviewer within the political architecture of the government from time to time.

On the other hand, there is no compulsion on the part of the independent reviewer to undertake any review no matter how many requests might be made for that review. As a safeguard, the legislation should make it abundantly clear that the independent reviewer is subject to scrutiny by way of prerogative writs such as mandamus.

In my view, the provision empowering the Independent Reviewer to initiate an inquiry should be altered to provide that the Independent Reviewer may initiate an inquiry on his or her own initiative or at the request of any individual. In the event that an individual, be it the Minister or member of the public requests such a review, and the Independent Reviewer refuses to do so, the person so requesting the review has the right to seek relief against the Independent Reviewer by way of prerogative writ.

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