



THE UNIVERSITY OF  
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FACULTY OF LAW

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Committee Secretary  
Senate Legal and Constitutional Affairs Committee  
Department of the Senate  
PO Box 6100  
Parliament House  
Canberra ACT 2600  
Australia

Dear Secretary

### **Inquiry into the Independent Reviewer of Terrorism Laws Bill 2008 [No. 2]**

Thank you for the invitation to make a submission to the Committee's inquiry into the Independent Reviewer of Terrorism Laws Bill 2008 [No 2].

#### **A The Value of Independent Review**

We welcome this Bill as an initiative to establish ongoing, holistic and independent review of Australia's anti-terrorism laws.

We note that both the Security Legislation Review Committee ('SLRC') (June 2006<sup>1</sup>) and the Parliamentary Joint Committee on Intelligence and Security ('PJCIS') (December 2006;<sup>2</sup> September 2007<sup>3</sup>) unanimously supported the creation of a permanent mechanism for independent review, though, as will be discussed below, the two Committees favoured different models through which this was to occur.

It is worthwhile to briefly state the arguments in favour of creating a permanent mechanism of independent review of these laws:

- Contrast between Australia's abundance of anti-terrorism law and its lack of significant expertise in this area

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<sup>1</sup> Security Legislation Review Committee, *Report of the Security Legislation Review Committee* (2006), 6.

<sup>2</sup> Parliamentary Joint Committee on Intelligence and Security, *Review of Security and Counter Terrorism Legislation* (December 2006), 22 (Recommendation 2).

<sup>3</sup> Parliamentary Joint Committee on Intelligence and Security, *Inquiry into the Terrorist Organisation Listing Provisions of the Criminal Code Act 1995* (2007), ii, 52.

Australia's great fortune over its history is to be largely free of politically motivated violence meant. This means that at 11 September 2001, there were no national or state laws criminalising terrorism. The idea that we could, in the space of only a few years, perfect our approach to the creation and implementation of laws in this extremely complex area seems overly confident.

It is worth noting that the United Kingdom, which has had a great deal of experience in responding to terrorism, has established an office of Independent Reviewer of Terrorism Laws. The message from the United Kingdom experience is that counter-terrorism laws must be continually examined for both their effectiveness and impact.

Australia's need to build a national security legislative framework from scratch is also relevant. There has been extraordinary growth in the number of anti-terrorism laws in Australia since 2001, far beyond the original creation of various terrorism offence provisions in Divisions 101 and 102 of the Commonwealth *Criminal Code*. More than 40 anti-terrorism laws have been enacted in Australia to date. Understanding how the many disparate parts of our anti-terrorism laws fit together is a bewildering task. It seems reasonable to suggest, in light of their complexity and number, these laws require on-going review.

Regular reports on the state and operation of Australia's anti-terrorism laws would promote 'rational policy-making'<sup>4</sup> and assist parliamentary deliberation and committee work in the area.<sup>5</sup>

- Inadequate review mechanisms employed to date

Although there has been substantial review of various aspects of Australia's terrorism laws, this has not been without its problems.

For one thing, the Commonwealth government has demonstrated a selective responsiveness to pre-enactment scrutiny of Bills. This has occasionally produced laws rather different from those initially proposed and reviewed. A good example of this is the *Anti-Terrorism Act 2004* (Cth), which made changes to the pre-charge detention of terrorism suspects under Part IC of the *Crimes Act 1914* (Cth). Those provisions provided the legal basis for the 12 day detention of Dr Mohamed Haneef in July 2007 in a way clearly not envisaged by this Committee when it had reviewed the relevant Bill. The selective implementation of the Committee's recommendations accompanied by new additions to the Bill produced a law distinctive in key respects from that which was reviewed. One benefit of an Independent Reviewer would be to ensure that the law *as enacted* would receive scrutiny.

Some post-enactment review of Australia's anti-terrorism laws has occurred (in the Appendix to this submission, we provide a table of these reviews). However, these reviews have been markedly fragmented. While the basic offences, the Attorney-General's power to proscribe 'terrorist organisations', the power of ASIO to question and detain individuals, and the reworked sedition laws have all been reviewed, this has been done by several different bodies and all on a once-off basis. The structure of these reviews denies the clear interconnectedness of Australia's anti-terrorism laws and also prevents the development of expertise in review of these laws.<sup>6</sup>

<sup>4</sup> Clive Walker, 'The United Kingdom's Anti-Terrorism Laws: Lessons for Australia' in Andrew Lynch, Edwina MacDonald and George Williams (eds.) *Law and Liberty in the War on Terror* (2007) 189.

<sup>5</sup> Craig Forcese, 'Fixing the Deficiencies in Parliamentary Review of Anti-terrorism Law: Lessons from the United Kingdom and Australia' (2008) 14(6) *IRPP Choices*, 14.

<sup>6</sup> See John von Doussa QC, President of the Human Rights and Equal Opportunities Commission, 'Incorporating Human Rights Principles into National Security Measures' (Paper presented at the International Conference on Terrorism, Human Security and Development: Human Rights Perspectives, City University of Hong Kong, 16-17 October 2007).

Inevitably, given the approach to date, important components of the anti-terrorism regime have gone completely unreviewed. For example, no review has investigated the impact of the *National Security Information Act (Criminal and Civil Proceedings) Act 2004* (Cth) on the fairness of trials for persons accused of terrorist crimes – despite significant concerns having been voiced by sectors of the legal profession over this law.<sup>7</sup>

- Community fears

The PJCIS said of the Independent Reviewer proposal that ‘the establishment of a mechanism of this kind would contribute positively to community confidence as well as provide the Parliament with regular factual reports’.<sup>8</sup> A number of review bodies, including the SLRC and the PJCIS, identified and made recommendations for countering the perception that members of Australia’s Muslim communities are unfairly targeted by the Commonwealth’s counter-terrorism laws.<sup>9</sup> The existence of a ‘terrorism watchdog’ able to examine and criticise the operation of the relevant laws would be a significant step in addressing these fears.<sup>10</sup>

- Practical operation of the anti-terrorism laws requiring reflection

Lastly, we have clearly entered the next phase of anti-terrorism law in Australia – where the courts are now playing a part alongside the other arms of government. The SLRC noted that the timing of its own review rendered its inquiry a ‘theoretical exercise’ in many ways, before saying this situation was sure to change over the next few years.<sup>11</sup> Reviews from this point forward will not simply be appraising laws in the abstract but considering them in light of the life which they now have both in enforcement and in the courts. The Haneef affair of 2007 and also the outcome in the case of *R v Ul-Haque* ([2007] NSWSC 1251) are just two very clear examples of this need for renewed examination of the anti-terrorism laws.

### **Recommendation 1:**

**A mechanism of independent review of Australia’s anti-terrorism laws should be created to allow for ongoing and independent consideration of the operation of these laws both as to their effectiveness in achieving national security and their impact upon the rights of individuals and groups within the community.**

## **B Specific suggestions on the Independent Reviewer Bill [No 2]**

We view the Bill as an adequate means of establishing an office of independent Reviewer. However, we also recommend changes based on our examination of the operation of the Independent Reviewer in the United Kingdom:

<sup>7</sup> See Phillip Boulten, ‘Preserving National Security in the Courtroom: A New Battleground’ in Andrew Lynch, Edwina MacDonald and George Williams (eds.) *Law and Liberty in the War on Terror* (2007) 96-103.

<sup>8</sup> PJCIS, above n 3.

<sup>9</sup> See, for example, SLRC, above n 1, [10.92]-[10.102]; Australian Law Reform Commission, ‘*Fighting Words*’: *A Review of Sedition Laws in Australia* (2006), [7.36], [7.40]-[7.46]; PJCIS, above n 2, Chapter 3; PJCIS, above n 3, Chapter 3;. See further, Sharon Pickering et al, *Counter-Terrorism Policing and Culturally Diverse Communities* (2007).

<sup>10</sup> Centre for the Study of Human Rights, ESRC Seminar Series, *The Role of Civil Society in the Management of National Security in a Democracy, Seminar Five: The Proper Role of Politicians*, 1 November 2006, 4.

<sup>11</sup> SLRC, above n 1, [18.1].

- Better stipulate the subject of review

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 (s 8), 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.

This would not require any tightening of the definition of 'terrorism laws' in s 4 (as it is picked up by s 8). However, the Bill should provide the Independent Reviewer with a non-exhaustive list of legislative divisions, consideration of which is to be included in the annual report.

### **Recommendation 2:**

**A sub-section should be added to section 8 stipulating matters which must be included in the annual report of the Independent Reviewer. We would favour inclusion in this list of Divisions 101, 102, 103 and 104 of the Criminal Code and Division 3 Part III of the ASIO Act 1979.**

- Better stipulate the purpose of review

At present, s 8 of the Bill simply says that the purpose of the review is to examine 'the operation, effectiveness and implications of laws relating to terrorist acts'. While that is suitably broad, it might be worthwhile to articulate the reviewer's functions with slightly more precision – both as to effectiveness and other impact.

### **Recommendation 3:**

**Section 8 should be amended to emphasise that the laws relating to terrorist acts are to be reviewed for their effectiveness in achieving national security and their impact upon other relevant matters such as human rights and community relations.**

**The cumulative effect of our Recommendations 2 and 3 leads us to suggest that s 8 as it currently exists should be replaced with a new version as follows:**

**(1) *The function of the Independent Reviewer is to review the:***

- (a) *operation;***
- (b) *national security effectiveness; and***
- (c) *impact upon other relevant matters such as human rights and community relations.***

***of laws relating to terrorist acts.***

- (2) *The functions of the Independent Reviewer are to be exercised:*
- (a) *at the request of the responsible Minister; or*
  - (b) *at the request of the Parliamentary Joint Committee on Intelligence and Security; or*
  - (c) *of the Independent Reviewer's own motion.*
- (3)
- (a) *Subject to sub-section (b), in compiling his or her annual report, the Independent Reviewer is free to determine priorities as he or she thinks fit.*
  - (b) *The annual report of the Independent Reviewer must include sections reviewing Divisions 101, 102, 103 and 104 of the Criminal Code and Division 3 Part III of the ASIO Act 1979.*

- Improve the reporting requirements

At present, s 11 provides that the Independent Reviewer's reports are made to the relevant Minister, who must present it, along with a response, to the Parliament 'as soon as reasonably practicable' thereafter. We note that this differs from the PJCIS recommendation that the Independent Reviewer deliver his or her annual report directly to the Parliament.<sup>12</sup>

There have been difficulties in the United Kingdom arising from the delivery and tabling of the reports of the Independent Reviewer, but these largely pertain to the need for the UK Parliament to conduct an annual debate on the renewal of particular provisions subject to a one year sunset clause.<sup>13</sup>

#### **Recommendation 4:**

**Section 11 be amended to provide that the report of the Independent Reviewer must be presented directly to the Commonwealth Parliament.**

The PJCIS may commission a report of the Independent Reviewer directly (s 8). This is an admirable feature of the Bill in that it weakens the suggestion that the Independent Reviewer is exclusively in service to the executive and a clear improvement on the UK situation where the relevant Parliamentary Committee may only request a report through the Office of the Home Secretary. It is incongruous, however, that where the PJCIS commissions a report of the Independent Review, there is no provision for the report to be delivered directly to that Committee.

#### **Recommendation 5:**

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<sup>12</sup> PJCIS, above n 2, 22.

<sup>13</sup> United Kingdom Parliament, Joint Committee on Human Rights, *Tenth Report: Counter-Terrorism Policy and Human Rights (Ninth Report): Annual Renewal of Control Orders Legislation 2008* (2008), Chapter 2, [33]; United Kingdom Parliament, Joint Committee on Human Rights, *Twenty-Fifth Report: Counter-Terrorism Policy and Human Rights (Twelfth Report): Annual Renewal of 28 Days 2008* (2008), 3, 7, 9, 19.

**Section 11 be amended to provide that in the case of reports requested by the PJCIS, the Independent Reviewer is to deliver these directly to that body. In such a situation, the PJCIS may then refer the report to the Minister seeking a response.**

Section 11(2)(a) allows the Independent Reviewer to certify that certain parts of the report which ‘may affect adversely national security’ can be deleted from the version tabled by the Minister. This does not appear to have been an issue in the UK despite the ready access which the Independent Reviewer has to classified material in that jurisdiction. 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.

### **Recommendation 6:**

**Amend section 11(2)(a) (and (2)(b) and (3) accordingly) to provide that the report of the Independent Reviewer is presented to Parliament in full and without any deletion.**

- More than a single reviewer

While it recognised the UK’s model of a sole Independent Reviewer, the SLRC’s first preference for providing ongoing review was a committee of persons not too dissimilar to itself. By contrast, the PJCIS favoured a ‘single independent appointee’ as this would be more responsive and flexible than ‘periodic review by an independent committee’.<sup>14</sup>

While we appreciate the arguments in favour of an individual in the role, ultimately we advocate a trio of reviewers. A leading expert on terrorism law in the United Kingdom for several decades, Professor Clive Walker, has observed that ‘there should be a panel of multiple reviewers to gain a spread of expertise and a fresh look’.<sup>15</sup> In this light, it is worth noting that Lord Alex Carlile, the UK’s sole Independent Reviewer has been criticised for being too accepting of many of the government’s proposals and existing legislative devices. For example, his strong support for measures such as the extension of pre-charge detention from 28 to 42 days (accomplished by the Terrorism Act 2008 (UK) – passed with just nine votes in the House of Commons) led to one commentator to remark:

Far from being an independent reviewer who should be looking to protect the interests of the public from ever-encroaching legislation, it appears that Carlile sees himself instead as an enthusiastic advocate for the government.<sup>16</sup>

Additionally, the UK Parliament’s Joint Committee on Human Rights expressed ‘surprise’ at some of Lord Carlile’s conclusions in his report, in light of conflicting opinions about their operation, fairness and effectiveness having been given to the Committee in the course of its

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<sup>14</sup> PJCIS, above n 2, 20.

<sup>15</sup> Walker, above n 4.

<sup>16</sup> Inayat Bunglawala, ‘Carlile’s curious reasoning’, *The Guardian*, 18 December 2007.

own inquiries<sup>17</sup> and also expressed in judicial opinions of the House of Lords in challenges to the control order scheme.<sup>18</sup>

Taking these lessons on board, there would seem less risk of the office of Independent Reviewer being perceived as an ‘advocate’ of the Commonwealth’s laws if it was comprised of a panel of three reviewers of diverse backgrounds and relevant expertise.

There is also the issue of workload, which the UK Parliament’s Joint Committee on Human Rights raised as the reason behind its recommendation that a panel of reviewers be appointed.<sup>19</sup> This is also a relevant consideration in relation to this Bill. While our smaller population and different national security needs might be said to offer less work to an Australian Independent Reviewer compared to her or his UK counterpart, in having already identified the reasons why creation of the office is worthwhile here, those same factors – the number of new anti-terrorism law and their increasing consideration by the courts – also ensure that there is more than enough on which a trio of part-time reviewers might report.

### **Recommendation 7:**

**The Bill be amended to establish a panel of three part-time Independent Reviewers of diverse backgrounds and relevant expertise.**

- Tenure of the Independent Reviewer

Section 12(1) of the Bill provides for a five year term, with the possibility of re-appointment. If the office of Independent Reviewer remains one filled by an individual, then the potential prospect of allowing a 10 year incumbency warrants caution. As an example, Lord Carlile’s reappointment in the UK has meant that he alone has provided independent review of the many anti-terrorism laws passed there since this decade began. Given the amount of activity (legislative or otherwise) which can occur in counter-terrorism over a five year period, there is something to be said for not allowing reappointment upon the expiry of the initial five year period.

If the Committee accepts our Recommendation 7, and establishes a panel of Independent Reviewers, then the tenure of the individuals could be longer but ideally should be staggered so that a range of expertise and familiarity with the laws and the review process is held by those serving in the office at any one time.

### **Recommendation 8:**

**Amend s 12 to:**

- **if a single Independent Reviewer is appointed, remove the possibility of reappointment after 5 years; or,**

<sup>17</sup> United Kingdom Parliament, Joint Committee on Human Rights, *Tenth Report: Counter-Terrorism Policy and Human Rights (Ninth Report): Annual Renewal of Control Orders Legislation 2008* (2008) [56].

<sup>18</sup> *Secretary of State for the Home Department v MB and others* [2007] UKHL 46.

<sup>19</sup> United Kingdom Parliament, Joint Committee on Human Rights, *Twenty-Fourth Report: Counter-Terrorism Policy and Human Rights Government Responses to the Committee’s Twentieth and Twenty-First Reports and other Correspondence* (2008), 20.

- **if a panel of Independent Reviewers is appointed in accordance with our Recommendation 7, stagger appointment periods with the possibility of renewal being retained.**

Yours sincerely,

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Director

**Ms Nicola McGarrity**  
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**Professor George Williams**  
Anthony Mason Professor  
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## Appendix

### Post Enactment Reviews of Australia's Anti-Terrorism Laws

Report Tabled:	Title of Review:	Review Body:	Terms of Reference:	Empowering Legislation:
20 September 2007	Inquiry into the Terrorist Organisation Listing Provisions of the <i>Criminal Code Act 1995</i>	Parliamentary Joint Committee on Intelligence and Security	Review the operation, effectiveness and implications of the terrorist organisation listing provisions of the <i>Criminal Code Act 1995</i> (s 102.1(2), (2A), (4), (5), (6), (17) and (1))	<i>Criminal Code Act 1995</i> , s 102.1A(2)
4 December 2006	Review of Security and Counter-Terrorism Legislation	Parliamentary Joint Committee on Intelligence and Security	To review the operation, effectiveness and implications of the: <ul style="list-style-type: none"> <li>• <i>Security Legislation Amendment (Terrorism) Act 2002</i></li> <li>• <i>Border Security Legislation Amendment Act 2002</i></li> <li>• <i>Criminal Code Amendment (Suppression of Terrorist Bombings) Act 2002</i></li> <li>• <i>Suppression of the Financing of Terrorism Act 2002</i></li> </ul>	<i>Intelligence Services Act 2001</i> , s 29(1)(ba)
30 November 2005	Review of Division 3 Part III of the <i>ASIO Act 1979</i> – Questioning and Detention Powers	Parliamentary Joint Committee on ASIO, ASIS and DSD	To review the operation, effectiveness and implications of (a) ASIO's compulsory questioning and detention powers in Div 3 of Pt III of the <i>Australian Security Intelligence Organisation Act 1979</i> and (b) the amendments made by the <i>Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003</i> (except item 24 of Schedule 1 to that Act)	This review was not mandated by legislation.  ASIO's questioning and detention powers were subject to a three year sunset clause. They were due to expire on 23 July 2006.  The review was designed to precede and inform consideration by the Parliament of whether the re-legislate these provisions.  Review was announced on 17 January 2005.
13 September	Fighting Words:	Australian Law	The operation of Schedule 7 of	No empowering

2006	A Review of Seditious in Australia	Reform Commission	<p>the <i>Anti-Terrorism Act (No. 2) 2005</i> and Pt IIA of the <i>Crimes Act 1914</i>, including:</p> <ul style="list-style-type: none"> <li>• whether the amendments in Schedule 7 and Pt IIA of the <i>Crimes Act 1914</i> effectively address the problem of urging force or violence</li> <li>• whether 'sedition' is an appropriate word to describe this conduct</li> </ul>	legislation. Attorney-General signed the terms of reference on 1 March 2006.
15 June 2006	Security Legislation Review	Security Legislation Review Committee	<p>Review the operation, effectiveness and implications of amendments made by the:</p> <ul style="list-style-type: none"> <li>• <i>Security Legislation Amendment (Terrorism) Act 2002</i></li> <li>• <i>Suppression of the Financing of Terrorism Act 2002</i></li> <li>• <i>Criminal Code Amendment (Suppression of Terrorist Bombings) Act 2002</i></li> <li>• <i>Border Security Legislation Amendment Act 2002</i></li> <li>• <i>Telecommunications Interception Legislation Amendment Act 2002</i></li> <li>• <i>Criminal Code Amendment (Terrorism) Act 2003</i></li> </ul> <p>Identify alternative approaches and mechanisms for the above legislation as appropriate.</p>	<i>Security Legislation Amendment (Terrorism) Act 2002</i> , s 4