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Senate Legal and Constitutional Committee  
Department of the Senate  
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Canberra ACT 2600

Dear Mr Hallahan

## INQUIRY INTO THE INDEPENDENT REVIEWER OF TERRORISM LAWS BILL 2008 [NO. 2]

The Office of the Privacy Commissioner ('the Office') is pleased to provide the below comments to the Senate Standing Committee on Legal and Constitutional Affairs ('the Committee') regarding its inquiry into the Independent Reviewer of Terrorism Laws Bill 2008 [No. 2] ('the Bill').

The second reading speech accompanying this Bill's introduction to Parliament highlights the intended role of an Independent Reviewer of Terrorism as establishing a safeguard to ensure scrutiny, accountability and transparency in regard to laws relating to terrorism.<sup>1</sup> The Office welcomes this broad intention, though draws attention to a number of matters where the policy intent of this Bill could be advanced, particularly in regard to the protection of individuals' rights to privacy.

### **Privacy Commissioner's responsibilities regarding terrorism laws**

The Privacy Act regulates how 'personal information' is handled by most Australian and ACT Government agencies, through 11 Information Privacy Principles ('IPPs'). In addition, regulation applies to all private sector organisations with a turnover greater than \$3 million, as well as all private sector health service providers, regardless of their size, and to a range of other businesses, such as credit reporting agencies and tax file number recipients.

A number of Australian Government agencies are exempt from the Privacy Act, including defined intelligence agencies and the Australian Crime Commission. Other agencies that may be affected by terrorism laws, such as the Australian Federal Police and the Australian Customs Services, are covered by the Privacy Act.

### **Previous engagement on terrorism laws**

The Office has previously commented on the development and review of terrorism-related laws. Since 2002, in addition to a number of submissions regarding reform of anti-money laundering and counter-terrorism financing laws, the Office has also made public submissions to Committee inquiries into the:

- Anti-Terrorism Bill (No. 2) 2005 (November 2005)
- Anti-terrorism Bill (No.2) 2004 (August 2004) and
- Security Legislation Amendment (Terrorism) Bill 2002 and Related Bills (April 2002).

The Office also made a submission to the *Review of Legislation relating to Terrorism*, conducted by the Security Legislation Review Committee chaired by the Hon Simon Sheller AO QC (January

<sup>1</sup> Senator the Hon Judith Troeth, Senate Hansard, 23 June 2008.



2006) ('the Sheller Review'). As required by section 4 of the *Security Legislation Amendment (Terrorism) Act 2002*, I was also a member of this review committee in my capacity as Privacy Commissioner. The Office notes that there has been no public response to the Sheller Review's 2006 report.

### **Key issues for privacy and terrorism legislation**

The Office's submissions outlined above share a number of common themes, many of which may be relevant to how an Independent Reviewer of laws relating to terrorism should be established and function. These themes include:

- that privacy is an important right, the protection of which helps to promote community trust and confidence in public administration and law enforcement
- on occasion, it may be necessary to trade-off privacy for other important public interests, such as community safety and security
- an expansion in the power of law enforcement and intelligence agencies to collect personal information about individuals is likely to diminish the privacy of individuals by eroding their ability to control their personal information
- any lowering of privacy protections for law enforcement purposes must be:
  - a necessary response to a clearly defined problem
  - proportionate to the risk posed, and
  - accompanied by adequate accountability and review mechanisms.

The Office has also drawn attention to the risks of 'function creep' whereby legislative measures progressively and incrementally expand in scope to have greater affect than what was initially envisaged. These risks can be particularly pronounced in the area of terrorism related laws.

The Office agrees with Attorney-General McClelland's view that vigilance is essential to ensure community trust is not undermined by the introduction of terrorism laws without appropriate scrutiny, accountability and transparency.<sup>2</sup>

### **Potential benefits of an Independent Reviewer of laws relating to terrorism**

The Sheller Review recommended that there be continuing review of the security legislation by an independent body. An Independent Reviewer was one model that the Committee believed warranted further consideration.

#### ***Complementing existing accountability bodies***

The Office submits that a dedicated Independent Reviewer, if accompanied by a well defined mandate focused solely on the examination of terrorism laws, could complement existing accountability bodies, which often have more diffuse functions and responsibilities. For example, an Independent Reviewer, with this specific mandate, may be well positioned to digest the full implications of what can be complex and multifaceted pieces of legislation, including in regard to how such laws may be applied by agencies.

#### ***An holistic approach to terrorism law oversight***

Since 2002, there has been an incremental expansion in the powers available to law enforcement and intelligence agencies to combat terrorism. Much of this expansion has been through discrete

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<sup>2</sup>The Hon Robert McClelland MP, Attorney-General, speech, *Security in Government* conference, 7 December 2007, available at [http://www.attorneygeneral.gov.au/www/ministers/robertmc.nsf/Page/Speeches\\_2007\\_FourthQuarter\\_7December2007-SecurityinGovernmentConference](http://www.attorneygeneral.gov.au/www/ministers/robertmc.nsf/Page/Speeches_2007_FourthQuarter_7December2007-SecurityinGovernmentConference)

legislative measures, the full effect of which may be best assessed collectively. A permanent and dedicated Independent Reviewer is likely to be well placed to examine laws relating to terrorism in their entirety, rather than episodically as is often the case when specific laws are subject to review.

The proposed position could also provide for consideration of a range of issues and interests, that might otherwise be distinct. For example, in any given review, an Independent Reviewer may be positioned to give regard to a range of interests, which could include privacy issues, alongside other human rights and civil liberties matters, as well as the interests of law enforcement and intelligence agencies.

### ***Permanent and ongoing oversight***

The Office submits that a standing Independent Reviewer may be well placed to ensure continuity in the review and oversight of terrorism-related laws, including through the systematic following-up of review findings. Such a form of ongoing oversight would assist in overcoming potential limitations to one-off reviews.

### **Potential opportunities to enhance the Bill**

#### ***Objects and functions set out in the Bill***

The Office notes the relevantly brief objects clause in the Bill. While this clause is appropriately broad in scope, it provides limited guidance or direction on how the proposed Independent Reviewer would go about their duties. Similarly, clause 6 of the Bill describes the functions of the Independent Reviewer in broad terms as being to review the ‘operation, effectiveness and implications of laws relating to terrorist acts’, as well as establishing that the Independent Reviewer must ‘be free to determine priorities as he or she thinks fit’.

As currently drafted, these clauses could be ambiguous. While the Office agrees that the position should operate independently, its enabling legislation should ensure that the Independent Reviewer conducts his or her activities in a manner that meets the policy intent underpinning the Bill.

By way of examples, the Office draws the Committee’s attention to provisions in statutes that establish other oversight and accountability roles:

- Part IV of the Privacy Act specifies in some detail the functions of the Privacy Commissioner, including, at section 29, a range of matters that the Commissioner is required to have regard to in the exercise of his or her powers; relevantly, these matters include the protection of other important human rights and right of government to achieve its objectives efficiently.
- Section 4 of the *Inspector General of Intelligence and Security Act 1986* set outs the objects of that Act, including to assist Ministers in ensuring that the activities of relevant agencies are consistent with human rights. In turn, section 8 of that Act establishes a broad range of specific inquiry functions for the Inspector General, including to conduct inquiries into the practices of relevant agencies that may be inconsistent with or contrary to any human right (sub-section 8(3)(b)(1)).
- The *Law Enforcement Integrity Commissioner Act 2006* sets out, at section 15, the functions of the Integrity Commissioner and, at section 16, provides the direction that, in carrying out these functions, the Integrity Commissioner must give priority to corruption issues that relate to corrupt conduct that constitutes serious corruption or systemic corruption.

The Office submits that these types of provisions provide frameworks as to how oversight and accountability functions should be exercised. This form of direction may assist in ensuring that the



policy intent of the legislation is met. Such provisions would not appear to fetter the overall independence of the roles.

The Office specifically suggests that in assessing the 'operation, effectiveness and implications of laws relating to terrorist acts' the proposed Independent Reviewer should be required to consider, with respect to circumstances at the time:

- the continuing necessity and proportionality of those laws, and
- the impact of those laws on the privacy of individuals.

### ***Consultation with other accountability agencies***

Subclause 9(3) of the Bill provides that the Independent Reviewer may consult with other accountability bodies during the conduct of reviews. In the Office's view, this consultation should not be discretionary in regard to matters that are relevant to the jurisdiction of existing accountability bodies.

The Office submits that it is important that the Independent Reviewer position should complement existing bodies, rather than replace their existing legitimate powers or functions. Accordingly, the Office suggests that where a matter is relevant to the jurisdiction of existing accountability agencies, the Independent Reviewer should be **required** to consult with those agencies, and to take account of those views. The Office specifically submits that the Independent Reviewer should be required to consult with the Privacy Commissioner on terrorism-related laws that may affect the handling of individuals' personal information or other aspects of personal privacy.

A consultation requirement of this type is likely to promote a 'coordinated and comprehensive approach' (as described in subclause 7(3)) to considering terrorism-related laws and lessen the potential for the unnecessary expenditure of resources for similar reviews or inquiries.

Yours sincerely



Karen Curtis  
Australian Privacy Commissioner

12 September 2008