



**Submission by the
Commonwealth Ombudsman**

**Inquiry by Senate Standing Committee
on Constitutional and Legal Affairs**

*Independent Reviewer of Terrorism Laws
Bill 2008*

*Submission by the Commonwealth Ombudsman, Prof John McMillan
12 September 2008*

INTRODUCTION

1. The Senate Standing Committee on Constitutional and Legal Affairs has invited the Commonwealth Ombudsman to make a submission into the Committee's inquiry into the Independent Reviewer of Terrorism Laws Bill 2008.
2. The Commonwealth Ombudsman safeguards the community in its dealings with Australian Government agencies by:
 - correcting administrative deficiencies through independent review of complaints about Australian Government administrative action
 - fostering good public administration that is accountable, lawful, fair, transparent and responsive
 - assisting people to resolve complaints about government administrative action
 - developing policies and principles for accountability, and
 - reviewing statutory compliance by law enforcement agencies with record keeping requirements applying to telephone interception, electronic surveillance and like powers.
3. The office of the Commonwealth Ombudsman has a dual interest in the Bill before the Committee. First, the jurisdiction of the Ombudsman under the *Ombudsman Act 1976* extends to any action taken by the Australian Federal Police in administering counter terrorism laws. Those laws in fact make special mention of the role of the Commonwealth Ombudsman. For example, the *Australian Security Intelligence Act 1979* (Cth) s 34J provides that a person upon whom a questioning detention warrant has been served is to be informed of their right to make a complaint to the Ombudsman (see also ss 34K, 34ZG, 34ZS).
4. Secondly, the Commonwealth Ombudsman was an ex officio member of the Security Legislation Review Committee (SLRC) established by the *Security Legislation Amendment (Terrorism) Act 2003* s 4(1) to review parts of Australia's security legislation. The SLRC reported in June 2006 (*Report of the Security Legislation Review Committee*).

COMMENTARY ON BILL

5. The core function of both the SLRC and Independent Reviewer is defined in similar terms, namely to review 'the operation, effectiveness and implications' of laws relating to terrorism. Both are to provide a report to government for tabling in the Parliament. They have statutory independence, and in conducting a review can consult widely and obtain a briefing from government on confidential matters.
6. An important difference between the two bodies is that the SLRC was required by statute to conduct a single review, which has now been completed. The Independent Reviewer, by contrast, is appointed on a continuing basis and may conduct a review at any time.

7. The SLRC supported the need for a continuing review of security legislation, recommending as follows:

18.2 The SLRC recommends that the government establish a legislative-based timetable for continuing review of the security legislation by an independent body, such as the SLRC, to take place within the next three years.

8. The SLRC also discussed the option of a separate office being created of Independent Reviewer, concluding that '*if the Government is minded to establish a similar body in Australia, the SLRC favours it being attached to the office of the Inspector-General of Intelligence and Security or the office of the Commonwealth Ombudsman*' ([18.8]).
9. There has been no formal government response to those recommendations. However, the Council of Australian Governments (COAG) agreed at a meeting in September 2005 to a review (scheduled to start in December 2010) into some (but not all) aspects of Australian security legislation. The review is to be conducted by a committee of five people, which is to include two independent statutory officers (such as the Inspector-General or Ombudsman), two appointees from government agencies, and to be chaired by a former judicial officer.
10. The Commonwealth Ombudsman supports the need, as proposed by the SLRC, for a periodic review of Australian security legislation. The need for such a review is amply illustrated by the work of the SLRC itself, which prepared a report of over 200 pages in length, containing 20 recommendations for legislative and administrative reform, after an inquiry that received 35 submissions and heard from over 42 witnesses at 8 days of private and public hearings around Australia. Comprehensive as that report was, it did not extend to all features of the Australian security legislation. As the SLRC explained in [1.13], its review did not extend 'to what are arguably the most controversial aspects of the security legislation', such as questioning and detention powers, control orders and preventative detention orders.
11. The SLRC also noted (eg, [1.4], [1.12]) that a distinct limitation on its review was that there was limited public knowledge of the use that had been made of the legislative provisions since their enactment only three years previously, and that some amendment provisions had been enacted more recently. Since the SLRC reported in 2006 there has been considerably more activity taken under the security legislation, including the commencement of prosecution action.
12. It is clear from public debate that there is a great deal of public interest and at times concern or controversy about the terms of Australian security legislation. The laws are widely accepted as necessary to safeguard the community from acts of terrorism, and yet there is a concern that laws of this nature pose a potential threat to the rights and liberties of individuals and groups in society. Six areas of sensitivity in the counter-terrorism legislation are outlined in a separate submission to this inquiry by the Inspector-General of Intelligence and Security.
13. The balance that is struck in security legislation, between protecting the community and intruding on individual freedom, is a balance that needs to be reconsidered within government and by the parliament on a continuing basis. An independent review of security legislation can make a valuable contribution to the reconsideration process. It is important to the credibility of this process that the review body is independent from government, is properly informed about issues

arising in the administration of the legislation, and is able to gauge community attitudes through consultation and other means.

14. It is a challenging question to decide which person or body is best suited, on a recurrent basis, to conduct an independent review of security legislation. The model of the SLRC itself has much to recommend it, though it is questionable whether a similar body should in future be constituted (as the SLRC was) by eight people, including four statutory officers, and four independent appointees.¹
15. A different option, canvassed by the SLRC, is to attach the function of an Independent Reviewer to the office of the Ombudsman or the IGIS. That option was not further explained by the office, but it could be problematic if the idea was to create a separate statutory office that could exercise the statutory functions of the Ombudsman or the IGIS. The statutory powers that they exercise are conferred on a nominated statutory position and office holder, who is able to delegate them to other staff in the same organisation. It would be a novel arrangement if the powers could be exercised by a separate statutory officer who was not subject to the managerial supervision of the Ombudsman or IGIS.
16. Another option would be to require either the Ombudsman or the IGIS, or both jointly, to conduct a joint review on a recurrent basis (for example, every three years). Those two officers currently have a jurisdiction that extends to the actions of the Australian Federal Police and the six agencies that constitute the Australian Intelligence Community (which includes the Australian Security Intelligence Organisation). Through complaint investigation and other monitoring work, the Ombudsman and the IGIS have acquired a keen understanding of the issues that arise in police and intelligence work generally, including in the administration of counter-terrorism laws. An example of the monitoring work undertaken by the Ombudsman is the periodic inspection, as required by statute, of police records relating to telephone interception, electronic surveillance, stored communications, controlled operations, and complaint handling. Similar monitoring work is undertaken by the IGIS concerning the records of intelligence agencies relating to the use of warrant powers.
17. A legislation review discharged by the NSW Ombudsman provides a comparative model for officers such as an Ombudsman or IGIS to review security legislation. It has been the practice in NSW, when new coercive powers are conferred by statute on State police, for the statute to require the NSW Ombudsman to undertake a review of the operation of the legislation after three years. Recent examples of reports providing a comprehensive analysis of the exercise of policing functions under contentious new legislation are reports on *Review of the Police Powers (Drug Detection Dogs) Act 2001* (2006), *DNA Sampling and other Forensic Procedures Conducted on Suspects and Volunteers under the Crimes (Forensic Procedures) Act 2000* (2006), and *Review of Emergency Powers to Prevent or Control Disorder* (2007). The Ombudsman brings to the review a practical knowledge of the working of the law, that is gained through handling complaints received under the law, through monitoring and inspection work undertaken by the Ombudsman, and through the general oversight and complaint handling experience of the Ombudsman.

¹ The members of the SLRC were the Inspector-General of Intelligence and Security, Privacy Commissioner, Human Rights Commissioner, Commonwealth Ombudsman, a nominee of the Attorney-General, two nominees of the Law Council of Australia, and an independent chair appointed by the Attorney-General.

18. There are practical advantages to be had in basing a review function of this kind in an existing office, such as the Ombudsman or the IGIS. Both already have the staff, corporate structure, facilities, premises and work systems that are necessary to support an extensive review of a topic. The legislation establishing both offices confers upon them all the necessary powers, protections and immunities to conduct a review of sensitive and confidential security issues.
19. The continuing oversight role of both offices means that they can take a continuing interest in an issue after a report has been presented. For example, then can monitor whether recommendations for administrative reform are being implemented by policing or intelligence agencies. Both offices are also available on a continuing basis to undertake consultation with parliamentary committees or other government agencies.
20. It is likely, by contrast, that many practical hurdles would be faced by an Independent Reviewer established in the manner proposed in the Independent Reviewer of Terrorism Laws Bill 2008. A threshold consideration is whether an Independent Reviewer will bring to the task existing experience or knowledge of policing and intelligence issues. Those areas are not fully exposed to public scrutiny, and it is possible that an Independent Reviewer will take some time to become familiar with the area under scrutiny. This will be more of a challenge if the Reviewer is appointed only for a short period or to conduct a single review.
21. 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. There are other practical issues that are not currently addressed in the Bill, such as the length of term of the Independent Reviewer, remuneration, and protection of the Independent Reviewer against legal proceedings and civil liability.

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