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**Submission to the Senate Legal and Constitutional Affairs
Committee**

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

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This Submission concerns the Independent Reviewer of Terrorism Laws Bill 2008 [No. 2] (Cth) (hereafter, the Bill). The creation of an independent statutory office-holder with the power to review the operation and effect of Australian anti-terrorism laws has the potential to increase accountability for the administration of those laws, and to reduce their potential to adversely affect the human rights of those subject to them. This Submission therefore supports the Bill.

The Bill could be strengthened in certain respects, however, by the introduction of more precise criteria at various key points.

The Scope of the Independent Reviewer's powers

Under the Bill, the function of the Independent Review would be “to review the operation, effectiveness and implications of laws relating to terrorist acts,”¹ as that term is defined in part 5.3 of the *Criminal Code* (Cth).² The Bill does not define the phrase “laws relating to terrorist acts,” although it does define a similar phrase, “terrorism laws,” as including “any law or part of a law directed to the prevention, detection or prosecution of a terrorist act.”³ It would be better if the Bill were to deploy consistent and uniform terminology.

The notion of a law being “directed to the prevention, detection or prosecution of a terrorist act” is a very broad one. Nevertheless, some elements of Australia’s anti-terrorism laws do not fall under it.

One example of such a law is section 203DA(1)(c)(i) of the *Customs Act 1901* (Cth), which permits a warrant to be issued to permit the seizure of goods in transit through Australia if “the goods are connected, whether directly or indirectly, with the carrying out of a terrorist act, whether the terrorist act has occurred, is occurring or is likely to occur.” This law is directed to the prohibition of transport of certain sorts of goods through Australia. Such a prohibition may, in certain cases, facilitate the prevention,

¹ Clause 8.

² Clause 4 of the Bill refers to Part 5.3 of the *Criminal Code Act 1995*. As per section 3(2) of that Act, the correct citation is simply “Part 5.3 of the *Criminal Code*.”

³ Clause 4.

detection or prosecution of terrorist acts, but this is not an essential feature of the operation of the law.

Another example is provided by the offences pertaining to involvement in terrorist organisations found in Division 102 of the *Criminal Code*, and the power to list organisations found in that Division. While certain uses of these provisions may be used to further the prevention of terrorist acts – for example, when Operation Pendennis resulted in arrests in Melbourne and Sydney public statements were made by the police and others to the effect that a terrorist plot had been disrupted⁴ – in other cases the purpose behind their use appears to be to create certain sorts of “status offences”. This appears to particularly the case in relation to the exercise of the power to list organisations under Division 102. In relation to the exercise of that power, a remark by the former Attorney-General seems relevant:

The re-listing [of four organisations] confirms the Government’s commitment to ensuring that involvement in these organisations will not be tolerated.⁵

One particular example of an organisation whose listing appears intended to create status offences rather than to prevent terrorist acts is that of the Kurdistan Workers Party (PKK).⁶ In its evidence to the Parliamentary Joint Committee on Intelligence and Security, ASIO (which advised the Attorney-General in respect of the listing of this organisation) did not indicate that the proscription of the PKK under Australian law was directed in any significant way to the prevention or prosecution of acts of politically-motivated violence committed in Turkey.⁷

It is therefore difficult to conclude that it is an essential feature of the operation of Division 102 that it is directed to the prevention and/or prosecution of terrorist acts.

Other examples that could be given include the offences defined in section 101.4 and 101.5 of the *Criminal Code*, and the power conferred by section 105.4(6) of the

⁴ See, for example, the media release from the Australian Federal Police, “Terrorism Related Charges” (November 8, 2005).

⁵ Attorney-General The Hon Philip Ruddock MP, *Government Re-Lists Four Terrorist Organisations*, News Release, May 25, 2005.

⁶ For the listing of this organisation as a terrorist organisation pursuant to Division 102, see the *Criminal Code Regulations 2002* (Cth), s 4W.

⁷ Parliamentary Joint Committee on Intelligence and Security, *Review of the listing of the Kurdistan Workers Party (PKK)* (2006) [2.32]-[2.52]; *Review of there- listing of the Kurdistan Workers Party (PKK)* (2008) [2.14]-[2.21].

Criminal Code to detain individuals in order to preserve evidence of a terrorist act which is already known to have occurred, and which does not require that such preservation be linked to any attempts at prosecution.

It would therefore be preferable if (i) the Independent Reviewer's power of review were stated to pertain to "any laws relating to terrorist acts", and (ii) if "law relating to terrorist acts" were then defined along such lines as "any law or part of a law of the Commonwealth under which a power is conferred, or liability established, in virtue of one or more actions, omissions to act or states of affairs being connected, either directly or indirectly, to a terrorist act (whether or not a terrorist act has occurred or will occur)."

This definition would still exclude some pieces of legislation which would be regarded by many as anti-terrorist legislation. For example, Division 72 of the *Criminal Code* is characterised by many other Commonwealth laws as establishing terrorism offence,⁸ while Division 80 of the *Criminal Code* establishes broad treason and sedition offences. These laws could be incorporated into the definition of "laws relating to terrorist acts" by express reference, however.

Criteria to be Applied By the Independent Reviewer, and Relationship to Other Agencies and Office-holders

The Bill currently provides that, in exercising her/his power of review, the Independent Reviewer "must be free to determine priorities as he or she thinks fit,"⁹ but also "must, before commencing a review of legislation, have regard to the functions of the Inspector-General of Intelligence and Security, Australian Security Intelligence Organisation, the Australian Federal Police, the Human Rights and Equal Opportunity Commission, the Auditor-General, the Ombudsman, and the Privacy Commissioner ... with a view to ensuring a cooperative and comprehensive

⁸ See, for example, *Australian Security Intelligence Organisation Act 1979* (Cth), s 4; *Crimes Act 1914* (Cth), s 3(1).

⁹ Clause 8.

approach and to avoiding inquiries being conducted unnecessarily by more than one of them.”¹⁰

There is a degree of tension between these two provisions, as the second of them implies that the priorities of the Independent Reviewer ought, in part at least, to be shaped in response to the activities of other agencies and office-holders with responsibilities in relation to oversight of Australia’s anti-terrorism legislation.

It would probably be preferable to state certain considerations to which the Independent Reviewer is obliged to have regard in performing her/his review function, and then to vest her/him with a power (but not a duty) to have regard to the activities of other relevant agencies and office-holders.

As currently drafted, the only criteria to guide the Independent Reviewer in performing her/his review function are that s/he is “to review the operation, effectiveness and implications” of the relevant laws. This wording appears to be derived from that used in the *Security Legislation Amendment (Terrorism) Act 2002*, which both established the Security Legislation Review Committee¹¹ and amended the *Intelligence Services Act 2001* to require the Parliamentary Joint Committee on Intelligence and Security to carry out a similar review of the new anti-terrorism legislation.¹² The same wording was used by the *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003*¹³ and the *ASIO Legislation Amendment Act 2003*¹⁴ in requiring the Parliamentary Joint Committee on Intelligence and Security to carry out a review of the ASIO questioning and detention warrant regime.

While such open-ended wording may be appropriate when a review in respect of certain narrowly-defined items of legislation is established, the far more open-ended scope of the Independent Reviewer’s functions suggest that a more tightly-defined basis for review might be appropriate. One way to achieve this would be to flesh out

¹⁰ Clause 9(3).

¹¹ Section 4.

¹² Schedule 1, Item 19.

¹³ Schedule 1, Item 27D.

¹⁴ Schedule 2, Item 1.

the sorts of *implications* which are to be the appropriate subject matter of review. Presumably these are primarily intended to be implications for human rights (and particularly civil and political liberties) rather than (for example) implications for the conduct of Australia's intelligence relationships with other countries.

It might therefore be desirable to rephrase the criteria according to which the Independent Reviewer is to exercise her/his review function along such lines as "to review the operation and effect of any laws relating to terrorist acts, and in particular to review the human rights implications of such laws, their operation and their effect." "Human rights" could then be defined by reference to the *Human Rights and Equal Opportunity Commission Act 1986 (Cth)*.¹⁵

In order to avoid unnecessary duplication across agencies and office-holders, the Independent Reviewer could then be given a power along the following lines: "before commencing a review of legislation, the Independent Review may have regard to the functions of the Inspector-General of Intelligence and Security, Australian Security Intelligence Organisation, the Australian Federal Police, the Human Rights and Equal Opportunity Commission, the Auditor-General, the Ombudsman, and the Privacy Commissioner ... with a view to ensuring a cooperative and comprehensive approach and to avoiding inquiries being conducted unnecessarily by more than one of them." By making this provision permissive, rather than mandatory, it would prevent the functions of the Independent Reviewer from being either deliberately or inadvertently stymied by the operations of some other agency or office-holder – particularly one whose administration of the law might itself be the subject-matter of a review.

¹⁵ Section 3(1).