

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

Senate Legal and Constitutional Affairs Committee

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Introduction

The Law Council is grateful for the opportunity to comment on the *Independent Reviewer of Terrorism Laws Bill 2008 (No 2)* ('the June 2008 Bill').

The June 2008 Bill is a private Senator's bill co-sponsored by Senators Troeth and Humphries, introduced into the Senate on 23 June 2008.

The June 2008 Bill seeks to establish an Independent Reviewer of Terrorism Laws ('an Independent Reviewer') to review the operation, effectiveness and implications of laws relating to terrorist acts.

The appointment of a single Independent Reviewer or a panel of Independent Reviewers has previously been considered by a number of Australian review bodies, often in light of the UK experience where an Independent Reviewer is appointed to regularly report on the operation and effectiveness of UK terrorism laws.

The Law Council supports the appointment of an Independent Reviewer as a model for ensuring regular, comprehensive and independent review of the content, operation and effectiveness of Australia's terrorism measures, and as one way of monitoring unjustified executive intrusion on an individual's rights.

However, the Law Council encourages the Committee to give further consideration to a number of aspects of the June 2008 Bill, including:

- the lack of legislative parameters defining the Independent Reviewer's mandate and functions;
- the fact that the Independent Reviewer reports directly to the Minister rather than to Parliament;
- the ability of the Independent Reviewer to exclude certain parts of his or her report from publication; and
- the appointment of a single Independent Reviewer, rather than a committee or panel, and the absence of appropriate limits on re-appointment.

The Law Council is also of the view that independent review, while of great value to Parliament and the community, is no substitute for the implementation of much-needed safeguards within the terrorism laws themselves.

The Need for Independent Review of Australia's Terrorism Laws

The past eight years have seen prolific legislative activity in an effort to protect the Australian community from the threat of international terrorism. Since 2001 the Commonwealth Parliament has passed over 30 separate pieces of legislation dealing with terrorism and security, accompanied by significant budget increases to fund these new security measures.

While undoubtedly the threat of international terrorism poses significant complexities and challenges for law makers, many of the legislative measures introduced depart from established principles of the Australian criminal law and have a restrictive impact on individual rights. As observed by NSW Chief Justice Spigelman:

*The particular nature of terrorism has resulted in a special, and in many ways unique, legislative regime.*¹

For example, unlike traditional criminal offences, terrorism offences rely on broad definitions, such as ‘terrorist act’, and are wide enough to cover preparatory conduct engaged in *before* criminal intent has been formed, without the need to prove a connection to a specific terrorist act.² The powers to preventively detain a person also depart from established principles of Australian criminal law by restricting the liberty of persons not charged with a criminal offence, as do the terrorist organisation offences which criminalise mere association.³

For many years, the Law Council has submitted that the exceptional nature of these anti-terrorism measures – and the often disproportionate impact they have on the enjoyment of individual rights - should not become normalised within the Australian criminal justice system and must be subject to regular and comprehensive review.

As noted by the Parliamentary Joint Committee on Intelligence and Security (‘the PJCIS’), without such review ‘there is a real risk that the terrorism law regime may, over time, influence legal policy more generally with potentially detrimental impacts on the rule of law’.⁴

A number of different approaches to reviewing specific legislative acts have been trialled in the past six years, each with specific terms of reference. For example:

- the first package of terrorism and security legislation was reviewed by the Security Legislation Review Committee (‘the Sheller Committee’) and subsequently the PJCIS;⁵
- Division 3 Part III of the *Australian Security Intelligence Organisation Act 1979* was reviewed by a Parliamentary Joint Committee in November 2006 and will be subject to further review in 2016.⁶
- Schedule 7 of the *Anti Terrorism Act 2005 (No.2)(Cth)*, which revised the law of sedition, was referred to the Australian Law Reform Commission (ALRC) for inquiry in 2006;⁷ and

¹ *Lodhi v R* [2006] NSWCCA 121 at 66.

² See offences contained in Part 5.3 of the Commonwealth *Criminal Code* and the definition of ‘terrorist act’ in section 100.1 of the *Criminal Code*. For further discussion of the Law Council’s concerns regarding this definition and related offences see Law Council of Australia submission to Senate Legal and Constitutional Legislation Committee Inquiry into *Security Legislation Amendment (Terrorism) Bill 2002 [No.2] and Related Bills*, April 2002; Law Council of Australia submission to Senate Legal and Constitutional Legislation Committee Inquiry into *Anti-Terrorism Bill 2004*, 29 April 2004; Law Council of Australia submission to Senate Legal and Constitutional Legislation Committee Inquiry into *Anti-Terrorism Bill (No. 2) 2004*, 15 July 2004. See also Law Council of Australia, *Shadow Report to Australia’s Common Core Document*, submitted to the UN Human Rights Committee on 29 August 2008 available at <http://www.lawcouncil.asn.au/sublist.html?section=&month=&year=2008&search=&searchon=titles>

³ For terrorist organisation offences see Division 102 of the Commonwealth *Criminal Code*. Law Council of Australia submission to Senate Legal and Constitutional Legislation Committee Inquiry into *Security Legislation Amendment (Terrorism) Bill 2002 [No.2] and Related Bills*; Law Council of Australia submission to Attorney-General, House of Representatives, *Criminal Code Amendment (Terrorist Organisation) Bill 3* March 2004.

⁴ The Parliamentary Joint Committee on Intelligence and Security’s Review of Security and Counter Terrorism Legislation was tabled in December 2006 (PJCIS Report) para [2.48] available at <http://www.aph.gov.au/house/committee/pjcis/securityleg/index.htm>.

⁵ See s4(6) of the *Security Legislation Amendment (Terrorism) Act 2002*; paragraph 29 (1) (ba) of the *Intelligence Services Act 2001*; subsection 4 (9) of *Security Legislation Amendment (Terrorism) Act 2002*.

⁶ Parliamentary Joint Committee on ASIO, ASIS and DSD, *ASIO’s Questioning and Detention Powers: Review of the operation, effectiveness and implications of Division 3 of Part III of the ASIO Act 1979*, November 2005

- Division 102 of the *Criminal Code*, containing the terrorist organisation proscription regime and related offences, was reviewed by the PJCIS in 2007.⁸

While valuable in their own right, past reviews of Australia's terrorism laws have failed to provide a comprehensive analysis of the content and workings of Australia's terrorism laws and have excluded key legislative Acts such as the *National Security Information (Criminal and Civil Proceedings) Act* and Part 1C of the *Crimes Act*.

In addition, past and present review mechanisms do not have the mandate to consider how terrorism provisions are understood and applied by those agencies responsible for their implementation, such as law enforcement and intelligence agencies, court and prison authorities. For example, the review powers of the Inspector General of Intelligence and Security (IGIS) do not cover the activities of the Australian Federal Police (AFP) or the legislation which establishes the Australian control order regime. Similarly, while complaints regarding the actions of the AFP may be made to the Commonwealth Ombudsman, he or she may only review individual complaints, and cannot enquire into the operation of the particular measures, such as the control order regime, as a whole.

The timing of some reviews has also resulted in a largely theoretical exercise, where the laws to be examined have not yet been exercised in practice.

The Law Council submits that a comprehensive, independent evaluation of Australia's terrorism laws - that considers the content and operation of such laws and explores their impact on the practices of law enforcement and intelligence officers, courts and the community more broadly - is urgently needed in Australia.

Without such evaluation, existing review mechanisms are unlikely to identify systemic operational problems or assess whether measures that impact significantly on the rights of individuals are actually effective in combating terrorism and continue to be necessary.

For these reasons, the Law Council supports thorough consideration by this Committee of models such as that proposed by the June 2008 Bill.

Past Consideration of an Independent Reviewer of Terrorism Laws in Australia

The notion of appointing an Independent Reviewer of terrorism laws has previously been considered on a number of occasions. Both the Sheller Committee and the PJCIS considered the possibility of a single Independent Reviewer or an Independent Review Committee, and referred to the UK experience as a useful model to consider. Legislation appointing an Australian Independent Reviewer has also been previously proposed to Parliament, most recently by the *Independent Reviewer of Terrorism Laws Bill 2008*, introduced by Petro Georgiou MP in March 2008.

⁷ On 1 March 2006, the Attorney-General, referred to the Australian Law Reform Committee terms of reference for a review of the operation of Schedule 7 of the *Anti Terrorism Act (No.2) 2005 (Cth)* and *Part IIA of the Crimes Act 1914*. The ALRC's Report, *Fighting Words: A Review of Sedition Laws in Australia* (ALRC 104) —was delivered to the Attorney-General on 31 July 2006

⁸ See s102.1A(2) of the *Criminal Code*.

The Sheller Committee Recommendations

The Sheller Committee⁹ was established on 12 October 2005 to review the operation, effectiveness and implications of amendments made by the package of anti-terrorism legislation introduced during 2002 and 2003.¹⁰ It reported to the Attorney-General and the PJCIS on 21 April 2006.¹¹

Chapter 18 of the Sheller Report concerned mechanisms for review of Australia's terrorism laws. The Committee noted that given the relatively short time in which the legislation had been in operation, there was a limit to the value of the review in 2006.¹² It was noted that in the next few years, when more would be known about the operation of such laws, an independent body would be better placed to fully assess their operation and effectiveness.¹³ For this reason, the Committee recommended that:

*the government establish a legislative-based timetable for continuing review of the security legislation by an independent body, such as the [Sheller Committee], to take place within the next three years.*¹⁴

The Committee noted the existence of several possible models to provide ongoing review of terrorism legislation, such as a Public Advocate, a Public Interest Monitor (PIM) and an Independent Reviewer.¹⁵

When considering the possibility of an Independent Reviewer, the Committee referred to the United Kingdom (UK) experience where an Independent Reviewer reports to the Secretary of State on the implications of the operation of UK terrorism laws and any proposals for reform.¹⁶

The Sheller Committee recommended that if the Australian Government were to establish a similar body in Australia, it should be:¹⁷

- attached to the office of the (IGIS), or the office of the Commonwealth Ombudsman; and
- required to provide a report to the Attorney-General every 12 months, which the Attorney-General should be obliged to table in Parliament.

⁹ The Attorney-General established the independent Security Legislation Review Committee on 12 October 2005 under the Chairmanship of the Honourable Simon Sheller AO QC (the Sheller Committee). The Sheller Committee was made up of representatives of major stakeholder organisations. It conducted a public inquiry, receiving 29 submissions and taking evidence from 18 witnesses over 5 days of hearings in Melbourne, Sydney, Canberra and Perth.

¹⁰ *Security Legislation Amendment (Terrorism) Act 2002; Suppression of the Financing of Terrorism Act 2002; Criminal Code Amendment (Suppression of Terrorist Bombings) Act 2002; Border Security Legislation Amendment Act 2002; Telecommunications Interception Legislation Amendment Act 2002 and the Criminal Code Amendment (Terrorism) Act 2003*

¹¹ The report was tabled by the Attorney-General on 15 June 2006 and is available at: [http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/\(03995EABC73F94816C2AF4AA2645824B\)~SLRC+Report-+Version+for+15+June+2006\[1\].pdf/\\$file/SLRC+Report-+Version+for+15+June+2006\[1\].pdf](http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(03995EABC73F94816C2AF4AA2645824B)~SLRC+Report-+Version+for+15+June+2006[1].pdf/$file/SLRC+Report-+Version+for+15+June+2006[1].pdf) (the Sheller Report).

¹² As at the date of submissions to the Sheller Committee, twenty-four people had been charged with offences under the amended provisions of the Criminal Code originally enacted in 2002. In only two of these matters have the accused been tried. See Sheller Report para [18.1].

¹³ Sheller Report para [18.1].

¹⁴ Sheller Report para [18.2].

¹⁵ In respect of a role for a public advocate or a public interest monitor, the Committee concluded that 'there is merit in further investigation and consideration by all governments of the establishment of a body similar to the Special Advocate and/or [a Public Interest Monitor].' See Sheller Report para [18.9]-[18.17]

¹⁶ The UK experience is discussed in more detail later in this submission.

¹⁷ Sheller Report para [18.2]

It was recommended that the report of the Independent Reviewer deal with:

- the operation and effectiveness of Part 5.3 of the Criminal Code, and
- the implications for the operation and effectiveness of any Government proposals for the amendment of terrorism laws.

The Joint Parliamentary Committee's Recommendations

A further review of some of Australia's terrorism laws took place in 2006, this time by the PJCIS.¹⁸

The PJCIS released its report entitled *Review of Security and Counter Terrorism Legislation* ('the PJCIS Report') on 4 December 2006.¹⁹

Chapter 2 of the PJCIS Report considered the need for ongoing review of terrorism laws by an Independent Reviewer or independent committee.²⁰ The PJCIS recommended that:²¹

- *the Government appoint an independent person of high standing as an Independent Reviewer of terrorism law in Australia;*
- *the Independent Reviewer be free to set his or her own priorities and have access to all necessary information;*
- *the Independent Reviewer report annually to the Parliament;*
- *the Intelligence Services Act 2001 be amended to require the PJCIS to examine the reports of the Independent Reviewer tabled in the Parliament.*

The PJCIS adopted this view after considering the breadth and significance of the anti-terrorism measures, the fragmented nature of review so far and the ongoing importance of counter terrorism policy into the future.²²

The PJCIS noted that the limited mandate of existing review mechanisms had prevented a more holistic assessment of the terrorism law framework.²³ As a result, broader questions relating to operational practices of police, the interpretation of new powers,, the scope and application of offence provisions, the conduct of trials and the management of prisoners had fallen outside the terms of reference.²⁴

¹⁸ Pursuant to section 29(1)(ba) of the *Intelligence Services Act 2001*, the PJCIS was required to review the operation, effectiveness and implications of the *Security Legislation Amendment (Terrorism) Act 2002*; *Border Security Legislation Amendment Act 2002*; *Criminal Code Amendment (Suppression of Terrorist Bombings) Act 2002*; and *Suppression of the Financing of Terrorism Act 2002* and report to each House of the Parliament and to the responsible Minister, as soon as practicable after the third anniversary of the laws coming into force. The PJCIS was also required to take account of the findings of the Sheller Committee Report, see *Security Legislation Amendment (Terrorism) Act 2002* s4.

¹⁹ The Parliamentary Joint Committee on Intelligence and Security's Review of Security and Counter Terrorism Legislation was tabled in December 2006 (PJCIS Report) available at <http://www.aph.gov.au/house/committee/pjcis/securityleg/index.htm>.

²⁰ See PJCIS Report paras [2.42]-[2.62]. The majority of witnesses supported the proposal for further review of terrorism laws, see PJCIS Report para [2.54].

²¹ PJCIS Report Recommendation 2 at p.22.

²² PJCIS Report para [2.43].

²³ PJCIS Report para [2.50].

²⁴ PJCIS Report parap [2.50] For example, *Anti Terrorism Act 2004 (Cth)*, which increased maximum questioning and detention times by police for terrorist offences; *Anti Terrorism Act (No.2) 2004 (Cth)*, which provides for the transfer of prisoners on security grounds, by order of the Attorney General, between States and Territories; *Anti Terrorism Act (No.3) 2004 (Cth)*, which, among other things, provides for the confiscation of travel documents and prevents persons from leaving Australia; *National Security*

The Committee described the existing system of review as ‘fragmented, limiting the capacity for independent, ongoing and comprehensive examination of how terrorism laws are operating’.²⁵

The review model favoured by the PJCIS ‘takes a holistic approach to terrorism laws with a statutory mandate to report annually to the Parliament’.²⁶ In this respect the PJCIS preferred a single independent appointee, rather than periodic review by an independent committee.²⁷ It was observed that:

*A single appointee would overcome the existing fragmentation by providing a consistent and identifiable focal point for the community and the executive agencies.*²⁸

The PJCIS envisaged that the Independent Reviewer would:²⁹

- be someone of high standing who commands respect and is trusted as an impartial and informed source of information and analysis;
- be free to set their own priorities and have access to all relevant information, including security sensitive information where necessary; and
- work cooperatively with agencies and other relevant office holders such as the IGIS and the Commonwealth Ombudsman.

The PJCIS suggested that it would be appropriate for a parliamentary committee to receive and consider any reports of the Independent Reviewer. It referred to the Joint Committee on Public Accounts, which has a statutory responsibility to examine all reports of the Auditor-General which are tabled in the Parliament, as a useful model that should be adopted in the context of anti terrorism laws.³⁰

The UK Experience

When considering the possibility of the appointment of an Independent Reviewer in Australia, both the Sheller Committee and the PJCIS referred to the established position of Independent Reviewer in the UK.³¹

Not established under a single legislative instrument, the UK Independent Reviewer draws his or her authority and functions from the provisions of the *Terrorism Act 2000* (UK)³² and the *Prevention of Terrorism Act 2005* (UK).³³

Information (Criminal and Civil Proceedings) Act 2004 (Cth), which provides a regime for non-disclosure of security sensitive information.

²⁵ PJCIS Report para [2.53].

²⁶ See PJCIS Report para [2.56].

²⁷ At the PJCIS Committee’s inquiry, the Commonwealth Attorney General’s Department suggested that the parliamentary committee system is more inclusive and effective than an individual reviewer. The Committee acknowledged the important role of the parliamentary committee, but found that a case had been established for independent ongoing oversight of Australia’s terrorism laws. See PJCIS Report para [2.59]; see also AGD, *Transcript*, 1 August 2006, p. 8.

²⁸ PJCIS Report para [2.57].

²⁹ PJCIS Report paras [2.57]-[2.58].

³⁰ The Committee noted that this model ensures that the legislature has a clear and unambiguous role in exercising its oversight and scrutiny functions on important matters of public administration, PJCIS Report para [2.61]; see also *Public Accounts and Audit Committee Act 1951(Cth)*

³¹ This position was established pursuant to the *Terrorism Act 2000 (UK)* s126; and *Prevention of Terrorism Act 2005 (UK)* s14(3)

³² Section 126 of the *Terrorism Act 2000*.

³³ Section 14(3) of the *Prevention of Terrorism Act 2005*.

Section 26 of the *Terrorism Act 2000* (UK) provides that the Secretary of State shall lay before both Houses of Parliament at least once in every 12 months a report on the working of the Act.

Section 14(2) of the *Prevention of Terrorism Act 2005* (UK) provides that the Secretary of State must appoint a person to review the operation of the Act. Such an appointment must take place every 12 months and during that period, the person appointed must carry out a review of the operation of the Act.³⁴

Section 14 of the *Prevention of Terrorism Act* sets out a number of the Independent Reviewer's functions and powers. Subsection 14(4) provides that the person who conducts a review under this section must send the Secretary of State a report on its outcome as soon as reasonably practicable after completing the review. That report must address:³⁵

- the implications for the operation of this Act of any proposal made by the Secretary of State for the amendment of the law relating to terrorism; and
- the extent (if any) to which the Secretary of State has made use of his power to make non-derogating control orders in urgent cases without the permission of the court.

Subsection 14(6) provides that on receiving such a report, the Secretary of State must lay a copy of it before Parliament.

The current Independent Reviewer is Lord Carlile of Berriew QC. His reports have proved to be a valuable contribution to the debates on terrorism law in the UK and have provided the public, the Government and the Parliament with valuable information, insights and suggestions for reform.³⁶

For example, under the UK's *Prevention of Terrorism Act 2005* the Independent Reviewer is required to report annually on the use and operation of the control order regime.³⁷

One of the tasks of the Independent Reviewer is to 'replicate exactly the position of the Home Secretary at the initiation of a control order'.³⁸ The Independent Reviewer is given the same information as that provided to the Home Secretary, and draws a

³⁴ *Prevention of Terrorism Act 2005* (UK) s14(3).

³⁵ *Prevention of Terrorism Act 2005* (UK) s14(5).

³⁶ Reports of the Independent Reviewer are available at:<http://security.homeoffice.gov.uk/counter-terrorism-strategy/legislation/parliamentary-oversight/?version=5>.

³⁷ *Prevention of Terrorism Act 2005* (UK) s14(3). Unlike Australia, the UK scheme includes two types of control orders:

- non-derogating control orders—which comply with Article 5 of the ECHR regarding an individual's right to liberty, and
- derogating control orders—which impose obligations that are incompatible with Article 5 of the ECHR, thereby requiring UK Parliament to suspend (derogate) its compliance with the ECHR. To date there have not been any of these control orders issued in the UK

. The UK scheme was developed in response to the House of Lords finding that the indeterminate detention of foreign nationals, as was allowed under the *Anti-Terrorism, Crime and Security Act 2001*, was incompatible with the UK's obligations under the *European Convention for the Protection of Human Rights and Fundamental Freedoms* (the ECHR).

³⁸ Lord Carlile of Berriew, Independent Reviewer of Terrorism Legislation, *First Report of the Independent Reviewer Pursuant to Section 14(3) of the Prevention of Terrorism Act 2005*, February 2006, <http://security.homeoffice.gov.uk/news-publications/publication-search/prevention-terrorism-act-2005/laws-against-terror.pdf?view=Binary>, accessed September 2008.

conclusion as to whether a control order should have been issued in each case.³⁹ To date, Lord Carlile has reached the conclusion that in each case, a control order should have been made. However he has, on occasion, disagreed with the conditions imposed by control orders.⁴⁰

The Independent Reviewer is also charged with making recommendations as to any necessary reforms to the control order laws. In 2006 Lord Carlile recommended that officials of the control authorities meet regularly to review each case, with a view to revising the necessity of the conditions placed on each person subject to a control order, including the effects of such an order on the person's family.⁴¹ In response the UK Government established the Control Order Review Group, which meets quarterly to assess the conditions of each control order. Lord Carlile has also recommended improvements to the Home Secretary's quarterly reporting to Parliament.

In his 2008 report Lord Carlile also expressed concern about the ending of control orders, arguing that they should not be renewed beyond two years. He recommended a statutory limitation to that effect, save in genuinely exceptional circumstances.⁴²

The reports of the Independent Reviewer also include other information relevant to evaluating the use and effectiveness of the control order regime. For example, the reports include information on:

- the number of individuals subject to a control order;
- the number of control orders presently in force;
- details of whether persons subject to control orders were deported, committed for trial, subject to renewed orders or absconded; and
- the resources allocated to monitoring compliance with control orders.

The reports also sets out in an accessible way the rationale behind the system of control orders, the officers with the power to make such orders, what conditions may be imposed under a control order and the court's supervisory role.

This type of information is useful not only for Parliament when examining whether powers have been exercised lawfully, but also for the public to be able to understand and engage in the broader debate of whether such powers are effective and necessary.

The UK experience suggests that the reports of the Independent Reviewer figure prominently in Parliamentary debates, encourage rational policy making, and generate

³⁹ For example, in His Lordship's February 2008 Report Lord Carlile stated that he would have reached the same decision as the Secretary of State in each case in which a control order was made, so far as the actual making of the control order is concerned. Lord Carlile made it clear that the Secretary of State acted appropriately in relation to the exercise of her powers under the Act, however, this does not mean that the Secretary of State was correct in every case. It was noted that court procedures for the review of decisions made by the Minister had led to the quashing of three control orders in 2007. See Lord Carlile of Berriew QC, *Third Report of the Independent Reviewer Pursuant to Section 14(3) of the Prevention of Terrorism Act 2005*, 18 February 2008 available at <http://security.homeoffice.gov.uk/news-publications/publication-search/general/report-control-orders-2008?view=Binary> accessed September 2008 (the February 2008 Report)..

⁴⁰ See for example the February 2008 Report at [454]-[47].

⁴¹ The February 2008 Report at [46].

⁴² Lord Carlile of Berriew, Independent Reviewer of Terrorism Legislation, *Report on the operation in 2005 of the Terrorism Act 2000*, May 2006, <http://security.homeoffice.gov.uk/news-publications/publication-search/terrorism-act-2000/tact-2005-review?view=Binary>,

public confidence and debate.⁴³ They provide an independent assessment of the lawfulness of the exercise of executive power under the legislation, and an opportunity to consider whether in light of continually changing social and international circumstances, such measures are operating effectively and continue to be necessary.⁴⁴

However, the UK experience also suggests that the appointment of an Independent Reviewer in itself does not lead to reform and that other mechanisms to review legislative provisions and formulate proposals for reform are also necessary..

It has also been suggested that the effectiveness of the role of the Independent Reviewer in the UK is hampered by the absence of a single Act containing all of his or her functions and powers. Other criticisms of the UK model include:

- the short time frames often imposed for the reports of the Independent Reviewer to be considered by Parliament;
- uncertainty regarding what type of information should be included in the reports and which body determines whether particular information should be included;
- concerns regarding the independence of the appointed Reviewer, particularly given that the appointment is made by the Secretary of State (rather than Parliament) and that there are no limits on the reappointment of the Reviewer.

The Law Council urges this Committee to keep these criticisms in mind when evaluating the model proposed by the June 2008 Bill.

The *Independent Reviewer of Terrorism Laws Bill (No 2) 2008*

Features of the June 2008 Bill

The object of the June 2008 Bill is to establish an Independent Reviewer to 'ensure ongoing and integrated review of the operation, effectiveness and implications of laws in Australia relating to terrorism.'⁴⁵

The Independent Reviewer is appointed by the Governor General, on the recommendation of the Prime Minister, following consultation with the Leader of the Opposition in the House of Representatives.⁴⁶

⁴³Associate Professor Andrew Lynch, 'An Independent Reviewer for Australian Terror Laws' (Paper presented to the Law Council of Australia and NSW Bar Association Federal Criminal Law Conference, Sydney, 5 September 2008), 11 (available at <http://www.gtcentre.unsw.edu.au/>).

⁴⁴ *ibid*

⁴⁵ *Independent Reviewer of Terrorism Laws Bill 2008* (Cth) s3.

For the purposes of the June 2008 Bill 'terrorist act' has the same meaning as in Part 5.3 of the *Criminal Code Act 1995* (Cth) and 'terrorism' laws means 'any law or part of a law directed to the prevention, detention or prosecution of a terrorist act'.

Pursuant to s100.1 of the *Criminal Code Act 1995* (Cth), *terrorist act* means an action or threat of action where:

- (a) the action falls within subsection (2) and does not fall within subsection (3); and
- (b) the action is done or the threat is made with the intention of advancing a political, religious or ideological cause; and
- (c) the action is done or the threat is made with the intention of:
 - (i) coercing, or influencing by intimidation, the government of the Commonwealth or a State, Territory or foreign country, or of part of a State, Territory or foreign country; or
 - (ii) intimidating the public or a section of the public.

The Independent Reviewer is appointed on a full-time or part-time basis for a term not exceeding five years. He or she may be reappointed but is not eligible to be appointed to the office more than twice.⁴⁷

The functions of the Independent Reviewer are broadly expressed in section 8 of the June 2008 Bill as reviewing the 'operation effectiveness and implications of laws relating to terrorist acts'. While the Independent Reviewer is free to determine his or her own priorities, section 8 (f) provides that the functions of the Independent Reviewer can also be directed by the responsible Minister or the PJCIS.

When conducting a review, the Independent Reviewer may:

- obtain information, including classified or confidential information;⁴⁸
- require a person to produce documents relevant to the review;⁴⁹
- take possession of, make copies of, or take extracts from documents;⁵⁰ or
- require a person to attend before the Independent Reviewer to answer questions relevant to the review.⁵¹

When each review is complete, the Independent Reviewer is required to report to the relevant Minister.⁵² The Minister must then present this report to each House of Parliament, which will in turn have the opportunity to provide a response to the report.⁵³

The Independent Reviewer is also required to provide the relevant Minister with an annual report of his or her activities, which must also be tabled in Parliament.⁵⁴

Any report of the Independent Reviewer presented to Parliament must also be considered by the PJCIS and included in its annual report.⁵⁵

When completing these reports, the Independent Reviewer may direct that a particular part of the report be excluded from publication on the grounds that it may affect adversely national security, or for other compelling grounds.⁵⁶

The June 2008 Bill envisages the Independent Reviewer working cooperatively with existing review bodies to ensure a comprehensive approach and avoid duplication of work. Section 9 provides that before commencing a review into legislation, the Independent Reviewer must inform the responsible Minister⁵⁷ and have regard to the

⁴⁶ *Independent Reviewer of Terrorism Laws Bill 2008* (Cth) s6(2) and (3).

⁴⁷ *Independent Reviewer of Terrorism Laws Bill 2008* (Cth) s12. A person may resign as Independent Reviewer in writing to the Governor General, see *Independent Reviewer of Terrorism Laws Bill 2008* (Cth) s13. An appointment may be terminated on the grounds of misbehaviour, incapacity, bankruptcy or on other limited grounds provided in section 14 of the June 2008 Bill.

⁴⁸ *Independent Reviewer of Terrorism Laws Bill 2008* (Cth) s9(2). Where the Independent Reviewer requires access to documents with a national security classification, arrangements must be made with the relevant agencies for the protection of the documents while they remain in the Independent Reviewer's control, see s10(3)-(4) *Independent Reviewer of Terrorism Laws Bill 2008* (Cth).

⁴⁹ *Independent Reviewer of Terrorism Laws Bill 2008* (Cth) s10(1).

⁵⁰ *Independent Reviewer of Terrorism Laws Bill 2008* (Cth) s10(2).

⁵¹ *Independent Reviewer of Terrorism Laws Bill 2008* (Cth) s10(5). NB, pursuant to s10(6) a person is not liable to any penalty under the provisions of any other enactment by reason of his or her giving information to the Independent Reviewer or producing the document to the Independent Reviewer.

⁵² *Independent Reviewer of Terrorism Laws Bill 2008* (Cth) s11(1).

⁵³ *Independent Reviewer of Terrorism Laws Bill 2008* (Cth) s11(2).

⁵⁴ *Independent Reviewer of Terrorism Laws Bill 2008* (Cth) s11(3).

⁵⁵ *Independent Reviewer of Terrorism Laws Bill 2008* (Cth) s11(4).

⁵⁶ *Independent Reviewer of Terrorism Laws Bill 2008* (Cth) s11(2) and 11(3).

⁵⁷ *Independent Reviewer of Terrorism Laws Bill 2008* (Cth) s9(1).

functions of the following bodies in relation to the particular legislation subject to review:⁵⁸

- the Inspector General of Intelligence and Security (IGIS);
- the Australian Security and Intelligence Organisation (ASIO);
- the Australian Federal Police;
- the Human Rights and Equal Opportunity Commission (now the Australian Human Rights Commission);
- the Auditor General;
- the Ombudsman; and
- the Privacy Commissioner.

Areas in Need of Further Consideration

In many ways, the June 2008 Bill reflects the recommendations of the Sheller Committee and the PJCIS. Under the June 2008 Bill there is a single appointment of an independent person of high standing who is free to set his or her priorities, has access to all relevant information and works cooperatively with existing review bodies.

Many features of the appointment are borrowed from the UK experience, with the advantage of encapsulating the appointment and role of Independent Reviewer in a single Act.

However, while generally supporting the object of the June 2008 Bill, the Law Council is of the view that a number of its features warrant further consideration by this Committee.

Lack of legislative parameters defining the Independent Reviewer's mandate and functions

The Law Council is concerned that the broadly-expressed, flexible mandate of the Independent Reviewer as provided by the June 2008 Bill appears to depart somewhat from the UK experience and the PJCIS recommendations.

For example, under the June 2008 Bill there are no requirements that the Independent Reviewer:

- replicate the position of the Minister in respect of initiating a control order or preventative detention order
- Include in his or her report statistical details of the operation and effectiveness of particular features of the terrorism laws, such as the 'dead time' provisions in Part 1C of the Crimes Act or the provisions of the *National Security Information (Civil and Criminal) Proceedings Act*
- make reference in his or her report to the impact of the terrorism laws on Australia's international human rights obligations or on traditional common law rights.

The subject, detail and scope of the Independent Reviewer's reviews and reports are left to the discretion of the Independent Reviewer, or in some cases the direction of the relevant Minister or the PJCIS.

⁵⁸ *Independent Reviewer of Terrorism Laws Bill 2008 (Cth)* s9(3).

The Law Council appreciates the value in ensuring a degree of flexibility within the Independent Reviewer's mandate, and acknowledges the need to ensure the Independent Reviewer sets his or her own priorities in order to preserve his or her independence. However, without some further indication as to the required content or scope of the reviews undertaken or a statement of minimum matters that must be addressed, the Law Council is concerned that the parameters of the review and reporting process will be so wide as to dilute the potential benefits of the independent examination.

Reports to Minister rather than Parliament

The Law Council is also concerned that under the June 2008 Bill the Independent Reviewer reports to the relevant Minister, rather than directly to Parliament. This appears to depart from the recommendations of the PJCIS, who clearly envisaged a central role for Parliament and its Committees in directing the content of any review, and receiving the Independent Reviewer's report directly.

As Professor Clive Walker argues, an Independent Reviewer of terrorism laws should have explicit links to a parliamentary committee and should not have to 'await the pleasure of the government as to the terms on which the debate takes place'.⁵⁹

Further, it would seem appropriate that if a Parliamentary Committee is given the authority to direct the Independent Reviewer to conduct a review, that same Committee should be entitled to receive the report directly from the Independent Reviewer, rather than via the relevant Minister.

Power to exclude material from publication

A further concern arises from section 11 of the June 2008 Bill, which permits the Independent Reviewer to issue a certificate deleting part of his or her report from publication on the grounds that it may affect adversely national security, or for other compelling grounds.⁶⁰ This provision has the potential to undermine one of the key purposes of the appointment of an Independent Reviewer, namely the provision of readily accessible information to the public regarding the practical operation of terrorism measures.

It is clear that in the course of his or her review the Independent Reviewer is likely to come into contact with, or request the production of, documents or material that is of a confidential or classified nature and that could pose a risk to national security if published. However, the Law Council is of the view that the Independent Reviewer should be required to reflect this information in his or her report in a manner that can be made available to the public in its entirety. This appears to be the approach taken in the UK, where the Independent Reviewer's representation of statistical and other information regarding the operation and effectiveness of terrorism laws has been presented in a manner that does not threaten national security and can be made widely available.⁶¹

⁵⁹ C. Walker, 'The United Kingdom's Anti-terrorism Laws' in Andrew Lynch, Edwina MacDonald and George Williams (eds) *Law and Liberty in the War on Terror*, The Federation Press, Sydney, October 2007, p. 189.

⁶⁰ *Independent Reviewer of Terrorism Laws Bill 2008* (Cth) s11(2) and 11(3).

⁶¹ For a list of all of Independent Reviewer Lord Carlile's reports see <http://security.homeoffice.gov.uk/legislation/independent-review-legislation/?version=7>

Independent Reviewer as a single appointee

The Law Council also recommends that further consideration be given to the concept of a panel or committee or reviewers, rather than a single appointee. The experience in the UK suggests that where an Independent Reviewer remains in the position for a considerable period of time, there is a risk that the value of his or her review function could be undermined by speculation as to his or her independence or willingness to be openly critical of the Government of the day.

A panel of independent reviewers, as opposed to a single appointee, has been proposed as an improvement on the UK model by a number of commentators,⁶² and would also align with the Sheller Committee's recommendation that the government establish 'an independent body' or committee to undertake regular review of Australia's terrorism laws. A panel arrangement could also address the barriers to effective review posed by the sheer size of the workload a faced by a single Independent Reviewer.

At the very least, the Law Council encourages the Committee to consider removing the provision of the June 2008 Bill that permits an Independent Reviewer to be re-appointed twice for further five year terms.⁶³

Appointment of Independent Reviewer no substitute for legislative safeguards

The Law Council is firmly of the view that the appointment of an Independent Reviewer should not been seen as a substitute or alternative to the enactment of legislative safeguards to ensure individual rights are protected within Australian terrorism legislation.

Whilst beneficial as a post-facto analysis of areas in need of reform, review mechanisms cannot provide the type of protection necessary to guard against unjustified executive intrusion into the lives of individuals by the misuse or overuse of the powers provided under Australia's terrorism laws.

For example, in the context of the control order and preventative detention order regime contained in Divisions 104 and 105 of the Commonwealth *Criminal Code*, the Law Council recommends that a maximum period for which a person can be held under successive continued preventative detention orders (preferably 28 days) be prescribed. The Law Council also recommends the inclusion of the following safeguards:⁶⁴

- a person who is the subject of a control order or preventative detention should be provided with all the information and evidence that forms the basis of the application for such order or detention, or at the very least, the court should be empowered to exercise discretion in this regard;
- a person subject to a preventative detention order should be entitled to attend an application hearing and present his or her case;

⁶²See for example C. Walker, 'The United Kingdom's Anti-terrorism Laws' in Andrew Lynch, Edwina MacDonald and George Williams (eds) *Law and Liberty in the War on Terror*, The Federation Press, Sydney, October 2007, p. 189. A similar view as also advanced by Dr Lynch's recent at the Federal Criminal Law Conference hosted by the NSW Bar Association and the Law Council of Australia on 5 September 2008, Sydney.

⁶³ See *Independent Reviewer of Terrorism Laws Bill 2008* (Cth) s12(1)

⁶⁴ For further discussion of the Law Council's proposed safeguards see Law Council of Australia submission to Attorney General's Department on *UN Committee Against Torture's Concluding Observations on Australia* submitted on 1 September 2008 available at <http://www.lawcouncil.asn.au/sublist.html?section=&month=&year=2008&search=&searchon=titles>.

- the exercise of powers under Divisions 104 and 105 of the *Criminal Code* should be subject to full judicial review under the *Administrative Decisions (Judicial Review) Act 1977*; and
- a person who is detained under a preventative detention order should be able to freely seek legal advice without conversations between lawyer and client being monitored.

In the context of the 'dead time' provisions in Part 1C of the *Crimes Act* some safeguards proposed by the Law Council include:⁶⁵

- section 23CA should be amended to impose a maximum cap on the amount of dead time allowed to be taken into account;
- there should remain a requirement for advance judicial certification of any period of dead time claimed in reliance on sub-paragraph 23CA(8)(m);
- police should have only one opportunity to apply to a judicial officer under section 23CB to declare a specified period as reasonable dead time for the purposes of calculating the investigation period; and
- section 23CB should be amended to ensure that police are not able to extend the period of a suspect's detention without charge if they are already satisfied that sufficient information is available to support a terrorism charge against that suspect.

The Law Council is of the view that while independent review of the operation and effectiveness of these provisions is vital – so too is legislative action to ensure that in the meantime a person's rights to liberty and to a fair trial are protected.

It should also be noted that in the UK the Independent Reviewer often works along side other bodies such as the Public Interest Monitor (PIM) that also provide an important safeguard against the misuse or overuse of executive power. Bodies such as the PIM are often able to appear before decision-making authorities where decisions would otherwise be made *ex parte*, to represent the public interest and to assist the court in its scrutiny of evidence placed before it.

As previously submitted by the Law Council there is a vital role to be played by an independent body such as a Public Interest Monitor (PIM) in all aspects of the Australian control orders and preventative detention order regime.⁶⁶ The need for a PIM, with access to all material upon which an application for such orders is based, is particularly acute where interim orders can be granted in the absence of the persons who are to be subject to them, or those persons and their lawyers are denied access to all of the material upon which an order is sought.⁶⁷

⁶⁵ For further discussion of the Law Council's proposed safeguards see Law Council of Australia submission to the *Clarke Inquiry into the Case of Dr Muhamed Haneef*, submitted on 16 May 2008 available at

<http://www.lawcouncil.asn.au/sublist.html?section=&month=&year=2008&search=&searchon=titles>.

⁶⁶ See Law Council of Australia submission to the Senate Legal and Constitutional Committee's *Inquiry into the Anti-Terrorism, (Non 2) Bill 2005*, submitted 11 November 2005 p. 17

⁶⁷ Under the control order regime in Division 104 of the *Criminal Code* there is a limited role of the Queensland Public Interest Monitor, if the person subject to the control order is from Queensland. For example, the Queensland Public Interest Monitor is entitled to receive a copy of the interim control order and a notification if the control order is confirmed., see ss104.12(5), 104.14(4)(b), 104.18(3)(b), 104.31 of the *Criminal Code*. No such role is provided in respect of preventative detention orders made under Division 105, however, s105.49 provides the Division 105 does 'not affect a function or power that the Queensland public interest monitor, or a Queensland deputy public interest monitor, has under a law of Queensland'.

Like the Sheller Committee, the Law Council encourages this Committee to consider other models of review, such the appointment of a Public Interest Monitor or a public advocate, in addition to the appointment of an Independent Reviewer.⁶⁸

Conclusion

The Law Council supports the Committee's full consideration of the June 2008 Bill as a mechanism to ensure comprehensive, coordinated, independent review of Australia's terrorism laws takes place.

The appointment of an Independent Reviewer may also serve to generate parliamentary and public debate as to the effectiveness and necessity of existing terrorism measures..

The Law Council encourages this Committee to give particular consideration to the features of the June 2008 Bill highlighted in this submission and warns that independent review, while of great value to the Parliament and the community, is no substitute for the implementation of much-needed safeguards within the terrorism laws themselves.

⁶⁸ Sheller Report para [18.3].

Attachment A

Profile – Law Council of Australia

The Law Council of Australia is the peak national representative body of the Australian legal profession. The Law Council was established in 1933. It is the federal organisation representing approximately 50,000 Australian lawyers, through their representative bar associations and law societies (the “constituent bodies” of the Law Council).

The constituent bodies of the Law Council are, in alphabetical order:

- Australian Capital Territory Bar Association
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society of the Australian Capital Territory
- Law Society of the Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar Association
- The Victorian Bar Inc
- Western Australian Bar Association
- LLFG Limited (a corporation with large law firm members)

The Law Council speaks for the Australian legal profession on the legal aspects of national and international issues, on federal law and on the operation of federal courts and tribunals. It works for the improvement of the law and of the administration of justice.

The Law Council is the most inclusive, on both geographical and professional bases, of all Australian legal professional organisations.