



AUSTRALIAN
LAWYERS
FOR
HUMAN RIGHTS

PO Box A147
Sydney South
NSW 1235
DX 585 Sydney
alhr@alhr.asn.au
www.alhr.asn.au

Committee Secretary
Senate Legal and Constitutional Affairs Committee
Department of the Senate
PO Box 6100
Parliament House
Canberra ACT 2600
By email: legcon.sen@aph.gov.au

15 September 2008

Dear Inquiry Secretary

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

Please find attached a submission by Australian Lawyers for Human Rights for the consideration of the Committee.

We stand ready to give evidence at a hearing if required. Thank you very much for granting an extension.

Kind regards

Susan Harris Rimmer
President, Australian Lawyers for Human Rights

Australian Lawyers for Human Rights

Submission to the Senate Legal and Constitutional Affairs Committee

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

Introduction

1. Australian Lawyers for Human Rights (ALHR) welcomes the opportunity to make a submission on the Independent Reviewer of Terrorism Laws Bill 2008 [No. 2].
2. ALHR has made many submissions on counter-terrorism related matters to the Australian Parliament over the past decade.ⁱ ALHR also supports the submissions of other human rights agencies to this inquiry, notably the Gilbert and Tobin Centre, the Castan Centre and the HRLRC. In ALHR's view, excellent work has already been done on the problems inherent in Australia's current system of counter-terrorism measures by Federal Parliamentary Committees, the Sheller Review, the UN Human Rights Committee, the Eminent Panel of the International Commission of Jurists, the Commonwealth Ombudsman, and the Human Rights and Equal Opportunity Commission, as well as civil society and academic writing.ⁱⁱ
3. The theme of these reports is essentially that Australia's current system of counter-terrorism measures has proven itself inherently and irredeemably problematic, and ultimately irreconcilable with basic human rights and respect for human dignity. For example, the Clarke Inquiry has released a legal issues paper to inform an upcoming public seminar.ⁱⁱⁱ The suite of legal issues that arose from the Dr Haneef case shows there is a need for a unified approach to reforming the text and operationalisation of the laws.
4. ALHR supports the Bill and urges the Committee to recommend its adoption, albeit with certain amendments as elaborated below.

ALHR

5. Australian Lawyers for Human Rights (ALHR) was established in 1993, and incorporated as an association in NSW in 1998 (ABN 76 329 114 323).
6. ALHR is a network of Australian lawyers active in practising and promoting awareness of international human rights standards in Australia. ALHR has a national membership of about 1200 lawyers, with active National, State and Territory committees.
7. Through training, information, submissions and networking, ALHR promotes the practice of human rights law in Australia. ALHR has extensive experience and expertise in the principles and practice of international law, and human rights law in Australia.

The need for an Independent Reviewer

8. ALHR believes that Australia needs an independent review mechanism to provide oversight of its current and future counter-terrorism measures, duly noting that the COAG review will be held in 2010. ALHR takes a broad view of counter-terrorism measures which includes aviation and maritime safety, telecommunications interception, and protection of critical infrastructure, as well as changes to criminal law. Although substantive reviews have been held, none have yet achieved a holistic overview of counter-terrorism measures. This is because many of the provisions were passed through Parliament in haste as reactive measures, copied from other jurisdictions, or have been operationalised in unforeseen ways. .
9. Academic Miriam Gani underscored this operational point recently in the Canberra Times:

What should not be forgotten, however, is that there already exists on the public record a statement from a senior AFP officer about that agency's approach to the charging and prosecution of terrorism offences. That statement, which has already been drawn to the

attention of the inquiry by the Australian Lawyers Alliance, was made in the context of another prosecution that of university student Izhar ul-Haque who was charged with training with a terrorist organisation in Pakistan. The charges against ul-Haque were dropped in November 2007 after Justice Adams ruled certain records of interview inadmissible as evidence.

As was widely reported at the time (including by Sally Neighbour in *The Australian*, November 13, 2007), senior AFP agent Kemuel Lam Paktsun told the court that the AFP was acting under directions to test the limits of the terrorism offences: "At the time, we were directed, we were informed, to lay as many charges under the new terrorist legislation against as many suspects as possible because we wanted to use the new legislation. So regardless of the assistance that Mr Ul-Haque could give, he was going to be prosecuted, charged, because we wanted to test the legislation and lay new charges, in our eagerness to use the legislation."^{iv}

10. The question of the role of the courts in reviewing national security matters is exposed by the discussion of the need for an Independent Reviewer. As Caroline Bush has argued in a recent article, although technically there are opportunities for judicial review of national security decisions by intelligence agencies, courts rarely look behind assertions of secrecy by said agencies out of deference to executive power.^v The role of the courts in reviewing executive action in the national security area is very important. ALHR have previously called for amendments or the abolition of the use of certificates by the Attorney-General in court matters, as an example. This Bill is not an alternative. However, even if the Executive release some of the current fetters on the judiciary, there would still be a need for an independent reviewer of the kind established by this Bill.
11. Finally, ALHR believes that Australia can take the benefit of the experience of other countries in this exercise to improve accountability

and risk management, especially since many of our current laws are modeled on those of the UK in particular. Other submissions have elaborated on the UK model. ALHR below recommends to the Committee in particular the experience of Canada who reviewed in great depth the policy framework of their national security laws in response to the Arar incident.^{vi}

12. The O'Connor Commission undertook a policy review to recommend an independent, arm's-length review mechanism for the Royal Canadian Mounted Police's (RCMP) national security activities. Commissioner O'Connor chose to interpret his mandate as extending to all national security activities of the federal government, and his recommendations in part two of the report reflect this broad interpretation. The Commission recognised that post-9/11 anti-terrorist efforts are much more integrated, between agencies and across governments, than in the past and that new review mechanisms must be more integrated than the narrowly institutional-based review mechanisms now in place. The Commission concluded that enhanced review mechanisms for the RCMP, the Canadian Security Intelligence Service and other departments and agencies with national security responsibilities should be integrated through the device of "statutory gateways", which some European countries use to permit an investigative trail to be pursued past narrow jurisdictional boundaries. The Commission also recommended a new integrative body linking the various review bodies that would offer a complainant a single entry point for registering a concern. The Canadian experience is worth considering.
13. Finally, ALHR would like to reiterate the point made by the Law Council that an independent reviewer, whilst important, is no substitute for a Cabinet and Parliamentary process that evaluates and debates new legislative measures against human rights standards. While Lord Carlyle has been important in the UK, it is the Joint Committee on Human Rights that has consistently advocated for a balance between efficacious

counter-terrorism measures and the protection of human rights.^{vii} ALHR believes that a Charter of Rights and a culture of human rights built up over time is Australia's best protection against future abuses or disproportionate actions.

RECOMMENDATIONS

14. That the Reviewer be appointed for a fixed 5 year term, to ensure the 'honest broker' role is maintained.
15. That the mandate of the Reviewer be clearly linked to the protection of human rights. The Reviewer should also be consulted with regard to Australia's responses to relevant UN treaty body recommendations.
16. That if a single Reviewer model is adopted as per the Bill (noting good arguments for a panel model), then the Reviewer should be obligated to consult with the IGIS and Commonwealth Ombudsman, as well as the Chair of PJCIS. A retired judge as the apex of a triumvirate model would be ALHR's preference.
17. That the subject matter of the Reviewer's remit be widely defined (for example, the Haneef incident also revolved around the use of migration laws).
18. That the Reviewer report directly to Parliament.
19. That the Committee take evidence on the Canadian Arar review.
20. ALHR recommend to the Committee the following articles:
 - *The Arar O'Connor Commission Policy Review 2006* – especially Part VII, section 2 on Australia:
<http://www.ararcommission.ca/eng/EnglishReportDec122006.pdf>
 - *Arar: The Affair, the Inquiry, the Aftermath*, IRPP Policy Matters, May 2008: <http://www.irpp.org/pm/archive/pmvol9no1.pdf>
 - Roger Douglas, 'The Judicial Review of Counter-Terrorism Measures: a comparative study', 2008 (hard copy attached)

- Caroline Bush, National Security and Natural Justice, AIAL Forum No 57, 2008 (hard copy attached).

ⁱ <http://www.alhr.asn.au/html/main/ALHRActionbySubjectArea.html#TerrorismWar> (accessed 15 September 2008).

ⁱⁱ See further the Appendix attached to the Gilbert and Tobin Centre submission. ALHR would also add the ICJ Eminent Panel review - <http://www.icj-aust.org.au/files/ICJ%20Australia%20-%20PAPER%20-%20ICJ%20opposes%20new%20counter%20terrorism%20laws.pdf>. For academic writing see further Gani, Miriam and Mathew, Penelope. *Fresh perspectives on the war on terror*, ANU E Press, Canberra : 2008, available at http://epress.anu.edu.au/war_terror/pdf/prelims.pdf (accessed 15 September 2008).

ⁱⁱⁱ [http://www.haneefcaseinquiry.gov.au/www/inquiry/rwpattach.nsf/VAP/\(C7C220BBE2D77410637AB17935C2BD2E\)~PublicForumIssuesPaper.pdf/\\$file/PublicForumIssuesPaper.pdf](http://www.haneefcaseinquiry.gov.au/www/inquiry/rwpattach.nsf/VAP/(C7C220BBE2D77410637AB17935C2BD2E)~PublicForumIssuesPaper.pdf/$file/PublicForumIssuesPaper.pdf) (accessed 15 September 2008).

^{iv} <http://www.canberratimes.com.au/news/opinion/editorial/general/accountability-overwhelmed-by-antiterrorism-laws/1240686.aspx> (accessed 15 September 2008).

^v Caroline Bush, National Security and Natural Justice, *AIAL Forum* No 57, 2008 (hard copy attached). See also Joo-Cheong Tham, Casualties of the Domestic ‘War on Terror’: A Review of Recent Counter-Terrorism Laws, <http://www.austlii.edu.au/au/journals/MULR/2004/16.html>, (accessed 15 September 2008).

^{vi} The Maher Arar affair was about the scandal of a Canadian citizen’s “extraordinary rendition” from the United States to a year of torture in a Syrian prison. A public inquiry under Mr. Justice Dennis O’Connor was held into the complicity of Canadian officials. See further Reg Whitaker, IRPP Policy Matters, May 2008, available at <http://www.irpp.org/pm/archive/pmv01no1.pdf>, (accessed 15 September 2008).

^{vii} See further http://www.parliament.uk/parliamentary_committees/joint_committee_on_human_rights.cfm. See further: <http://www.publications.parliament.uk/pa/jt200708/jtselect/jtrights/132/132.pdf> (accessed 15 September 2008).