

# The Independent Reviewer of Terrorism Bill 2008

September 2008

Contact:

Tilda Hum  
Legal and Policy Officer

[tilda@lawyersalliance.com.au](mailto:tilda@lawyersalliance.com.au)

Phone: +61 (02) 9258 7700

Suite 5, Level 7, 189 Kent Street, Sydney NSW 2000 GPO Box 7052 Sydney NSW 2001  
DX 10126 Sydney Stock Exchange ABN 96 086 880 499

T + 61 2 9258 7700 F + 61 2 9258 7777 E [Enquiries@lawyersalliance.com.au](mailto:Enquiries@lawyersalliance.com.au)

[www.lawyersalliance.com.au](http://www.lawyersalliance.com.au)

# Contents

- 3**    **Who we are**
- 4**    **Introduction**
- 4**    **Executive Summary**
- 5**    **Summary of recommendations**
- 6**    **The Independent Reviewer of Terrorism Laws Bill 2008**
- 6**    **Why is such a Bill needed?**
- 9**    **Suggested improvements to the Bill**
- 11**   **The Australian Lawyers Alliance position**



# Who we are

## Background

The Australian Lawyers Alliance is the only national association of lawyers and other professionals dedicated to protecting and promoting justice, freedom and the rights of individuals. We estimate that our 1,500 members represent up to 200,000 people each year in Australia. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief. The Lawyers Alliance started in 1994 as the Australian Plaintiff Lawyers Association, when a small group of personal injury lawyers decided to pool their knowledge and resources to secure better outcomes for their clients – victims of negligence.

## Corporate Structure

ALA Ltd, trading as the Australian Lawyers Alliance, is a company limited by guarantee with branches in every state and territory of Australia. We are governed by a board of directors made up of representatives from around the country. This board is known as the National Council. Our members elect one director per branch. Directors serve a two-year term, with half the branches holding an election each year. The Council meets four times each year to set the policy and strategic direction for the organisation. The members also elect a president-elect, who serves a one-year term in that role and then becomes National President in the following year. The members in each branch elect their own state/territory committees annually. The elected office-bearers are supported by eleven paid staff who are based in Sydney.

## Funding

Our main source of funds is membership fees, with additional income generated by our events such as conferences and seminars, as well as through sponsorship, advertising, donations, investments, and conference and seminar paper sales. We receive no government funding.

## Programs

We take an active role in contributing to the development of policy and legislation that will affect the rights of individuals, especially the injured and those disadvantaged through the negligence of others. The Lawyers Alliance is a leading national provider of Continuing Legal Education/Continuing Professional Development, with some 25 conferences and seminars planned for 2008. We host a variety of Special Interest Groups (SIGs) to promote the development of expertise in particular areas. SIGs also provide a focus for education, exchange of information, development of materials, events and networking. They cover areas such as workers' compensation, public liability, motor vehicle accidents, professional negligence and women's justice. We also maintain a database of expert witnesses and services for the benefit of our members and their clients. Our bi-monthly magazine, *Precedent*, is essential reading for lawyers and other professionals keen to keep up to date with developments in personal injury, medical negligence, public interest and other, related areas of the law.

# Introduction

The Australian Lawyers Alliance is an association of lawyers and other professionals dedicated to protecting and promoting justice, freedom and the rights of the individual.

Therefore we are pleased to have the opportunity to offer a view on the proposed Independent Reviewer of Terrorism Laws Bill, as the Alliance has significant concerns regarding the scope and operation of Australia's terrorism legislation and the effect that the application of these laws can have on basic human rights.

## Executive Summary

The Australian Lawyers Alliance supports the Independent Reviewer of Terrorism Bill. The Alliance believes that such a Bill is essential as:

- All of Australia's anti-terrorism legislation was passed hurriedly in response to perceived threats to national security, with minimal community consultation and parliamentary debate;
- Many provisions of the anti-terrorism legislation and their application have already had a detrimental impact on fundamental human rights;
- Australia is relatively inexperienced at managing legislation designed for terrorism offences;
- Significant areas of the anti-terrorism regime are not being regularly reviewed and debated; and
- Numerous cases, including those of the Dr Mohamed Haneef, Izhar Ul-Haque and the Barwon 12, among others, demonstrate that the laws are not working as intended and are operating at the expense of basic human rights.

## Summary of Recommendations

**Recommendation One** – There should be a panel of reviewers (three or five) rather than an individual reviewer.

**Recommendation Two** – There should be clearer guidelines as to which particular areas or aspects of the laws the Independent Reviewer must report on.

**Recommendation Three** – The Independent Reviewer should be required to report on whether the laws and their application are consistent with Australia’s international human rights obligations, particularly the International Covenant on Civil and Political Rights.

**Recommendation Four** – The Independent Reviewer should have the scope and capacity to examine the conditions in which terrorism suspects, and those who are convicted of terrorism offences and receive custodial sentences, are detained by relevant custodial authorities.

**Recommendation Five** - The Independent Reviewer should have the ability to consider the interaction between state and federal anti-terrorism legislation.

**Recommendation Six** – The reports handed down by the Independent Reviewer should be handed directly to the Parliamentary Joint Committee on Intelligence and Security.

## The Independent Reviewer of Terrorism Laws Bill 2008

The purpose of the Independent Reviewer of Terrorism Laws Bill 2008 is to appoint an independent person to oversee the application and effects of the relatively recently implemented anti-terror legislative regime. The Bill reflects the unique nature of the anti-terrorism laws and the potential for these laws to lead to serious abuses of human rights in a climate of secrecy and closed doors.

The inspiration for this particular Bill may have derived from the United Kingdom experience, where an Independent Reviewer, Lord Carlile of Berriew QC, has been providing annual reports on various aspects of anti-terrorism legislation since 2001.<sup>1</sup> In the UK, the public is also encouraged to offer its views on the legislation on an ongoing basis.

### Why is such a Bill needed?

Australia has seen a sharp increase in federal criminal legislation following the terrorism attacks on the United States in 2001. Our domestic anti-terrorism provisions were further expanded in 2005, following terrorism attacks in the United Kingdom. Much of this legislation was rushed through in a climate of fear and urgency, with little to no time allocated for meaningful discussion at a parliamentary or community level, despite the fact that many of its provisions greatly curtailed fundamental rights to freedom of speech and movement, privacy and access to legal assistance, and undermined long-held common law rights.

Unlike other countries, Australia has little experience in dealing with terrorism-type offences, having never encountered a significant ongoing terrorism threat locally. Before 2001, Australia did not have a specific legislative regime to deal with

---

<sup>1</sup> These reports can be viewed through the United Kingdom Home Office site at: <http://security.homeoffice.gov.uk/legislation/independent-review-legislation/>

terrorism offences, and instead relied on existing federal criminal law to manage these crimes. Following the attacks on the United States, the Australian government attempted to create an entire functioning system to manage terrorism offences in an extremely short period of time.

While some provisions of the terrorism laws have been reviewed - the most comprehensive review being the 'Sheller Inquiry' undertaken through the Parliamentary Joint Committee on Intelligence and Security in 2002 - many have not. As the practical effect of the legislation becomes apparent, serious questions are being raised as to whether these legislative measures are proportionate to the risk and, indeed, whether they are effective in minimising threats of terrorism in Australia.

### ***Concerning matters regarding terrorism laws and their application***

One need only to look at recent cases to see why constant vigilance over the anti-terrorism regime is essential. Dr Mohamed Haneef was held without charge for 12 days, as Australian federal authorities attempted to pull together sufficient evidence to warrant a charge. Under section 102.7(2) of the *Criminal Code Act 1995 (Cth)*, Dr Haneef was charged with recklessly assisting a terrorist organisation, a crime carrying a maximum penalty of 15 years. This crime does not require that a person actively support an organisation, merely that they were 'reckless' to that fact. Any person who may have unknowingly donated money to a religious or charity group that has been classed, or subsequently classed, as a terrorist organisation is potentially at risk of breaching the *Criminal Code Act*, demonstrating just how wide the net of these laws can be cast.

Other worrying facts about how these laws have been applied have come to light. A senior Australian Federal Police (AFP) agent, Kemuel Lam Pakstun, made the following statement at the terrorism trial of university student, Izhar Ul-Haque:<sup>2</sup>

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.<sup>3</sup>

Another matter of significant concern was the case of *R v Brenbrika & Ors* (Ruling 20) (2008) VSC 80, a long-running criminal trial process concerning 12 accused charged in Victoria with terrorism offences. The classification of these accused as 'high-risk prisoners', without any justification other than that they had been charged with terrorism offences, led the accused to apply to stay the Supreme Court trial that had commenced in February 2008.

In the stay ruling, Bongiorno J noted that the prison at which the suspects were being housed, in the Acacia Division of Barwon Prison, was built as a high-security prison for sentenced prisoners, and was not designed for prisoners on remand. Bongiorno J noted numerous concerns that had been raised, in relation to their incarceration including that the prisoners spent 23 hours in their cells, had such severe restrictions in relation to visits that they claimed that the preparation of their defence had been adversely affected and that they were shackled and strip-searched

---

<sup>2</sup> Izhar Ul-Haque was charged with training with the terrorist organisation, Lashkar-e-Toiba, in Pakistan, despite the organisation not being classed as a terrorist organisation under federal regulations at the time of alleged training. The case was dismissed after significant evidence was ruled inadmissible.

<sup>3</sup> Sally Neighbour, 'Charge suspects to test terror laws', *The Australian* (13 November 2007).



when travelling to and from court each day.

Bongiorno J concluded: 'Neither Corrections Victoria nor the Crown has ever placed any evidence before this court in any form to justify either the accuseds' classification or their treatment which is, in terms of the fairness of this trial, intolerable.'

In short, the classification of the accused, simply on the basis of their being charged with terrorism offences, constituted not only a serious breach of their human rights by the prison authorities, but led to the trial judge declaring that it was one of the reasons for concluding that the trial had become unfair.

An independent review function is vital to ensure that the rights of individuals, even those accused with serious criminal offences, are appropriately balanced with the need to protect Australia's security. A reviewer would facilitate greater engagement and understanding of this complex area of law, ensure greater consistency and transparency and accountability of the government and its various departments.

## **Suggested improvements to the Bill**

While the Australian Lawyers Alliance largely commends the Bill, the Alliance offers the following suggestions for improvement to the draft Bill:

**Section 6** should be amended to appoint a panel of reviewers (three or five) on either a full-time or part-time basis, rather than a single individual. Aside from the issue of whether significant scrutiny of the laws could be handled by one person alone, a panel would enable a variety of skills and insights to be brought to the

review process and reduce any perception of bias that may occur with a single reviewer.

**Section 8** should incorporate clearer guidance as to what the reviewer should report on. While flexibility and allowing the reviewer to determine priorities to some extent are desirable, specifying mandatory areas for review would provide greater consistency, while still leaving room for the reviewer to consider other, additional areas. The Lawyers Alliance believes that this section should also include the capacity for the Independent Reviewer to examine and review the way in which terrorism suspects, and those who are convicted of terrorism offences and receive custodial sentences, are detained by relevant custodial authorities.

As state parliaments have also enacted a series of terrorism laws, the role of the Independent Reviewer should include looking at the interaction and considering state and federal terrorism laws, while not being empowered to assess state laws separately.

The Lawyers Alliance supports the amendments moved by Senator Bob Brown and the Greens in which the Reviewer would be required to consider international human rights law, particularly the International Covenant on Civil and Political Rights, in the absence of a federal charter of rights, to ensure that Australia is meeting its international obligations to protect fundamental human rights.

**Section 11(1)** - The Lawyers Alliance submits that reports from the Independent Reviewer should be delivered to the Parliamentary Joint Committee on Intelligence and Security, rather than to the Minister for tabling. This would further enhance

transparency and the independent nature of the Reviewer.

## **The Australian Lawyers Alliance position**

The Australian Lawyers Alliance strongly supports this Bill and believes that in the absence of a federal charter of rights, constant vigilance of these serious laws is essential to ensure that our fundamental rights are not eroded unjustifiably.

Lawyers

for the People



protecting and promoting justice,  
freedom and the rights of the individual

[www.lawyersalliance.com.au](http://www.lawyersalliance.com.au)