

A The Value of Independent Review of Australia's Anti-Terrorism Laws

We welcome the National Security Legislation Monitor Bill 2009 as an initiative to establish ongoing, holistic and independent review of Australia's anti-terrorism laws.

We note that both the Security Legislation Review Committee ('SLRC') (June 2006¹) and the Parliamentary Joint Committee on Intelligence and Security ('PJCIS') (December 2006;² September 2007³) unanimously supported the creation of a permanent mechanism for independent review, although the two Committees favoured different models through which this was to occur. Additionally, the Clarke Inquiry into the case of Dr Mohamed Haneef also supported the establishment of such an office.⁴

It is worthwhile to briefly state the arguments in favour of creating a permanent mechanism for independent review of these laws.

- **Contrast between Australia's abundance of anti-terrorism law and its lack of significant expertise in this area**

Australia's great fortune over its history is to be largely free of politically motivated violence. This means that as at 11 September 2001, the Northern Territory was the only Australian jurisdiction to have enacted anti-terrorism laws of general application. There were no national or state laws criminalising terrorism. The idea that we could, in the space of only a few years, perfect our approach to the creation and implementation of laws in this extremely complex area seems overly confident.

It is significant that, even with its much longer history of responding to terrorist threats, the United Kingdom sees ongoing value in the existence of an office of Independent Reviewer of Terrorism Legislation. The message from the United Kingdom experience is that anti-terrorism laws must be examined continually for both their effectiveness and impact upon the community.

Australia's need to build a national security legislative framework from scratch is also relevant. There has been extraordinary growth in the number of anti-terrorism laws in Australia since 2001, far beyond the original creation of various terrorism offence provisions in Divisions 101 and 102 of the Commonwealth *Criminal Code*. More than 40 anti-terrorism laws have been enacted in Australia to date. Understanding how the many disparate parts of our anti-terrorism laws fit together is a bewildering task. It seems reasonable to suggest, in light of their complexity and number, that these laws require ongoing review.

¹ Security Legislation Review Committee, *Report of the Security Legislation Review Committee* (2006), 6.

² Parliamentary Joint Committee on Intelligence and Security, *Review of Security and Counter Terrorism Legislation* (December 2006), 22 (Recommendation 2).

³ Parliamentary Joint Committee on Intelligence and Security, *Inquiry into the Terrorist Organisation Listing Provisions of the Criminal Code Act 1995* (2007), ii, 52.

⁴ The Hon John Clarke QC, *Report of the Inquiry into the Case of Dr Mohamed Haneef - vol 1* (November 2008) 255-56.

Regular reports on the state and operation of Australia's anti-terrorism laws would promote 'rational policy-making'⁵ and assist parliamentary deliberation and committee work in the area.⁶

- **Inadequate review mechanisms employed to date**

Although there has been review of various aspects of Australia's terrorism laws, this has not been without its problems.

For one thing, the Commonwealth government has demonstrated a selective responsiveness to the pre-enactment scrutiny of Bills. This has occasionally produced laws rather different from those initially proposed and reviewed. A good example of this is the *Anti-Terrorism Act 2004* (Cth), which made changes to the pre-charge detention of terrorism suspects under Part IC of the *Crimes Act 1914* (Cth). Those provisions provided the legal basis for the 12 day detention of Dr Mohamed Haneef in July 2007 in a way clearly not envisaged by the Senate Standing Committee on Legal and Constitutional Affairs when it reviewed the relevant Bill. The selective implementation of the Committee's recommendations accompanied by new additions to the Bill produced a law different in key respects from that which was reviewed. One benefit of an Independent Reviewer would be to ensure that the law *as enacted* would receive scrutiny.

Some post-enactment review of Australia's anti-terrorism laws has occurred (in the Appendix to this submission, we provide a table of these reviews). However, these reviews have been markedly fragmented. While the basic offences, the Attorney-General's power to proscribe 'terrorist organisations', the power of ASIO to question and detain individuals, and the reworked sedition laws have all been reviewed, this has been done by several different bodies and all on a once-off basis. The structure of these reviews is inconsistent with the interconnectedness of Australia's anti-terrorism laws and also prevents the development of expertise in reviewing the laws.⁷

Inevitably, given the approach to date, important components of the anti-terrorism regime have gone completely unreviewed. For example, no review has investigated the impact of the *National Security Information Act (Criminal and Civil Proceedings) Act 2004* (Cth) on the fairness of trials for persons accused of terrorist crimes – despite significant concerns having been voiced by sectors of the legal profession over this law.⁸

- **Community fears**

In 2007, the PJCIS said that the establishment of an office of an Independent Reviewer of Terrorism Legislation 'would contribute positively to community confidence as well as

⁵ Clive Walker, 'The United Kingdom's Anti-Terrorism Laws: Lessons for Australia' in Andrew Lynch, Edwina MacDonald and George Williams (eds.) *Law and Liberty in the War on Terror* (2007) 189.

⁶ Craig Forcese, 'Fixing the Deficiencies in Parliamentary Review of Anti-terrorism Law: Lessons from the United Kingdom and Australia' (2008) 14(6) *IRPP Choices*, 14.

⁷ See John von Doussa QC, President of the Human Rights and Equal Opportunities Commission, 'Incorporating Human Rights Principles into National Security Measures' (Paper presented at the International Conference on Terrorism, Human Security and Development: Human Rights Perspectives, City University of Hong Kong, 16-17 October 2007).

⁸ See Phillip Boulten, 'Preserving National Security in the Courtroom: A New Battleground' in Andrew Lynch, Edwina MacDonald and George Williams (eds) *Law and Liberty in the War on Terror* (2007) 96-103.

provide the Parliament with regular factual reports'.⁹ The existence of a 'watchdog' able to review Australia's anti-terrorism laws would also go a considerable way towards countering the perception among members of Australia's Muslim communities that they are unfairly targeted by these laws.¹⁰ This perception has been identified by a number of review bodies, including the SLRC and the PJCIS, as one of the greatest challenges facing Australia in responding to terrorism.¹¹

- **Practical operation of the anti-terrorism laws requiring reflection**

Finally, we have clearly entered the next phase of anti-terrorism law in Australia – where the courts are now playing a part alongside the other arms of government. The SLRC noted that the timing of its own review rendered its inquiry a 'theoretical exercise' in many ways, before saying that this situation was sure to change over the next few years.¹² Reviews from this point forward will not simply be appraising laws in the abstract but considering them in light of the life which they now have both in enforcement and in the courts. Since 2002, 32 men have been charged and/or prosecuted in Australia for terrorism-related offences. Nine of these men have been found guilty. The Haneef case of 2007 and the outcome in the case of *R v Ul-Haque* ([2007] NSWSC 1251) provide just two examples of the need for renewed examination of the anti-terrorism laws.

Recommendation 1:

A mechanism of independent review of Australia's anti-terrorism laws should be created to allow for ongoing and independent consideration of the operation of these laws both as to their effectiveness in achieving national security and their impact upon the rights of individuals and groups within the community.

B Recommendations of the Standing Committee on Legal and Constitutional Affairs Inquiry into the Independent Reviewer of Terrorism Laws Bill 2008 [No. 2]

One of the principal issues for consideration by the Senate Standing Committee and Public Administration is 'the extent to which the recommendations of the Legal and Constitutional Inquiry into the [Independent Reviewer of Terrorism Laws Bill 2008 [No. 2]] were taken on board'¹³ in the drafting of the National Security Legislation Monitor Bill 2009.

Recommendation 1 of the Senate Standing Committee on Legal and Constitutional Affairs was that the Independent Reviewer of Terrorism Laws Bill 2008 [No. 2] be enacted, but

⁹ PJCIS, above n 3, 52.

¹⁰ Centre for the Study of Human Rights, ESRC Seminar Series, *The Role of Civil Society in the Management of National Security in a Democracy, Seminar Five: The Proper Role of Politicians*, 1 November 2006, 4.

¹¹ See, for example, SLRC, above n 1, [10.92]-[10.102]; Australian Law Reform Commission, *Fighting Words: A Review of Seditious Laws in Australia* (2006), [7.36], [7.40]-[7.46]; PJCIS, above n 2, Chapter 3; PJCIS, above n 3, Chapter 3. See further, Sharon Pickering et al, *Counter-Terrorism Policing and Culturally Diverse Communities* (2007).

¹² SLRC, above n 1, [18.1].

¹³ Parliament of Australia, Senate, *Hansard*, 25 June 2009, Appendix 10: Selection of Bills Committee, 69.

that Recommendations 2 to 5 be implemented prior to it being passed.¹⁴ Set out below is an examination of the National Security Legislation Monitor Bill 2009 against Recommendations 2 to 5 of the Senate Standing Committee on Legal and Constitutional Affairs.

Recommendation 2 of the Senate Standing Committee on Legal and Constitutional Affairs:

That the bill be amended to comprehensively describe the role and function of the [Independent Reviewer] and enumerate the criteria by which legislation should be reviewed.

Section 6 of the National Security Legislation Monitor Bill 2009 clearly and adequately sets out the role and functions of the National Security Legislation Monitor ('the Monitor') and thus satisfies Recommendation 2.

Subsection 6(1)(a) gives the Monitor the function of reviewing the 'operation, effectiveness and implications' of 'Australia's counter-terrorism and national security legislation' and 'any other law of the Commonwealth to the extent that it relates to Australia's counter-terrorism and national security legislation'. Discussed in more detail below is the breadth of the laws that the Monitor may review.

Subsection 6(1)(c) specifies that the Monitor is to report on a matter relating to counter-terrorism or national security that is referred to him/her by the Prime Minister. The process for the Prime Minister to refer a matter to the Monitor is set out in section 7.

We believe that it is appropriate for subsection 6(2) to set out particular functions that the Monitor is not to carry out, as these functions are already undertaken by the Commonwealth Ombudsman and the Inspector-General of Intelligence and Security. It would be inefficient and may result in contradictory outcomes for the Monitor to possess the power to undertake these same functions.

We are concerned that there is no explicit mention in section 6 of the Monitor's power to conduct inquiries upon his/her own initiative (beyond the obligation to lodge an annual report in section 29). At times, the Independent Reviewer in the United Kingdom has produced reports on his own volition¹⁵ and the Monitor should certainly possess a similar capacity.

It is possible that this power is implicit in section 6(1), especially given the statement in the Second Reading speech that '[t]he Monitor may initiate his or her own investigations'.¹⁶ However, rather than leaving it to implication, this power should be expressly set out in the National Security Legislation Monitor Bill 2009.

Recommendation 2:

¹⁴ Parliament of Australia, Senate Standing Committee on Legal and Constitutional Affairs, *Inquiry into the Independent Reviewer of Terrorism Laws Bill 2008 [No. 2]* (October 2008), ix.

¹⁵ Lord Alex Carlile, *The Definition of Terrorism*, 7 June 2007.

¹⁶ Parliament of Australia, Senate, *Hansard*, 25 June 2009, 10 (Penny Wong).

Section 6 of the National Security Legislation Monitor Bill 2009 should be amended to explicitly state that the Monitor may commence inquiries upon his/her own initiative.

Subsection 6(1)(b) of the National Security Legislation Monitor Bill 2009 specifies criteria against which any review by the Monitor is to be conducted. We submit that this is a significant improvement upon section 8 of the Independent Reviewer of Terrorism Laws Bill 2008 [No. 2].

First, the Monitor is to consider whether Australia's anti-terrorism laws 'contain adequate safeguards for protecting the rights of individuals'. The Senate Standing Committee on Legal and Constitutional Affairs saw 'potential merit in the legislation falling under the remit of the [Independent Reviewer] being benchmarked against Australia's international human rights obligations'. This is reflected in section 8 of the National Security Legislation Monitor Bill 2009, which requires the Monitor to have regard to 'Australia's obligations under international agreements' in reviewing the anti-terrorism laws. Furthermore, the objects clause in section 3 notes that the purpose of the Monitor is, amongst other things, to ensure that Australia's anti-terrorism laws are 'consistent with Australia's international obligations, including human rights obligations'.

The second criterion against which the Monitor must review Australia's anti-terrorism laws is whether such laws 'remain necessary'. In our opinion, this criterion is significant because it recognises that aspects of Australia's anti-terrorism laws may have been enacted without adequate justification, be ineffective or impractical or have ceased to be necessary given the current level of the terrorist threat. The objects clause in section 3 reiterates this in stating that the purpose of the Monitor is to ensure that Australia's anti-terrorism laws are 'effective in deterring and preventing terrorism and terrorism-related activity which threatens Australia's security' and 'effective in responding to terrorism and terrorism-related activity'. In our opinion, it is imperative that the Monitor is not simply given the power to tinker around the edges of the existing anti-terrorism laws but to consider such fundamental issues as whether any aspect of these laws should be repealed. We believe that section 6 achieves this.

The other relevant section of the National Security Legislation Monitor Bill 2009 is section 9. Section 9, appropriately in our opinion, requires the Monitor to place emphasis on anti-terrorism laws that have been applied or purportedly applied in the current or immediately preceding financial year.

Recommendation 3 of the Senate Standing Committee on Legal and Constitutional Affairs:

That the bill be amended to detail:

- (a) the legal status of the Independent Reviewer;*
- (b) the legislation intended to fall under its purview;*
- (c) remuneration of the [Independent Reviewer];*
- (d) resourcing of the [Independent Reviewer]; and*
- (e) the immunity or otherwise of the [Independent Reviewer] from civil liability.*

The Senate Standing Committee on Legal and Constitutional Affairs was critical of the lack of detail in the Independent Review of Terrorism Laws Bill 2008 [No. 2] regarding the matters listed in Recommendation 3 above.¹⁷ To some extent, this is rectified in the National Security Legislation Monitor Bill 2009.

Section 4 provides a detailed definition of 'counter-terrorism and national security legislation'. Furthermore, as discussed above, s 6(1)(a) enables the Monitor to not only conduct reviews of laws falling within this definition but also 'any other law of the Commonwealth to the extent that it relates to Australia's counter-terrorism and national security legislation' (emphasis added). This should allay concerns, such as those expressed by the Castan Centre for Human Rights in its submission to the Senate Standing Committee on Legal and Constitutional Affairs, that the definition of 'terrorism laws' in section 4 of the Independent Reviewer of Terrorism Laws Bill 2008 [No. 2] may not capture all the legislation it was intended to.¹⁸

Section 13 sets out a process for determining the remuneration of the Independent Reviewer.

Section 31 gives the Monitor immunity from legal action in relation to anything done, or omitted to be done, in good faith by him/her in the performance or purported performance of his/her functions or in the exercise or purported exercise of his/her powers.

However, the National Security Legislation Monitor Bill 2009 does not address either the legal status of the Monitor or the resourcing of the Monitor. Despite Recommendation 3 of the Senate Standing Committee on Legal and Constitutional Affairs, no details as to where the office of the Monitor will be situated, the corporate structure of the office, whether it constitutes an independent statutory agency, under what legislation it will employ staff and how it will be resourced¹⁹ are included in the National Security Legislation Monitor Bill 2009. In our opinion, this constitutes a substantial deficiency in the Bill.

The Government has publicly stated that the office of the Monitor will be established within the Department of Prime Minister and Cabinet and will be allocated \$1.4 million over four years.²⁰ Although we believe that it would be more appropriate for the office of the Monitor to be located within the Attorney-General's Department, which administers Australia's anti-terrorism laws, what is of paramount importance is that the office is truly independent. In this regard, the precedent of the office of the Inspector-General of Intelligence and Security should be followed. That office is situated within the Department of Prime Minister and Cabinet solely for administrative purposes. However, as an independent statutory office holder, the Inspector-General of Intelligence and Security is not subject to a general direction from the Prime Minister or other Ministers as to how his/her statutory functions should be performed. A similar level of independence must be ensured in relation to the Monitor, and clearly stated in the National Security Legislation Monitor Bill 2009.

¹⁷ Senate Standing Committee on Legal and Constitutional Affairs, above n 14, 20.

¹⁸ Castan Centre for Human Rights, Submission 14, Senate Standing Committee on Legal and Constitutional Affairs, above n 14, 1-2.

¹⁹ Senate Standing Committee on Legal and Constitutional Affairs, above n 14, 20.

²⁰ Parliament of Australia, Department of Parliamentary Services, Parliamentary Library, Research Paper No. 33 (2008-2009), 'Budget Review 2009-10', 29 May 2009 <<http://www.aph.gov.au/library/Pubs/RP/2008-09/09rp33.pdf>> (13 July 2009).

Recommendation 3:

The National Security Legislation Monitor Bill 2009 should be amended to provide details as to where the office of the Monitor will be situated, the corporate structure of the office, whether it constitutes an independent statutory agency, under what legislation it will employ staff and how it will be resourced.

A further issue of concern is that there is no mention of ‘independence’ in the title of the office. This, combined with the location of the office within the Department of Prime Minister and Cabinet, has the potential to undermine public confidence in the office and also the operation of Australia’s anti-terrorism laws more generally, which was identified by the PJCIS as a benefit of creating an ‘independent reviewer’.²¹

Recommendation 4:

The title of the office should be amended to the Independent National Security Legislation Monitor.

Recommendation 4 of the Senate Standing Committee on Legal and Constitutional Affairs:

That the bill be amended so that the role of Independent Reviewer is carried out by a panel of three people with relevant expertise, and that their terms of service be staggered where possible.

The Senate Standing Committee on Legal and Constitutional Affairs acknowledged that a single appointment ‘offers administrative simplicity and possibly financial advantages’. It ultimately accepted, however, that a panel of reviewers offers greater advantages – ‘the opportunity to stagger new appointments, therefore promoting continuity over time, but also reduces the risk of perceived lack of independence’.²² This conclusion is supported by the finding of the SLRC in 2006 that a committee of persons, not dissimilar to itself, should be appointed to the office of Independent Reviewer of Terrorism Legislation.²³

The National Security Legislation Monitor Bill 2009 ignores Recommendation 4 of the Senate Standing Committee on Legal and Constitutional Affairs. The definition of the ‘National Security Legislation Monitor’ in section 4 of the Bill refers to him/her as a single ‘person’.

There are a number of reasons why we remain of the view that the office of the Monitor should consist of a panel of three persons. As observed by a leading expert on United Kingdom anti-terrorism laws, Professor Clive Walker, a panel would ‘gain a spread of expertise’.²⁴ The United Kingdom’s Independent Reviewer of Terrorism Legislation, Lord Alex Carlile QC, has been criticised as too accepting of many of the United Kingdom government’s proposals and existing legislative devices. For example, Lord Carlile

²¹ PJCIS, above n 2, vii.

²² Senate Standing Committee on Legal and Constitutional Affairs, above n 14, 20.

²³ SLRC, above n 1, 201. Cf. PJCIS, above n 2, 20.

²⁴ Walker, above n 5, 189.

expressed strong support for the proposed extension of pre-charge detention from 28 to 42 days. The potential for the office of the Monitor to be perceived as an ‘advocate’ for the Commonwealth’s laws would be minimised if it consisted of a panel of three reviewers of diverse backgrounds and relevant expertise.

Another reason for the appointment of a panel of reviewers is the extensive workload that the office of the Monitor will have.²⁵ This is because of the large number of anti-terrorism laws enacted in Australia since 2002 and the increasing consideration of these laws by the courts. There is simply too much work for one person who is appointed on a part-time basis, as s 11(1) of the National Security Legislation Monitor Bill 2009 indicates that the Monitor will be.

Essential to maintaining public confidence in the office of the Monitor is that he/she be able to commence inquiries upon his/her own initiative. However, the ability to do this is potentially constrained by the Prime Minister’s power, under s 7 of the National Security Legislation Monitor Bill 2009, to refer numerous matters to the Monitor for review and specify a time-frame in which the review is to occur. In our opinion, the best means of ensuring that the office of the Monitor is not overburdened by references from the Prime Minister, and thus prevented from commencing inquiries upon the Monitor’s own initiative, is to appoint a panel of reviewers to share the workload.

Recommendation 5:

The National Security Legislation Monitor Bill 2009 should be amended to establish a panel of three reviewers.

If the Committee accepts that a panel of three persons should be appointed, we believe that they should all be appointed on a part-time basis. This is because the ability to undertake outside paid employment would ensure a level of financial independence from the Commonwealth government. There should, of course, be a prohibition on engagement in any outside paid employment that conflicts or may conflict with the proper performance of the Monitor’s duties except with the written consent of the Prime Minister (as per section 15 of the National Security Legislation Monitor Bill 2009).

Furthermore, the tenure of the three reviewers should be staggered so that a range of expertise and familiarity with the laws and the review process is held by those serving in the office at any one time.

Recommendation 6:

If a panel of three reviewers is appointed:

- **they should be appointed on a part-time basis; and,**
- **appointment periods should be staggered with a possibility of renewal at the end of the original appointment period.**

²⁵ This has been raised by the United Kingdom Parliament’s Joint Committee on Human Rights as the reason behind its recommendation that a panel of reviewers be appointed: United Kingdom Parliament, Joint Committee on Human Rights, *Tenth Report: Counter-Terrorism Police and Human Rights (Ninth Reports): Annual Renewal of Control Orders Legislation 2008* (2008) [56].

Recommendation 5 of the Senate Standing Committee on Legal and Constitutional Affairs:

That the bill be amended so that, in addition to reporting to Parliament on inquiries undertaken by the Independent Reviewer in respect of terrorism legislation, an Annual Report on the activities of the Independent Reviewer is tabled in Parliament.

Section 29 of the National Security Legislation Monitor Bill 2009 requires the Monitor to prepare and provide to the Prime Minister, as soon as practicable at the end of each financial year, a report on the performance of the Monitor's functions under subsections 6(1)(a) and (b) of that Act.

However, in our opinion, section 29 fails to reflect recommendation 5 of the Senate Committee by having the Monitor report to the Prime Minister rather than directly to the Commonwealth Parliament. The Law Council of Australia, in its submission to the Senate Standing Committee on Legal and Constitutional Affairs, clearly stated the arguments in favour of direct reporting by the Monitor to the Parliament:

[Reporting to the relevant Minister] 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'.²⁶

We agree with the arguments put forward by the Law Council of Australia and reiterate our own recommendation to the Senate Standing Committee on Legal and Constitutional Affairs about the value of reporting directly to the Parliament.²⁷

Recommendation 7:

Section 29(1) of the National Security Legislation Monitor Bill 2009 should be amended to provide that the annual report of the Monitor must be presented directly to the Commonwealth Parliament.

We have two further concerns about the referral and reporting requirements in the National Security Legislation Monitor Bill 2009.

First, the PJCIS does not have the power to refer matters to the Monitor. We believe that such a power vested in the PJCIS was an admirable feature of the Independent Reviewer of Terrorism Laws Bill 2008 [No. 2]. This is because it weakened the suggestion that the Independent Reviewer is exclusively in service to the executive and constituted a clear

²⁶ Law Council of Australia, Submission 15, Senate Standing Committee on Legal and Constitutional Affairs, *Inquiry into the Independent Reviewer of Terrorism Laws Bill 2008 [No. 2]*, 14.

²⁷ Gilbert + Tobin Centre of Public Law, Submission 4, Senate Standing Committee on Legal and Constitutional Affairs, *Inquiry into the Independent Reviewer of Terrorism Laws Bill 2008 [No. 2]*, 5.

improvement on the United Kingdom situation where the relevant Parliamentary Committee may only request a report through the Office of the Home Secretary.

Recommendation 8:

The National Security Legislation Monitor Bill 2009 should be amended to enable the PJCIS to refer matters to the Monitor for review. If the Bill is amended in this manner, reports by the Monitor on matters referred by the Parliamentary Joint Committee on Intelligence and Security (if not *all* reports, as per Recommendation 7) should be presented directly to the Commonwealth Parliament.

Second, section 30 of the National Security Legislation Monitor Bill 2009 provides that where the Prime Minister refers a matter to the Monitor, the Prime Minister may direct the Monitor to provide an interim report to the Prime Minister on the Monitor's work on the reference. Even if the Prime Minister does not direct the Monitor to provide an interim report, the Monitor may, upon his/her own initiative, decide to do so.

It is essential to public confidence in the office of the Monitor that reviews are perceived to be conducted in an independent and impartial manner. Every effort should be made in the National Security Legislation Monitor Bill 2009 to prevent the executive branch of government from having any involvement in the preparation of a report prior to its being tabled in Parliament. Even a discretionary power vested in the Monitor to provide the Prime Minister with an interim report may lead to allegations that the Monitor is open to the influence of, or worse, is an advocate for, the Commonwealth government and its stance in respect of the relevant laws. The actual and perceived independence of the office of the Monitor requires that his/her reports and recommendations are delivered in their final rather than preliminary form.

Recommendation 9:

Subsections 30(2) and (3) of the National Security Legislation Monitor Bill 2009 be deleted.

C Other Specific Comments on the National Security Legislation Monitor Bill 2009

- **Coercive information gathering powers**

We support the clarity with which the coercive powers of the Monitor are set out in part 3 of the National Security Legislation Monitor Bill 2009. These provisions are similar to section 11 of the Independent Reviewer of Terrorism Laws Bill 2008 [No. 2], but are both rather more extensive and likely to be far more effective given the specific inclusion of offences for those who fail to co-operate with the Monitor in the exercise of his/her statutory functions.

- **Operationally sensitive information and the Monitor's reports**

The approach of section 29 towards operationally sensitive material is preferable to that in section 11(2)(a) of the Independent Reviewer of Terrorism Laws Bill 2008 [No. 2] which allowed the Independent Reviewer to certify that certain parts of the report which

'may affect adversely national security' could be deleted from the version tabled by the Minister in Parliament. In our submission to the Senate Standing Committee on Legal and Constitutional Affairs on that Bill, we expressed concern that a crudely redacted report would impair the perception of the Independent Reviewer as suitably independent.²⁸

While the Monitor will undoubtedly view sensitive material, it would seem preferable that he/she writes reports in such a way that neither risks disclosure of such information nor necessitates the suppression of any contents. This has been managed by earlier review committees in Australia and also by Lord Carlile as Independent Reviewer in the United Kingdom. The Monitor taking a similar approach would go a long way towards ensuring the perception of his/her office as truly independent and fully accountable to both arms of government.

However, it is conceivable that sensitive information may be involved in an issue which it is desirable that the Monitor should be able to bring to the attention of the government. In those instances, the strategy mandated by section 29(7) of a supplementary report would seem appropriate. The reporting of the Clarke Inquiry into the case of Dr Mohamed Haneef provides an antecedent for this approach. However, the Monitor should be required to acknowledge the delivery of a supplementary report in his/her publicly available report.

Recommendation 11:

Section 29 should be amended to provide that if a supplementary report is delivered by the Monitor to the government, then that fact must be disclosed in the Monitor's publicly available annual report.

²⁸ Gilbert + Tobin Centre of Public Law, above n 27, 5.

Appendix

Post Enactment Reviews of Australia's Anti-Terrorism Laws

Report Tabled:	Title of Review:	Review Body:	Terms of Reference:	Empowering Legislation:
20 September 2007	Inquiry into the Terrorist Organisation Listing Provisions of the <i>Criminal Code Act 1995</i>	Parliamentary Joint Committee on Intelligence and Security	Review the operation, effectiveness and implications of the terrorist organisation listing provisions of the <i>Criminal Code Act 1995</i> (s 102.1(2), (2A), (4), (5), (6), (17) and (1))	<i>Criminal Code Act 1995</i> , s 102.1A(2)
4 December 2006	Review of Security and Counter-Terrorism Legislation	Parliamentary Joint Committee on Intelligence and Security	To review the operation, effectiveness and implications of the: <ul style="list-style-type: none"> • <i>Security Legislation Amendment (Terrorism) Act 2002</i> • <i>Border Security Legislation Amendment Act 2002</i> • <i>Criminal Code Amendment (Suppression of Terrorist Bombings) Act 2002</i> • <i>Suppression of the Financing of Terrorism Act 2002</i> 	<i>Intelligence Services Act 2001</i> , s 29(1)(ba)
13 September 2006	Fighting Words: A Review of Sedition in Australia	Australian Law Reform Commission	The operation of Schedule 7 of the <i>Anti-Terrorism Act (No. 2) 2005</i> and Pt IIA of the <i>Crimes Act 1914</i> ,	No empowering legislation. Attorney-General signed the terms of reference on 1 March

			<p>including:</p> <ul style="list-style-type: none"> • whether the amendments in Schedule 7 and Pt IIA of the <i>Crimes Act 1914</i> effectively address the problem of urging force or violence • whether 'sedition' is an appropriate word to describe this conduct 	2006.
15 June 2006	Security Legislation Review	Security Legislation Review Committee	<p>Review the operation, effectiveness and implications of amendments made by the:</p> <ul style="list-style-type: none"> • <i>Security Legislation Amendment (Terrorism) Act 2002</i> • <i>Suppression of the Financing of Terrorism Act 2002</i> • <i>Criminal Code Amendment (Suppression of Terrorist Bombings) Act 2002</i> • <i>Border Security Legislation Amendment Act 2002</i> • <i>Telecommunications Interception Legislation Amendment Act 2002</i> • <i>Criminal Code Amendment (Terrorism) Act</i> 	<i>Security Legislation Amendment (Terrorism) Act 2002</i> , s 4

			<i>2003</i>	
			Identify alternative approaches and mechanisms for the above legislation as appropriate.	
30 November 2005	Review of Division 3 Part III of the ASIO Act 1979 – Questioning and Detention Powers	Parliamentary Joint Committee on ASIO, ASIS and DSD	To review the operation, effectiveness and implications of (a) ASIO's compulsory questioning and detention powers in Div 3 of Pt III of the Australian Security Intelligence Organisation Act 1979 and (b) the amendments made by the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003 (except item 24 of Schedule 1 to that Act)	<p>This review was not mandated by legislation.</p> <p>ASIO's questioning and detention powers were subject to a three year sunset clause. They were due to expire on 23 July 2006.</p> <p>The review was designed to precede and inform consideration by the Parliament of whether the re-legislate these provisions.</p> <p>Review was announced on 17 January 2005.</p>