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Mr Peter Hallahan  
Committee Secretary  
Senate Standing Committee on  
Legal and Constitutional Affairs  
Parliament House  
CANBERRA ACT 2600

Dear Mr Hallahan

Thank you for your letter of 4 September 2008 advising of an inquiry by the Senate Standing Committee on Legal and Constitutional Affairs into the Independent Reviewer of Terrorism Laws Bill 2008 [No. 2], and seeking written submissions to this inquiry.

A submission to this end is attached.

Please let me know if any further assistance is required.

Yours sincerely

Ian Carnell  
Inspector-General of  
Intelligence and Security

12 September 2008

# INDEPENDENT REVIEWER OF TERRORISM LAWS BILL 2008 [NO. 2]

## SUBMISSION BY THE INSPECTOR-GENERAL OF INTELLIGENCE AND SECURITY

### Introduction

1. I remain of the view expressed by all members of the Security Legislation Review Committee in 2005-06, that it is important to enhance review of Australia's laws relating to terrorism.

2. The nature and potential impacts of terrorism laws require a special focus and one which is able to view the body of those laws as a whole. I will elaborate on this after reprising a little of the history to this issue. I will also make some comments of a technical nature about the Bill being considered.

### Sheller Review

3. In October 2005 a Security Legislation Review Committee was established to conduct a one-off review of the operation, effectiveness and implications of amendments in six Acts relating to terrorism which were passed in 2002 and 2003.<sup>1</sup>

4. The committee was chaired by a retired New South Wales Supreme Court judge, the Hon Simon Sheller, QC, AO and seven other members (of which I was one). After taking submissions and holding public hearings the committee produced a report by the end of its six month deadline.<sup>2</sup>

5. The focus of the Sheller Review (as it has become known) was the criminal offence provisions contained in Divisions 100-103 of Part 5.3 of Chapter 5 of the Commonwealth *Criminal Code*. Legislation which was not within the scope of the Sheller Review included that which established control order and preventative detention order regimes<sup>3</sup>, extended police questioning powers<sup>4</sup>, introduced Australian Security Intelligence Organisation (ASIO) questioning warrants<sup>5</sup>, and addressed the handling of classified information in court proceedings<sup>6</sup>.

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<sup>1</sup> *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; Criminal Code Amendment (Terrorism) Act 2003.*

<sup>2</sup> Security Legislation Review Committee 2006, *Report of the Security Legislation Review Committee*, SLRC, Attorney-General's Department, Canberra, tabled in Parliament on 15 June 2006.

<sup>3</sup> *Anti-Terrorism Act (No. 2) 2005.*

<sup>4</sup> *Anti-terrorism Act 2004.*

<sup>5</sup> *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003.*

<sup>6</sup> *National Security Information (Civil and Criminal Proceedings) Act 2004.*

6. One factor limiting the extent of the Sheller Review was that at the time of our deliberations, little had come before the courts in a substantive way. However, we were able to scrutinize the provisions as enacted with tests of proportionality, clarity and fairness in mind.

7. The Sheller Review made a number of recommendations for change, and expressed concern about the damaging effect on community relations of aspects of the new laws and the limited dissemination of accurate information about them. The Review emphasised that legislative refinements should be seen as an essential part of effective security strategies, not a soft approach.<sup>7</sup>

8. The Sheller Review was further concerned that there be adequate future review of the whole of Part 5.3 of Chapter 5 of the *Criminal Code* (i.e. the criminal offence provisions, control orders and preventative detention orders). The UK model of an independent reviewer (IR) was pointed out, as were possibilities such as having another review committee. If an IR were appointed, the Sheller Review suggested that it could be attached to the office of the Commonwealth Ombudsman or to my office.<sup>8</sup>

### **Other reviews**

9. The recommendations of the Sheller Review were in turn reviewed in two parts by the Parliamentary Joint Committee on Intelligence and Security (PJCIS). The first PJCIS review<sup>9</sup> covered all recommendations except those relating to the process of proscribing an organisation as a terrorist organisation, while the second<sup>10</sup> covered the proscription process.

10. The PJCIS agreed with a significant number of the Sheller Review recommendations (but not all) and made some additional recommendations of its own. The PJCIS strongly supported the notion of an IR being appointed.<sup>11</sup> There has not yet been a formal Government response to any of the recommendations.

11. Another key review was conducted by the Australian Law Reform Commission (ALRC) in early 2006 into amendments made to the sedition provisions in the Commonwealth *Criminal Code*. The ALRC report was finalised in July 2006 and tabled in Parliament in September 2006.<sup>12</sup> There has not yet been a formal Government response to any of the recommendations.

12. For completeness I should also mention that in 2005 the predecessor of the PJCIS reviewed the legislation and operation of questioning warrants which can be obtained by

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<sup>7</sup> SLRC, op. cit., pp. 5-6, 140-146.

<sup>8</sup> SLRC, op. cit., chapter 18.

<sup>9</sup> Parliamentary Paper No: 423/06.

<sup>10</sup> Parliamentary Paper No: 201/07.

<sup>11</sup> Parliamentary Paper No: 423/06, recommendation 2 and Parliamentary Paper No: 201/07 recommendation 7.

<sup>12</sup> ALRC Report No 104/2006.

ASIO.<sup>13</sup> A number of recommendations were made, some of which were accepted and amendments subsequently enacted, and the sunset clause was extended for 10 years until July 2016.<sup>14</sup>

## **Future review**

13. In the context of agreeing to certain significant changes to terrorism laws, a special Council of Australian Governments (COAG) meeting in September 2005 agreed to a review after five years of the new provisions. COAG also agreed to sunset clauses of 10 years for the control order and preventative detention order regimes.<sup>15</sup>

14. The scope of this review, which is scheduled to start in December 2010, covers control orders; preventative detention orders (both Commonwealth and State/Territory); police powers to stop, question and search (both Commonwealth and State/Territory); and certain amendments to the definition of terrorist organisation and the financing of terrorism provisions.<sup>16</sup>

## **Nature of terrorism laws**

15. There are six aspects of the terrorism laws which have much to do with why they are sensitive.

16. First, among the new criminal offences are offences concerning what are called “preliminary acts” i.e. planning or preparation; providing or receiving training; collecting or making documents likely to facilitate terrorism; providing or collecting funds; and possessing things connected with a terrorist act.<sup>17</sup> All carry high potential penalties.

17. The policy view behind these changes was that there must be a strong emphasis on the prevention of a terrorist incident. The argument was that it was no longer enough to be focussed on responding to an incident when or as it occurred - the consequences could be too great.

18. While the emphasis on prevention is understandable, it can raise concerns about just when should the criminal law operate. A person may well reflect on and talk about committing crimes and do things which might or might not lend themselves to carrying out crimes, but whether this develops to the point of actually constituting intent and a real threat to society, can be far from straightforward.

19. Second, mechanisms such as preventative detention orders, extended police questioning time and ASIO questioning/detention warrants involve detention without charge. This is something which is understandably viewed with great suspicion by a

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<sup>13</sup> Parliamentary Paper No: 454/2005.

<sup>14</sup> *ASIO Legislation Amendment Act 2006*.

<sup>15</sup> COAG Communiqué 27 September 2005, pp. 3-4.

<sup>16</sup> COAG Communiqué 10 February 2006, Attachment 6

<sup>17</sup> *Criminal Code Act 1995* (Cth), Schedule - the *Criminal Code*, Chapter 5, Part 5.3, Division 101.

society which holds dear individual liberty. Similarly control orders have the potential to greatly restrict an individual's freedom of movement and communication.

20. Third, sensitivity about freedom of speech can be roused by some of the preparatory offences, the sedition provisions and the relationship of "advocacy" to whether or not an organisation is a terrorist organisation.

21. Fourth, new or extended powers for police or other agencies to collect information or to stop and search, are intrusive in ways which cut across normal expectations of privacy and freedom of movement.

22. Fifth, legislation about the handling of classified material in court proceedings can sharpen concerns about the independence of the judiciary and poses real challenges for our adversarial court processes.

23. Sixth, the laws have the potential to be seen as discriminatory, and indeed the Sheller Review was concerned about fears and suspicions harboured by some components of our Australian society. The Sheller Review observed that the dynamics for the development of so called "home grown" terrorism must be reduced rather than provoked.<sup>18</sup>

24. I must emphasise that intense (but sometimes pressured) consideration has been given in the Parliament to the sensitivities I have outlined above. The legislation contains various features which attempt to balance the security needs of the community against individual liberties, as well as protections and safeguards about the exercise of the relevant powers.

25. Having said that, I believe that a key test for liberal democracies in the area of counter-terrorism is willingness to revisit what was done initially and, if necessary, modify the measures introduced to ensure balance and proportionality.

26. At the same time law enforcement and intelligence and related agencies have an interest in at least fine tuning relevant provisions, and may even wish to argue that some elements should go further.

### **Review mechanisms**

27. In such a context I would submit that it is necessary to have both regular review of the terrorism laws, and review which is able to examine interrelationships between the various provisions and the overall impact of all the relevant legislation.

28. Having an IR of terrorism laws has the potential to satisfy these requirements. Advantages are that the occupant of the position would develop knowledge about the field and not be inhibited by secrecy in carrying out his or her deliberations. A possible

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<sup>18</sup> SLRC, *op. cit.*, p. 6.

disadvantage is that one person would have to grapple with a wide range of issues and activities, and any in depth study of one topic might take time unless the IR were given some significant research resources in support. Who is selected as the IR would be crucial to whether the role can be fully effective.

29. Other mechanisms such as review by a specialist committee is an option. This can bring several minds and perspectives to bear on issues although secrecy can be a limiting factor if members are not all security cleared. Unless scheduled regularly such mechanisms are unlikely to provide the ongoing attention that an IR could bring. There is no equivalent of the Sheller Review scheduled at any time in the future.

30. There is an attraction in COAG sponsored review in that States and Territories are key stakeholders in countering terrorism. A referral of power from the States and Territories underpins the terrorism offence provisions, the States/Territories have also enacted legislation including preventative detention order regimes, and State/Territory resources by way of police and emergency services personnel are far greater than those of the Commonwealth. Of course, who is selected for the review team and its resourcing is vital to its independence and effectiveness.

31. The scope of the currently scheduled COAG review - see paragraphs 13 and 14 - is limited to certain changes made in 2005 and is a one-off exercise. No review beyond that is scheduled. There is the 14 December 2015 sunset clause for control orders and preventative detention orders (assuming they continue after the 2010/11 COAG review), and the 22 July 2016 sunset clause for ASIO questioning/detention warrants.

32. My office plays an important role in monitoring the use of powers and capabilities by the six intelligence and security agencies,<sup>19</sup> and this should not be underestimated. It is a very effective mechanism for looking at the practical application of agency powers and capabilities. However, my office is not resourced or structured to perform a continuing review of the body of terrorism laws from a policy perspective. My office could play a role in providing input to the work of an IR, as could the Commonwealth Ombudsman. One of our offices could be given the role of (and resources for) administrative support to the IR (to avoid them having to establish their own office).

### **Comments on the Bill**

33. The Bill as currently drafted provides for the IR to conduct reviews of the operation, effectiveness and implications “of laws relating to terrorist acts” (item 8). To avoid any potential for argument that this is a narrow construct, it might be better to refer to review of the operation, effectiveness and implications of terrorism laws. Moreover, the definition of “terrorism laws” in item 4 could give by way of illustration some of the laws which are in scope (but not attempt to be exhaustive). This could make clear that provisions which are not exclusively concerned with terrorism, but which have been

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<sup>19</sup> ASIO, Australian Secret Intelligence Service, Defence Imagery and Geospatial Organisation, Defence Intelligence Organisation, Defence Signals Directorate, Office of National Assessments.

amended as elements of the response to terrorism, are within scope. An illustrative list could therefore include:

- (a) Chapter 5 of the *Criminal Code*
- (b) Parts IAA and IC of the *Crimes Act 1914*
- (c) Part XII of the *Customs Act 1901*
- (d) the *National Security Information (Criminal and Civil Proceedings) Act 2004*
- (e) the *Australian Federal Police Act 1979*
- (f) the *Australian Security Intelligence Organisation Act 1979*
- (g) the *Financial Transactions Reports Act 1988*, and
- (h) the *Telecommunications Interceptions and Access Act 1979*.

34. Consideration could also be given to whether item 8 might usefully refer to possibilities such as the IR making submissions to parliamentary committees examining Bills brought forward affecting terrorism laws, or participating in reviews such as the scheduled COAG review (see paragraphs 13-14 earlier).

35. In addition to the consultation requirement in item 9 (3) of the Bill, I suggest that amendments be added to facilitate cooperation and exchange of information with the agencies listed in that item.

36. The independence of the IR could be further bolstered by:

- (a) providing for automatic appropriation from the Consolidated Revenue Fund for the remuneration of the IR (see clause 3 in Schedule 1 of the *Auditor-General Act 1997*), and
- (b) add to item 14 (1) of the Bill (but not to 14(2)), a requirement that there be an address by each House of Parliament, in the same session of the Parliament, praying for the removal of the IR (see clause 6 (1) of Schedule 1 of the *Auditor-General Act 1997*).

37. I would suggest that Part 3 - Administrative Provisions in the Bill cover remuneration and leave of absence for the IR, while Part 2 should include provisions about secrecy and protection of the IR from civil actions.

38. I hope the Committee finds this submission of assistance. If any further information or comment is required, I would naturally be happy to provide it.

Ian Carnell  
Inspector-General of  
Intelligence and Security

12 September 2008