A 'WATCH DOG' OF AUSTRALIA'S COUNTER-TERRORISM LAWS – THE COMING OF THE NATIONAL SECURITY LEGISLATION MONITOR

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I INTRODUCTION

In recent years, few areas of Australian law have generated as much public controversy as that of counter-terrorism. Following the terrorist strikes against the United States on 11 September 2001, Australia moved quickly to rectify its lack of any laws at either the national or state level specifically criminalising 'terrorist' activity.[1] Amongst other things, the first package of five counter-terrorism laws enacted in June 2002 established a definition of 'terrorism', enabled the proscription of terrorist organisations, created broad individual and group-based terrorism offences, and expanded the powers of the Australian Federal Police (AFP) and the Australian Security Intelligence Organisation (ASIO).[2] Australia's reaction to

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1 Andrew Lynch and George Williams, *What Price Security? Taking Stock of Australia's Anti-Terrorism Laws* (2006) 9. While Australia did have a few national laws giving domestic effect to international instruments dealing with terrorist acts such as airplane hijacking, only the Northern Territory, of all Australian jurisdictions, had a specific crime of terrorism on 11 September 2001.

2 *Security Legislation Amendment (Terrorism) Act 2002* (Cth), *Suppression of the Financing of Terrorism Act 2002* (Cth), *Criminal Code Amendment (Suppression of Terrorist Bombings) Act 2002* (Cth), *Border Security Legislation Amendment Act 2002* (Cth), and *Telecommunications Interception Legislation Amendment Act 2002* (Cth).

9/11 was entirely understandable,[3] even aside from the further incentive of swift compliance with the call by the United Nations Security Council to ensure that participation in the 'financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts' be established as 'serious criminal offences in domestic law'.[4] Once begun, the Commonwealth government took to legislating on counter-terrorism with enthusiasm,[5] enacting 44 counter-terrorism laws since 2002.[6] Its focus on national security was given particular impetus when the impact of terrorism came much closer to home with 88 Australian citizens killed in Bali in 2002. Subsequent attacks overseas maintained public concern about terrorism and the political commitment to strong legal measures designed to prevent it.[7]

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3 It is beyond the scope of this article to consider the fundamental question whether the enactment of any counter-terrorism laws by Australia, in particular the creation of new terrorism offences, was necessary. For an examination of this question, see, eg, Gregory Rose and Diana Nestorovska 'Australian Counter-Terrorism Offences: Necessity and Clarity in Federal Criminal Law Reforms' (2007) 31 *Criminal Law Journal* 20. Suffice to say that, to a large extent, Australia's enactment of preventative counter-terrorism laws after 9/11 has been mirrored in comparable nations such as the United States, Canada and the United Kingdom.

4 Resolution 1373 (2001), UN SCOR, 4385th mtg, cl 2(e), UN Doc S/Res/1373(2001). Member States were called upon to report within 90 days on the steps taken to comply with the Resolution to a specially established Committee: cl 6.

5 Arguably, legislating holds a particular attraction for governments as a favoured response to threats: Ben Golder and George Williams, 'Balancing National Security and Human Rights: Assessing the Legal Response of Common Law Nations to the Threat of Terrorism' (2006) 8 *Journal of Comparative Policy Analysis* 43, 57.

6 Dominique Dalla Pozza, 'Securing Democratic Traditions and Processes? Some Vital Statistics of the Australian Approach to Enacting Counter-Terrorism Law' (Paper presented at Australasian Law and Society Conference 2006, University of Wollongong, 13-15 December 2006). This paper reported that 37 counter-terrorism laws had been enacted by the Commonwealth Parliament. We have counted an additional seven counter-terrorism laws enacted since December 2006.

7 See, Anthony Reilly, 'The Processes and Consequences of Counter-Terrorism Law Reform in Australia 2001-2005' (2007) 10 *Flinders Journal of Law Reform* 81, 84-90 for the 'four phases' of counter-terrorism law-making.

Various components of this expanding national security law framework attracted public disquiet and political opposition as they were introduced into the Commonwealth Parliament and later enacted.[8] In addition to doubts about particular measures or the strength of their accompanying safeguards, the rapid accretion of counter-terrorism laws itself became a basis for argument that a sober stock-take was warranted as to how the various parts of the scheme harmonised. Factors such as these, which are considered at greater length in Part II of this article, ensured that from 2005 onwards, one of the few constants in recurring debates about Australia's counter-terrorism laws was the call from diverse quarters for the creation of some mechanism for the independent review of the operation of these laws.

The Independent Reviewer of Terrorism Legislation in the United Kingdom has been an influential model for Australia, with the general consensus amongst bodies reviewing Australia's anti-terrorism laws being that an Australian office should be created along similar lines. In Part III, we consider the history and recent performance of the United Kingdom Independent Reviewer in order to better understand the strengths and deficiencies of this model. These insights contribute to the discussion in Part IV about the merits of two Bills introduced into the Commonwealth Parliament in 2008 and 2009, which proposed the establishment of an Independent Reviewer of Terrorism Legislation or National Security Legislation Monitor in Australia. The second of these Bills, the National Security Legislation Monitor Bill 2009 (renamed the Independent National Security Legislation Monitor Bill 2010 by the Senate) was passed by the Commonwealth Parliament in March 2010 but has not yet come into effect. In examining the 2008 and 2009 Bills, the article examines the final reports of two separate Senate Committee reports into the two Bills, and draws upon and critiques the arguments raised by the various stakeholders who made submissions to those Committees.

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[8] See, eg, Roy Morgan Research, *Anti-Terrorism Legislation Community Survey*, 10 August 2006, prepared for Amnesty International Australia.

II WHY AN INDEPENDENT REVIEWER?

The purpose of this part is to expand upon three major reasons for the growing support in Australia towards the appointment of an Independent Reviewer to review Australia's counter-terrorism laws. The first of these concerns the unique nature of the laws, especially when considered in the context of the traditional operation and values of the Australian legal system and also their potential negative impact on the freedoms enjoyed by citizens and visitors to this country. Second, there are good reasons to suspect that aspects of the laws are flawed or unworkable and serve neither the interests of security nor liberty. Lastly, the creation of a designated office of review for the entire scheme would ensure a comprehensiveness that has eluded post-enactment reviews of the laws to date.

A *Novel Laws and their Potential Impact*

Unlike many other countries, Australia's great fortune over its history is to be largely free of politically motivated violence.[9] However, the downside to this is that Australia was unprepared for the events of 11 September 2001. It had minimal experience with terrorism or developing counter-terrorism measures, and there were no national or state laws in Australia specifically criminalising terrorism. The creation and implementation of laws responding to the extremely complex challenges posed by modern terrorism was therefore fraught with difficulty for both the political class and the community. In *Lodhi v R*, Spigelman CJ of the New South Wales Court of Appeal opined that 'the particular nature of terrorism has resulted in a special - and in many ways unique - legislative regime'.[10] That comment is also true of the counter-terrorism schemes in many nations other than Australia, however, in those jurisdictions there is likely to be a greater familiarity with the kind of exceptional measures that have been resorted to in the wake of 9/11.

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9 See Stuart Koschade, 'Constructing a Historical Framework of Terrorism in Australia: From the Fenian Brotherhood to 21st Century Islamic Extremism' (2007) 2 *Journal of Policing, Intelligence and Counter-Terrorism* 54.

10 [2006] NSWCCA 121 [66].

It is hardly contentious that the creation of an entirely new body of laws to address a threat not hitherto contemplated would necessitate some subsequent evaluation. There is early evidence of this realisation in s4 of the *Security Legislation Amendment (Terrorism) Act 2002* (Cth), which required a review of the 'operation, effectiveness and implications' of Australia's counter-terrorism laws as soon as practicable after the third anniversary of their commencement.[11] The Security Legislation Review Committee (SLRC), which included the Inspector-General of Intelligence and Security, the Privacy Commissioner, the Human Rights Commissioner and the Commonwealth Ombudsman amongst others,[12] further explained the criteria against which Australia's counter-terrorism laws should be assessed. The SLRC stated in the preface to its final report that it had 'sought to determine whether the legislation was a reasonably proportionate means of achieving the intended object of protecting the security of people living in Australia and Australians'.[13] It went on to insist that while it found no indication of improper use of the new laws, 'legislation must be well framed and have sufficient safeguards to stand the test of proportionality and fairness and to withstand administrative law challenge'.[14] Such scrutiny is of particular importance in Australia because we lack a national instrument of rights protection which can be enforced by the courts, and becomes even more significant in cases where the provisions being scrutinised (such as those the SLRC was concerned with) are not limited by a sunset clause.

The first clear occasion on which a call was made for the creation of an office dedicated to the ongoing and independent review of Australia's counter-terrorism laws was during the heated public debate which accompanied the introduction of the Commonwealth's Anti-Terrorism Bill (No 2) 2005.[15] This Bill

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11 *Security Legislation Amendment (Terrorism) Act 2002* (Cth) ss4(1), (2).

12 *Security Legislation Amendment (Terrorism) Act 2002* (Cth) s4(1).

13 Security Legislation Review Committee (SLRC), Parliament of Australia, *Report of the Security Legislation Review Committee* (2006) 3.

14 Ibid.

15 For a detailed discussion of the process by which that law was enacted, see Greg Carne, 'Prevent, Detain, Control and Order?: Legislative Process and Executive Outcomes in Enacting the *Anti-Terrorism Act (No 2) 2005* (Cth)' (2007) 10 *Flinders Journal of Law Reform* 17.

amended the Commonwealth *Criminal Code Act 1995* by, amongst other things, establishing preventative detention and control order regimes,[16] as well as revising existing 'sedition' offences and creating new ones.[17] In delivering the Castan Centre Lecture at Monash University on 18 October 2005, Liberal MP Petro Georgiou noted the necessity for the Commonwealth Parliament to ensure that the implementation of the counter-terrorism laws was monitored 'so as to identify and promptly rectify any unintended adverse consequences' which these laws might have.[18] He went on to state that in light of 'concerns about the potential impact of the legislation which have been expressed from a number of sources, the idea of an independent, statutory monitor, reporting regularly to the parliament, has much to commend it'.[19] During the very succinct debate engaged in by the House of Representatives on the Bill, Georgiou made similar remarks but the idea of appointing an Independent Reviewer was rejected by the Parliament.[20] Instead, the *Anti-Terrorism Act (No 2) 2005* (Cth) recognised the agreement of the Council of Australian Governments to review the operation of much of the Act's controversial changes and additions five years after they entered into force.[21]

Something rather closer to Georgiou's preferred reform was taken up by the SLRC when it delivered its report to the government in mid-2006. Although the SLRC criticised key aspects of the counter-terrorism laws,[22] it also acknowledged that it had been engaged in something of a 'theoretical exercise'.[23] This is because

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16 *Commonwealth Criminal Code Act 1995* (Cth) divs 104 and 105.

17 *Commonwealth Criminal Code Act 1995* (Cth) div 80.

18 Petro Georgiou MP, Federal Member for Kooyong, 'Multiculturalism and the War on Terror' (Speech delivered at the Castan Centre for Human Rights Law, Monash University, 18 October 2005).

19 Ibid.

20 Commonwealth, *Parliamentary Debates*, House of Representatives, 10 November 2005, 79 (Petro Georgiou).

21 *Anti-Terrorism Act (No 2) 2005* (Cth) s4.

22 For example, the SLRC recommended substantial review of the process of proscription (Recommendations 3-5) and the grounds on which an organisation could be proscribed (Recommendation 9), the deletion of the office of associating with a terrorist organisation (Recommendation 15) and the creation of a hoax offence (Recommendation 20): see SLRC, above n 13.

23 SLRC, above n 13, 201.

many of the provisions of the laws had yet to be used and tested. Consequently, the SLRC concluded its report with a discussion of possible models for future review. It recommended that the Commonwealth Parliament should establish a mechanism for periodic review of Australia's counter-terrorism laws, saying:

> It is important that the ongoing operation of the provisions, including the views taken of particular provisions by the courts, be closely monitored and that Australian governments should have an independent source of expert commentary on the legislation. Either an independent reviewer should be appointed, or a further review by an independent body such as the SLRC should be conducted in three years.[24]

In December 2006, the Parliamentary Joint Committee on Intelligence and Security (PJCIS) gave even stronger support to the idea of creating an office of Independent Reviewer than had the SLRC.[25] In so doing, it highlighted Australia's lack of experience in the area prior to 9/11 and the 'prolific legislative response'[26] in the intervening years:

> Since 2001 the Parliament has passed over thirty separate pieces of legislation dealing with terrorism and security and approved very significant budget increases to fund new security measures. Australia now has a substantial legal framework and institutional capacities to provide a coordinated and comprehensive governmental response to the problem of terrorism.[27]

The PJCIS then went on to outline the several ways in which the laws departed from the traditional criminal justice model, pointing to: the breadth of the definitional and specific criminal provisions; the potential for proscription to criminalise an individual's status and associations with others; and the preventative detention and control order regimes. It then concluded that 'the significance of these reforms and the distinctive nature of the terrorism law regime should

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24 Ibid 6.

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

26 Ibid 21.

27 Ibid 16-7.

not be underestimated, and in our view, warrants ongoing oversight'.[28] In a subsequent report published in September 2007, the PJCIS reiterated its support for the establishment of an Independent Reviewer,[29] stating that it would 'provide a more integrated and ongoing approach to monitor the implementation of terrorism law in Australia'.[30]

B *Problems with Australia's Counter-Terrorism Laws*

Another reason for appointing an Australian Independent Reviewer is that he or she will have real and significant work to do in identifying, and bringing to the attention of the government, the Commonwealth Parliament and the public, problems which inhere in the laws or arise through a particular application of them. If review of Australia's counter-terrorism laws was 'theoretical' in 2006, the same surely cannot be said today. Since 2002, 37 men have been charged with terrorism-related offences in Australia, ranging from individual preparatory offences to the offence of membership of a terrorist organisation to financing offences. In addition to the practical application of the laws, there are a number of other factors which also bear out the argument that the Independent Reviewer will have 'real and significant work' to do.

The first of these factors is that all of the post-enactment reviews of various aspects of Australia's counter-terrorism laws to date have made recommendations for amendments which would improve the clarity, fairness and/or effectiveness of those laws.[31] It is outside the scope of this article to recount the many ways in which the reviews

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28 See PJCIS, above n 25, 17.

29 Ibid.

30 PJCIS, Parliament of Australia, *Inquiry into the Terrorist Organisation Listing Provisions of the* Criminal Code Act 1995 (2007) ii, 52.

31 In addition to the SLRC and PJCIS reviews cited earlier, see also Parliamentary Joint Committee on ASIO, ASIS and DSD, Parliament of Australia, *ASIO's Questioning and Detention Powers - Review of the Operation, Effectiveness and Implications of Division 3 of Part III in the Australian Security Intelligence Organisation Act 1979*, November 2005; see also The Hon John Clarke QC, *Report of the Inquiry into the Case of Dr Mohamed Haneef*, November 2008.

have highlighted weaknesses in the national security legal framework. Suffice to say, in short, that the laws are clearly not perfect, and in some respects are seriously flawed.[32] A potent illustration of the consequences for individual liberty and the misuse of police resources to which the laws, through broadly-drafted terrorism crimes and convoluted processes lacking sufficient checks and balances, may give rise is found in the ill-fated investigation of Dr Mohamed Haneef for terrorism offences in 2007.[33] That the laws contain aspects which are worrying from a human rights perspective, or are simply unworkable in a practical sense, should not be terribly surprising when one considers the urgency with which many of the laws were passed by the Commonwealth Parliament.[34]

Australia, as already noted in this article, does not possess a national instrument of human rights protection. In this respect, it is unlike many comparable jurisdictions, including the United Kingdom from which it frequently draws inspiration for its counter-terrorism laws. In the United Kingdom, counter-terrorism legislation is subject to review against the *Human Rights Act 1998*, which implements the United Kingdom's obligations under the *European Convention for the Protection of Human Rights and Fundamental Freedoms*[35] and also imports the concept of proportionality review.

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32 See, eg, the SLRC's discussion of s 102.5 (offence of training with respect to a terrorist organisation) which culminated in its recommendation that it be 'redrafted as a matter of urgency': SLRC, above n 13, 110-18.

33 See Andrew Lynch, 'Achieving Security, Respecting Rights and Maintaining the Rule of Law' in Andrew Lynch, Edwina MacDonald and George Williams (eds) *Law and Liberty in the War on Terror* (2007) 225-32.

34 See Carne, above n 15; Andrew Lynch, 'Legislating with Urgency – The Enactment of the *Anti-Terrorism Act (No 1) 2005* (2006) *Melbourne University Law Review* 747, 776-777; Reilly, above n 7, 91-95.

35 *European Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature on 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953).

The United Kingdom courts have demonstrated their willingness to speak out against the government on national security issues.[36] While some have voiced scepticism over how effective this new capacity for judicial intervention has been in tempering the impact of counter-terrorism laws on civil liberties,[37] it has nevertheless had two positive consequences for the quality of such laws. First, the exercise of review by an independent judiciary charged with protecting the fundamental liberty of individuals may still stimulate a change in the law, despite the non-binding nature of declarations of incompatibility under the *Human Rights Act*.[38] Second, the mere prospect that the courts may be called upon to declare legislation, or the broad executive powers conferred by the same, as incompatible with basic human rights, must itself exert some positive influence at the point of enactment – even if this is only in terms of the process afforded through sufficient transparency, public consultation and political deliberation.[39] A Human Rights Act is no panacea for draconian counter-terrorism measures, however, its presence might enable deeper consideration of the implications of laws for human rights before enactment, as well as meaningful judicial intervention later on. Laws made in a jurisdiction (such as Australia) unable to receive either of the aforementioned benefits from the existence of a Human Rights Act would certainly benefit from other scrutiny mechanisms.

In September 2007, the PJCIS articulated another very significant advantage which the establishment of an Independent Reviewer could achieve in respect of Australia's counter-terrorism laws, when it said the office would 'contribute positively to community confidence as well as provide the Parliament with

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36 Most spectacularly in *A v Secretary of State for the Home Department* [2005] 2 AC 68, when the House of Lords declared the indefinite detention of aliens suspected of terrorism-related activity under Part IV of the *Anti-Terrorism, Crime and Security Act 2001* to be incompatible with the ECHR, leading the government to repeal it shortly after.

37 KD Ewing and Joo-Cheong Tham, 'The Continuing Futility of the Human Rights Act' [2008] PL 668.

38 See David Bonner, *Executive Measures, Terrorism and National Security* (2007), 345-353.

39 Janet Hiebert, 'Parliamentary Review of Terrorism Measures' (2005) 68 *Modern Law Review* 676.

regular factual reports'.[40] The fears which some sections of the Australian community hold about the discriminatory effect of the counter-terrorism laws had earlier been identified by the SLRC as a major security problem, requiring steps from all Australian governments in order to overcome the consequential alienation and disaffection which feeds into terrorist recruitment.[41] The suggestion from the PJCIS that an Independent Reviewer would, regardless of any actual deficiencies in the law that he or she might bring to light, fulfil an important function merely through existing as an additional safeguard – a 'watch dog' of counter-terrorism laws and their use – is further confirmation of the value of enhanced scrutiny in this controversial area.

Finally, it is worth observing that the United Kingdom Independent Reviewer, whose role is discussed in Part III of this article, has been kept busy with his reports on the relevant legislation in that jurisdiction and its operation in practice. Of course, the two jurisdictions face very different threat levels and have devised not entirely similar responses to that threat. However, our point is simply that it is a reasonable expectation that where there are counter-terrorism laws, there will be work for an Independent Reviewer to perform. Any suggestion that the Australian jurisdiction will demand less work of such an office tends to overlook just how many counter-terrorism laws have been enacted in Australia and the extent of the legal action conducted in respect of those laws.[42] Even if this is an issue, it could easily be accommodated by a part-time appointment or, as has been suggested, combining the office of Independent Reviewer with an existing statutory role such as the Inspector-General of Intelligence and Security (IGIS) or the Commonwealth Ombudsman.[43]

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40 See Hiebert, above n 39.

41 SLRC, above n 13, 140-46. See also Andrew Lynch and Nicola McGarrity, 'Australia's Counter-Terrorism Laws: How Neutral Laws Create Fear and Anxiety in Muslim Communities' (2008) 33 *Alternative Law Journal* 225.

42 See Nicola McGarrity, 'Testing Our Counter-Terrorism Laws: The Prosecution of Individuals for Terrorism Offences in Australia' *Criminal Law Journal* (forthcoming).

43 Clarke, above n 31, 255.

C *Scope and Adequacy of Previous Parliamentary Reviews*

As already discussed, several major post-enactment reviews have been conducted into aspects of Australia's counter-terrorism laws. However, these reviews have been inadequate in three respects.

First, as noted by the SLRC, previous reviews have been sporadic and fragmented in nature and critical issues have been omitted from their terms of reference. For example, until the Clarke Inquiry into the Case of Dr Mohammed Haneef was initiated in early 2008, no inquiry had been conducted into the provisions of the *Anti-Terrorism Act 2004* (Cth), which increased the time that the police could question and detain a person suspected of committing a terrorism offence. The lack of review of this Act is not unique. Other laws which remain unreviewed, and with no prospect of review in the near future, are the *Anti-Terrorism Act (No. 3) 2004* (Cth) (which provided for the confiscation of travel documents and prevented suspects from leaving Australia) and the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) (*NSIA*) (which severely curtailed fair trial and due process rights by limiting the defendant's access to 'national security information').

The significance of the *NSIA* is apparent from its use in many legal proceedings and the considerable attention given to it in the Attorney-General's Department National Security Legislation Discussion Paper released in August 2009. Despite the fact that public submissions were invited on the Discussion Paper, this is not a substitute for an open and independent review process. In particular, it appears that the Commonwealth government's response to these submissions will simply be to introduce a raft of amendments into the Commonwealth Parliament (without providing any detailed reasons as to why these particular amendments were chosen).

In 2006, Williams noted that one critical element missing from the review process had been 'a holistic look' at the counter-terrorism

laws.[44] That criticism still applies. No review, not even the Attorney-General's recent Discussion Paper, has approached anything like comprehensiveness. For example, there is no reference in the Discussion Paper to the controversial questioning and detention powers possessed by ASIO. There is unlikely to be any review of these powers until a review is conducted by the Council of Australian Governments in 2016. As long as such fragmentation persists, no review can really hope to get to the heart of the matter, namely, how these laws work together as a scheme and what overlap, gaps and inefficiencies we can detect when we examine the picture in its entirety.

The second reason why the reviews do not obviate the desirability of establishing an Independent Reviewer is the dismissive attitude demonstrated by the previous Commonwealth government towards the review bodies. In one notorious instance, the Commonwealth government commissioned the Australian Law Reform Commission to 'inquire into and report on measures to protect classified and security sensitive information in the course of investigations, legal proceedings, and other relevant contexts'.[45] Five days before the Commission was due to report to the Attorney-General, the Commonwealth government pre-empted its report by introducing the National Security Information (Criminal Procedures) Bill 2004 into the Commonwealth Parliament.[46]

A more insidious problem is the selectivity shown by the previous Commonwealth government towards the recommendations made by the review bodies.[47] As the President of the HREOC stated in 2007, 'too often the recommendations of committees and inquiries

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44 Evidence to the Parliamentary Joint Committee on Intelligence and Security, Parlient of Australia, Canberra, *Review of Security and Counter-Terrorism Legislation (2006)*, 31 July 2006 (George Williams). This was also noted by the Security Legislation Review Committee, above n 13, [2.50].

45 Australian Law Reform Commission, *Keeping Secrets: The Protection of Classified and Security Sensitive Information*, ALRC 98 (June 2004) [1.1].

46 Ibid [1.29].

47 See Carne, above n 15, 26-32, 43-64; see generally Dominique Dalla Pozza, 'Promoting Deliberative Debate? The Submissions and Oral Evidence Provided to Australian Parliamentary Committees in the Creation of Counter-Terrorism Laws' (2008) 23(1) *Australasian Parliamentary Review* 39-61.

into counter-terrorism legislation have (as in the case of the Australian Law Reform Commission's recommendations to reform the law of sedition or the Sheller Inquiry's [SLRC] recommendations to reform certain aspects of counter-terrorism legislation) simply been ignored'.[48] The many significant problems identified by these bodies go to issues not only of rights protection, but also in many cases to effectiveness in policing and prosecution. An obsession by the Commonwealth government with being seen as 'tough' on terror, rather than developing a sober, measured and effective response, apparently created a political climate which was hostile to even the most sensible reform of the counter-terrorism laws. In marked contrast to the speed with which the laws were enacted, the Commonwealth was not only slow to act in response to recommendations for change, but also largely deaf to suggestions that change was in any way necessary.[49]

An Independent Reviewer would not be a guarantee against a similarly dismissive attitude being taken by the Commonwealth government in the future. However, one clear advantage that he or she would have is constancy. Reviews by one-off panels assembled for the job, such as the SLRC, or as a specific referral to bodies such as the Australian Law Reform Commission (as per the 2006 review of Australia's 'sedition' offences) or individuals (as per the Haneef Inquiry) all suffer from an inability to pursue their recommendations with a stubborn government. Their role ceases with the provision of a final report to the Commonwealth government. Of the bodies which have reviewed Australia's counter-terrorism laws, only the standing PJCIS does not share this weakness. While even the PJCIS could hardly be said to have met with great success in following up its recommendations with the previous government, it was at least in

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48 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).

49 George Williams and Andrew Lynch, 'Fix it later legislation no way to govern', *The Australian* (Sydney), 28 December 2008. The Labor government which took office in 2007 eventually responded to all outstanding inquiries and reviews through the release of its *Discussion Paper on Proposed Amendments* in July 2009.

a position to reiterate these recommendations on occasion and to critique the government for failing to implement them. Perhaps disregard for the recommendations emanating from the PJCIS was due in part to its parliamentary basis, in contrast to the truly independent voice with which an Independent Reviewer would be able to speak. In lodging annual (and other) reports with the Home Secretary, the United Kingdom's Independent Reviewer has been able to press his recommendations quite forcefully over time.

Third, and finally, an Independent Reviewer is able to monitor the status and application of counter-terrorism laws on an ongoing basis, including most importantly, their judicial interpretation. In the passage quoted earlier, the SLRC itself recognised the need for ongoing review as the laws received more practical use. The Independent Reviewer would not simply be appraising laws in the abstract but performing his or her task in light of the life which these laws now have both in enforcement and in the courts.

III A MODEL FOR AUSTRALIA – THE UNITED KINGDOM INDEPENDENT REVIEWER OF TERRORISM LEGISLATION

The fact that a jurisdiction as experienced in responding to domestic terrorism as the United Kingdom has seen value in creating a permanent 'watchdog' to report to Parliament on the operation of controversial counter-terrorism measures has been a powerful factor in the Australian debate about establishing an office of Independent Reviewer. Furthermore, if such an office is to be established in Australia, it is logical to regard the United Kingdom's Independent Reviewer of Terrorism Legislation as 'a useful reference point'.[50] Part IV of this article discusses the 2008 and 2009 Bills proposing to create a permanent review body for Australia's counter-terrorism laws. As both of these proposals are strongly influenced by the role and functions of the United Kingdom Independent Reviewer of

[50] PJCIS, above n 25, 21.

Terrorism Legislation, it is valuable to give some brief account of the central features of this office.

A *The Role and Powers of the United Kingdom Independent Reviewer*

The United Kingdom Office of Independent Reviewer was created in the mid-1980s to review 'temporary' laws designed in response to terrorist violence associated with the Northern Ireland situation. The role of the Independent Reviewer was expressed in broad terms, namely, to make detailed enquiries of all who use or are affected by the laws and to have access to sensitive material as needed.[51] The power of the office to highlight flaws in the legal framework was strongly demonstrated by Lord Anthony Lloyd's sweeping survey of the accumulated counter-terrorism laws in 1996.[52] Although the office continues to operate in accordance with its original terms of reference, its statutory foundation has shifted. The permanent *Terrorism Act 2000* (UK), which replaced the earlier emergency instruments, contains a requirement that the Home Secretary report annually on 'the working of this Act'.[53] The Independent Reviewer's specific terms of reference under the *Terrorism Act 2000* are to

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51 Lord Carlile of Berriew QC, *Report on the Operation in 2005 of the Terrorism Act 2000* (2006) Office for Security and Counter-Terrorism 4 <http://security.homeoffice.gov.uk/news-publications/publication-search/terrorism-act-2000/tact-2005-review2835.pdf> 1 February 2010.

52 Lord Lloyd of Berwick and Paul Wilkinson, *Inquiry into Legislation Against Terrorism* (1996), Cm.3420.

53 *Terrorism Act 2000* (UK) c11, s126; now superseded by *Terrorism Act 2006* (UK), c11, s36. Part VII of the *Terrorism Act 2000* (UK) contained provisions specific to Northern Ireland. The Part was subject to annual review in the United Kingdom Parliament, with a 'sunset clause' limiting it to 5 years. In February 2006, Part VII was extended by the *Terrorism (Northern Ireland) Act 2006* (UK) for a further limited period. The *Justice and Security (Northern Ireland) Act 2007* (UK) made some of the provisions of Part VII permanent. In May 2008, the United Kingdom Secretary of State announced the appointment of Robert Whalley CB as the Independent Reviewer of the Justice and Security (Northern Ireland) Act 2007, with the particular function of reviewing the operation of additional powers of entry, search, seizure and arrest for the police and military. The Independent Reviewer of Terrorism Legislation continues to have a role in relation to the operation in Northern Ireland of other powers in the *Terrorism Act 2000* (UK).

consider whether (a) the Act has been used fairly and properly during the reporting period, taking into account the need to ensure that there are both effective powers to deal with terrorism and adequate safeguards for the individual and (b) whether any of the temporary powers in Part VII of the Act can safely be allowed to lapse.[54]

The functions of the office have grown significantly in keeping with new legislation enacted since 2000. The office of Independent Reviewer – which has been held by Lord Alex Carlile of Berriew QC since 2002 – is now also required to review the new offence of glorification of terrorism in the *Terrorism Act 2006* (UK),[55] the provisions for the indefinite detention of terrorist suspects in the *Anti-Terrorism, Crime and Security Act 2001* (UK)[56] and the system of 'control orders' in the *Prevention of Terrorism Act 2005* (UK).[57] The control orders report contains the Independent Reviewer's opinion on both the operation of the scheme and its continued necessity.[58] This report makes an important contribution to parliamentary debate as the 12 month sunset clause in the Act means that the United Kingdom Parliament is required to renew it annually.[59] The breadth of the Independent Reviewer's statutory reporting function is evidenced by the requirement that, in reporting on the control order regime, the Independent Reviewer must also give his or her opinion on the implications for the operation of the *Prevention of Terrorism Act 2005* (UK) of 'any proposal made by the Secretary of State for the amendment of the law relating to

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54 United Kingdom, *Parliamentary Debates*, House of Commons, 19 December 2001, 484W (David Blunkett, Home Secretary).

55 *Terrorism Act 2006* (UK) c11, s36.

56 *Anti-Terrorism, Crime and Security Act 2001* (UK) c24, s28.

57 *Prevention of Terrorism Act 2005* (UK) c2, s14. The control order regime replaced detention after the House of Lords declared the latter to be incompatible with the Human Rights Act: *A v Secretary of State for the Home Department* [2005] 2 AC 68.

58 Lord Carlile of Berriew QC, *Third Report of the Independent Reviewer Pursuant to Section 14(3) of the Prevention of Terrorism Act 2005* (2008) Office for Security and Counter-Terrorism 10, <http://security.homeoffice.gov.uk/news-publications/publication-search/general/report-control-orders-20082835.pdf> 10 February 2010.

59 *Prevention of Terrorism Act 2005* (UK) c2, s13.

terrorism'.[60] Furthermore, in addition to the statutory functions of the Independent Reviewer, Lord Carlile has also responded to ad hoc requests for reports – in 2007, producing a report on the definition of 'terrorism'. All reports are delivered to the Secretary who then tables them as soon as reasonably practicable in the Parliament.

In summary, there is no single enactment establishing the office of Independent Reviewer and listing its various functions and powers. Instead, Lord Carlile's reporting requirements are a composite of different agendas and timetables across a number of sketchily-worded legislative provisions. As a result of this fragmentation, the incumbent's personal interpretation of his role matters more than it otherwise might. In some respects, Lord Carlile has taken a broad approach to his role, stating that he will make recommendations to the Parliament if he forms the view that a particular section or legislative part is 'otiose, redundant, unnecessary or counter-productive'.[61] Furthermore, whilst the Independent Reviewer is not an appeal body for individuals affected by the counter-terrorism laws, Lord Carlile has nevertheless welcomed information from those persons who have had 'real-life experiences' with the laws, and feels that it is within his role to ask questions about individual cases and offer advice and comments.[62]

However, in other respects, Lord Carlile has taken a narrow approach. He sees his work as concerned with the 'working and fitness for purpose of the Acts of Parliament in question, rather than with broader conceptual issues'.[63] There is arguably a tension inherent in this statement. The detail of counter-terrorism laws – from essential definitions to the operation of aspects such as control

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60 *Prevention of Terrorism Act 2005* (UK) c2, s14(5)(a).

61 Lord Carlile of Berriew QC, *Report on the Operation in 2007 of the Terrorism Act 2000 and of Part I of the Terrorism Act 2006* (2008) Office for Security and Counter-Terrorism 6 <http://security.homeoffice.gov.uk/news-publications/publication-search/terrorism-act-2000/lord-carlile-report-07/lord-carliles-report-20082835.pdf?view=Binary> at 10 February 2010.

62 Ibid 7.

63 Lord Carlile of Berriew QC, *The Definition of Terrorism* (2007) Office for Security and Counter-Terrorism 1 <http://security.homeoffice.gov.uk/news-publications/publication-search/terrorism-act-2000/carlile-terrorism-definition2835.pdf?view=Binary> 10 February 2010

orders – is inextricably linked to deeper questions about the toleration or criminalisation of political violence and also has an impact on how the 'success' of strategies is assessed. Another factor which might limit the effectiveness of the Independent Reviewer's role in the United Kingdom is that he or she is dependent on other persons (including the police, intelligence community, politicians and members of the public) for a large amount of the information upon which he bases his reports. However, Lord Carlile notes that he has received almost complete co-operation from those he has approached for information[64] and he has never been refused access to closed material requested by him. He has been briefed as fully as has been necessary in his judgment.[65] He has also been provided with the resources necessary to complete his reviews.[66]

B *Assessment of the United Kingdom's Independent Reviewer*

On the whole, the office of the Independent Reviewer appears to be regarded as a success in the United Kingdom. Certainly one does not see calls for its abolition. Walker, an expert on the United Kingdom counter-terrorism laws for several decades, has said the Independent Reviewer encourages 'rational policy-making' by 'provid[ing] information on the working of the legislation and some thoughtful recommendations from time to time about its reform'.[67] Others have said that the reports produced have 'figured prominently in parliamentary deliberations on anti-terrorism legislation [and]… are a key source of information for parliamentarians and for witnesses appearing before parliamentary committees'.[68] Additionally, the Independent Reviewer 'generates public discussion about terrorism

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64 See Carlile, above n 63.

65 Lord Carlile of Berriew QC, *Report on the Operation in 2006 of the Terrorism Act 2000* (2007) Office for Security and Counter-Terrorism 9 <http://security.homeoffice.gov.uk/news-publications/publication-search/terrorism-act-2000/TA2000-review0612835.pdf> 10 February 2010.

66 Carlile, above n 61, 6.

67 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.

68 Craig Forcese, 'Fixing the Deficiencies in Parliamentary Review of Anti-terrorism Law: Lessons from the United Kingdom and Australia' (2008) 14(6) *IRPP Choices* 1, 14.

laws', and the simple fact that the public knows there is a 'terrorism watchdog' free to speak publicly without government approval gives it some reassurance in relation to the application of the laws.[69]

However, the Independent Reviewer has not been without criticism. In particular, the United Kingdom Parliament's Joint Committee on Human Rights has called for an improved reporting timetable, with the Committee frequently having only a few days to examine the Independent Reviewer's report before debate on the annual renewal of the control order legislation.[70] The Committee is also concerned about the uncertainty as to who determines what information is included in the Independent Reviewer's reports. In June 2008, it complained that the Independent Reviewer's latest report on the *Terrorism Act 2006* did not include a detailed analysis of the operation of that Act's extended pre-charge detention scheme. The Home Secretary responded by stating that it is for the Independent Reviewer, and not the United Kingdom government, to decide what information is included in his report. In contrast, Lord Carlile justified the omission by saying that he had 'not been asked by Ministers to provide a detailed analysis of the system'.[71]

A related issue is concern about the actual and perceived independence of the Independent Reviewer. The Committee recommended that the Independent Reviewer should be appointed by United Kingdom Parliament (not the Home Secretary), and report directly to the Parliament. Finally, noting that there is more work than one Independent Reviewer can reasonably do, the Committee recommended that a panel of reviewers be set up.[72] All

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69 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, 3-4.

70 Joint Committee on Human Rights, United Kingdom Parliament, *Counter-Terrorism Policy and Human Rights (Ninth Report): Annual Renewal of Control Orders Legislation 2008, Tenth Report of Session 2007-08* (February 2008) 9-12.

71 Joint Committee on Human Rights, United Kingdom Parliament, *Twenty-Fifth Report: Counter-Terrorism Policy and Human Rights (Twelfth Report): Annual Renewal of 28 Days 2008* (2008), 8-9.

72 Joint Committee on Human Rights, United Kingdom Parliament, *Counter-Terrorism Policy and Human Rights (Thirteenth Report): Counter-Terrorism Bill, Thirtieth Report of Session 2007-2008* (October 2008) 34, 39-40, 48.

recommendations have been rejected by the United Kingdom government.

The bulk of criticism of the Independent Reviewer has been directed not at the office but rather at the apparent unwillingness of the current office-holder (Lord Carlile) to express clear criticism of the executive and the laws devised by it.[73] However, such a failing does not appear to be unique to Lord Carlile or even the office of United Kingdom Independent Reviewer. After stating his assessment that the office is a 'valuable and useful innovation', O'Cinneide bluntly reminds us that 'no independent reviewer has yet been appointed who disagrees with the government policy of the day when it comes to the fundamental issues'.[74] However, criticism of Lord Carlile's opinions has been rendered more acute than that of his predecessors because of the enactment of the *Human Rights Act 2000* (UK). This Act introduced parliamentary and judicial forums in which conflicting opinions about the operation, fairness and effectiveness of the counter-terrorism laws could be expressed. The Joint Committee on Human Rights has both received and given conflicting opinions to those expressed by the Independent Reviewer and, in 2007, the House of Lords expressed rather more disquiet than Lord Carlile about certain aspects of the laws (in particular, the operation of the special advocates scheme).[75]

Most recently, Lord Carlile expressed support for the extension of the pre-charge detention period from 28 to 42 days, saying he was 'completely convinced' that the need for such an extended detention of a terrorist suspect might arise. [76] After the Bill was passed by a mere nine votes, Lord Carlile stated that he was 'satisfied that

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73 See, eg, Faisal Bodi, 'Carlile provides little enlightenment', *The Guardian* (UK), 28 June 2006.

74 Colm O'Cinneide, 'Strapped to the Mast: The Siren Song of Dreadful Necessity, the United Kingdom Human Rights Act and the Terrorist Threat' in Miriam Gani and Penelope Mathew (eds) *Fresh Perspectives on the 'War on Terror'* (2008) 327, 353.

75 Joint Committee on Human Rights, United Kingdom Parliament, *Tenth Report: Counter-Terrorism Policy and Human Rights (Ninth Report): Annual Renewal of Control Orders Legislation 2008* (2008), 17.

76 Andrew Sparrow, Deborah Summers and Jenny Percival, 'Brown wins dramatic victory on 42-day detention', *The Guardian* (UK), 11 June 2008.

Parliament has done the right thing' and 'this very highly protective new law is needed'.[77] This led one commentator to remark that:

> Far from being an independent reviewer who should be looking to protect the interests of the public from ever-encroaching legislation, it appears that Carlile sees himself instead as an enthusiastic advocate for the government. [78]

A further weakness of the United Kingdom Independent Reviewer, which we identified earlier in relation to the many Australian counter-terrorism reviews, is that his or her recommendations may simply be ignored by the government and parliamentary majority.[79] While Lord Carlile has noted that repeals of parts of the laws have occurred after he reported on their deficiencies,[80] nevertheless the risk of government inaction must remain. This is surely an inherent problem for all review mechanisms. One advantage that the Independent Reviewer has over and above other review bodies is that the office is a standing one, which would seem to at least give it the opportunity to make sustained criticism of problems in the law or its operation and to report on obstruction or tardiness in remedying any defects.

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77 See Sparrow, above n 76.

78 Inayat Bunglawala, 'Carlile's curious reasoning', *The Guardian* (UK), 18 December 2007.

79 O'Cinneide, above n 74.

80 Carlile, above n 65, 6-7.

IV HOW? PROPOSALS TO ESTABLISH AN INDEPENDENT REVIEWER IN AUSTRALIA

Despite strong support for the appointment of an Independent Reviewer from both the SLRC and the PJCIS, and the bipartisan nature of the latter's findings, the then Coalition government was unresponsive. The government rejected the SLRC's recommendation that the government 'establish a legislative-based timetable for continuing review of the security legislation by an independent body, such as the SLRC, to take place within the next three years'.[81]

In doing so, it noted that it was:

> ... [C]ommitted to ensuring that all security legislation remains necessary and effective against terrorism. Where the Government considers that legislation should be subject to review, due consideration is given to the various models of review available, such as those outlined in the report. ... The Government considers that it would be preferable to allow sufficient time for more operational and judicial experience with the legislation, and then respond to any issues that may arise as a result.[82]

At its simplest, the government's response to the SLRC's recommendation was that review by an independent body 'is not really necessary'.[83] '[T]here are independent mechanisms within the parliamentary process which enable all issues to be covered appropriately' and, furthermore, 'there is no question that those issues [that is, the issues identified by the SLRC] could have been identified in an internal review or the sort of review that we had last year following the London bombing'.[84]

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81 Australian Government, Submission to Parliamentary Joint Committee on Intelligence and Security *Review of Security and Counter-Terrorism Legislation* (June 2006) 1.

82 Australian Government, above n 81.

83 Commonwealth, *Parliamentary Debates*, Parliamentary Joint Committee on Intelligence and Security, 1 August 2006, ISEC 3.

84 Ibid.

A *The 2008 Bill*

In early 2008, after the Coalition lost the November 2007 federal election, Georgiou introduced a private members bill into the Commonwealth House of Representatives for the establishment of an office of Independent Reviewer – the Independent Reviewer of Terrorism Laws Bill 2008 ('Independent Reviewer Bill'). Georgiou stated that:

> It is vital that parliament and the executive receive expert advice on an ongoing basis about the effectiveness and impact of the regime of counterterrorism measures that have been put in place. A legislatively provided-for Independent Reviewer of Terrorism Laws would provide a much-needed additional safeguard for the protection of our security and our rights.[85]

However, the new Labor government used its majority in the House of Representatives to block any debate on the Independent Reviewer Bill, without providing any reason for so doing.[86]

The Independent Reviewer Bill was subsequently introduced into the Senate by Coalition Senators Judith Troeth and Gary Humphries on 23 June 2008.[87] In the Second Reading Speech for the Bill, Troeth stated:

> Some have expressed views that aspects of the current [counter-terrorism] regime are draconian. Obviously, our response to the threat of terrorism cannot simply be more and more stringent laws, more police and more intelligence personnel. Rather, we need to provide adequate safeguards to ensure scrutiny, accountability and transparency.[88]

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85 Commonwealth, *Parliamentary Debates*, House of Representatives, 17 March 2008, 1952 (Petro Georgiou).

86 Commonwealth, *Parliamentary Debates*, House of Representatives, 19 March 2008, 2199-2202. See also House of Representatives, House Notice Paper, Winter (2008), No 33, 26 June 2008, Orders of the Day, Item 6.

87 Commonwealth, *Parliamentary Debates*, House of Representatives, 23 June 2008, 34.

88 Commonwealth, *Parliamentary Debates*, Senate, 23 June 2008, 35.

The Bill provided that the Independent Reviewer would be appointed by the Governor-General[89] (after consultation between the Prime Minister and the Leader of the Opposition)[90] for a period of up to five years.[91] He or she could only be dismissed by the Governor-General for specified reasons, for example, misbehaviour.[92] The role of the Independent Reviewer would be to review the operation, effectiveness and implications of the laws relating to terrorist acts.[93] Such reviews could be conducted by the Independent Reviewer on his or her own motion, at the request of the Attorney-General or at the request of the PJCIS.[94] The Independent Reviewer was obliged, however, to inform the Attorney-General of any proposed review[95] and have regard to the work of other agencies to ensure co-operation and avoid duplication.[96] In carrying out a review, the Independent Reviewer would have the power to obtain confidential information necessary for reviews.[97]

Once a review had been completed, a report was to be provided to the Commonwealth Attorney-General.[98] This report would be tabled in the Commonwealth Parliament, and the Attorney-General and PJCIS must respond within a specified period of time.[99] The Independent Reviewer was also to prepare an annual report.[100]

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89 Independent Reviewer of Terrorism Laws Bill 2008 (Cth) s6(2).
90 Ibid s6(3).
91 Ibid s12. The Independent Reviewer may not be appointed to the office more than twice.
92 Independent Reviewer of Terrorism Laws Bill 2008 (Cth) s14. This appointment regime is based on that of the Inspector General of Intelligence and Security: see *Inspector General of Intelligence and Security Act 1986* (Cth) s6.
93 Independent Reviewer of Terrorism Laws Bill 2008 (Cth), s8.
94 Ibid.
95 Independent Reviewer of Terrorism Laws Bill 2008 (Cth), s9(1).
96 Ibid s9(3).
97 Ibid ss9(2), 10.
98 Ibid s11(1).
99 Ibid s11(2)-(4).
100 Ibid s11(3).

The Independent Reviewer Bill was referred to the Senate Standing Committee on Legal and Constitutional Affairs ('LCA Committee').[101] Submissions made to the LCA Committee, including those of the Commonwealth Ombudsman[102] and Inspector-General of Intelligence and Security,[103] generally accepted that it was important to for Australia to have an office of Independent Reviewer.[104] Even the brief one-page submission made by the Attorney General's Department stated that the government was 'not opposed to an independent reviewer', although it suggested that 'any annual review of the counter-terrorism legislation concentrate on those laws which have been used in the reporting year'.[105] Many of these submissions, however, also highlighted areas in which the Independent Reviewer Bill could be improved.

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101 Commonwealth, *Parliamentary Debates*, Senate, 2 September 2008, 4304.

102 Commonwealth Ombudsman, Submission to Senate Legal and Constitutional Affairs Committee *Inquiry into the Independent Reviewer of Terrorism Laws Bill 2008 [No. 2]* (12 September 2008).

103 Inspector-General of Intelligence and Security, Submission to Senate Legal and Constitutional Affairs Committee *Inquiry into the Independent Reviewer of Terrorism Laws Bill 2008 [No. 2]* (12 September 2008) 4-5.

104 See, eg, Gilbert + Tobin Centre of Public Law, Submission to Senate Legal and Constitutional Affairs Committee *Inquiry into the Independent Reviewer of Terrorism Laws Bill 2008 [No. 2]* (10 September 2008) 1, 3; Australian Human Rights Commission, Submission to Senate Legal and Constitutional Affairs Committee *Inquiry into the Independent Reviewer of Terrorism Laws Bill 2008 [No. 2]* (12 September 2008) 3-5; Public Interest Law Clearing House, Submission to Senate Legal and Constitutional Affairs Committee *Inquiry into the Independent Reviewer of Terrorism Laws Bill 2008 [No. 2]* (12 September 2008) 4, 18-19; Law Council of Australia, Submission to Senate Legal and Constitutional Affairs Committee *Inquiry into the Independent Reviewer of Terrorism Laws Bill 2008 [No. 2]* (15 September 2008) 5. Notably, a different view was taken by the New South Wales Council for Civil Liberties, which argued that legislation to address terrorist activity should be repealed in its entirety, rendering the appointment of an Independent Reviewer unnecessary: New South Wales Council for Civil Liberties, Submission to Senate Legal and Constitutional Affairs Committee *Inquiry into the Independent Reviewer of Terrorism Laws Bill 2008 [No. 2]* (11 September 2008).

105 Attorney General's Department, Submission to Senate Legal and Constitutional Affairs Committee *Inquiry into the Independent Reviewer of Terrorism Laws Bill 2008 [No. 2]* (15 September 2008).

First, it was argued that the role of the Independent Reviewer should be more explicitly spelt out in the Bill, with specific mention made of the legislation falling under his or her purview and the criteria used to guide any review. The latter should include a requirement that the Independent Reviewer consider whether the laws comply with Australia's human rights obligations under international law.[106]

Second, the Bill should set out clear consequences for persons who fail to comply with a request for information from the Independent Reviewer and/or give false information to the Independent Reviewer.[107] Third, the reporting requirements needed amendment to ensure the independence of the office. Reports produced by the Independent Reviewer should be directly tabled in the Commonwealth Parliament[108] or, where a review is requested by

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[106] See, eg, Gilbert + Tobin Centre of Public Law, Submission to Senate Legal and Constitutional Affairs Committee *Inquiry into the Independent Reviewer of Terrorism Laws Bill 2008 [No. 2]* (10 September 2008) 4-5; Australian Human Rights Commission, Submission to Senate Legal and Constitutional Affairs Committee *Inquiry into the Independent Reviewer of Terrorism Laws Bill 2008 [No. 2]* (12 September 2008) 6-7; Public Interest Law Clearing House, Submission to Senate Legal and Constitutional Affairs Committee *Inquiry into the Independent Reviewer of Terrorism Laws Bill 2008 [No. 2]* (12 September 2008) 9-11, 23-24; Castan Centre for Human Rights Law, Submission to Senate Legal and Constitutional Affairs Committee *Inquiry into the Independent Reviewer of Terrorism Laws Bill 2008 [No. 2]* (September 2008) 3-5; Law Council of Australia, Submission to Senate Legal and Constitutional Affairs Committee *Inquiry into the Independent Reviewer of Terrorism Laws Bill 2008 [No. 2]* (15 September 2008) 13-14.

[107] See, eg, Australian Human Rights Commission, Submission to Senate Legal and Constitutional Affairs Committee *Inquiry into the Independent Reviewer of Terrorism Laws Bill 2008 [No. 2]* (12 September 2008) 7; Public Interest Law Clearing House, Submission to Senate Legal and Constitutional Affairs Committee *Inquiry into the Independent Reviewer of Terrorism Laws Bill 2008 [No. 2]* (12 September 2008) 24-25; Liberty Victoria, Submission to Senate Legal and Constitutional Affairs Committee *Inquiry into the Independent Reviewer of Terrorism Laws Bill 2008 [No. 2]* (11 September 2008) 1.

[108] See, eg, Gilbert + Tobin Centre of Public Law, Submission to Senate Legal and Constitutional Affairs Committee *Inquiry into the Independent Reviewer of Terrorism Laws Bill 2008 [No. 2]* (10 September 2008) 5; Law Council of Australia, Submission to Senate Legal and Constitutional Affairs Committee *Inquiry into the Independent Reviewer of Terrorism Laws Bill 2008 [No. 2]* (15 September 2008) 14.

the PJCIS, the report should be provided to the PJCIS.[109] Furthermore, rather than the Independent Reviewer certifying that certain parts of a report should not be disclosed to the public for national security reasons, it would be preferable for the Independent Reviewer to prepare reports in such a way that neither risks disclosure of such information nor necessitates the suppression of its contents.[110] Fourth, it would prevent any suggestion of executive interference in the office of Independent Reviewer for individuals to be appointed to the office for a maximum five year term.[111]

Finally, and most significantly, it was argued that the office of Independent Reviewer should consist of a panel of three reviewers rather than a single individual.[112] This would enable 'a spread of expertise' and a range of different perspectives to be brought to the office.[113] In this context, it is worth recalling the criticisms of Lord Carlile's work as the United Kingdom's Independent Reviewer of Terrorism Legislation. It would be much harder to view the office as an 'advocate' of the government of the day and its legislation if it consisted of a panel. There is also the issue of workload. The size of

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109 See, eg, Gilbert + Tobin Centre of Public Law, Submission to Senate Legal and Constitutional Affairs Committee *Inquiry into the Independent Reviewer of Terrorism Laws Bill 2008 [No. 2]* (10 September 2008) 5-6; Law Council of Australia, Submission to Senate Legal and Constitutional Affairs Committee *Inquiry into the Independent Reviewer of Terrorism Laws Bill 2008 [No. 2]* (15 September 2008) 14.

110 See, eg, Gilbert + Tobin Centre of Public Law, Submission to Senate Legal and Constitutional Affairs Committee *Inquiry into the Independent Reviewer of Terrorism Laws Bill 2008 [No. 2]* (10 September 2008) 6; Law Council of Australia, Submission to Senate Legal and Constitutional Affairs Committee *Inquiry into the Independent Reviewer of Terrorism Laws Bill 2008 [No. 2]* (15 September 2008) 14.

111 See, eg, Gilbert + Tobin Centre of Public Law, Submission to Senate Legal and Constitutional Affairs Committee *Inquiry into the Independent Reviewer of Terrorism Laws Bill 2008 [No. 2]* (10 September 2008) 7-8.

112 See, eg, Gilbert + Tobin Centre of Public Law, Submission to Senate Legal and Constitutional Affairs Committee *Inquiry into the Independent Reviewer of Terrorism Laws Bill 2008 [No. 2]* (10 September 2008) 6-7; Law Council of Australia, Submission to Senate Legal and Constitutional Affairs Committee *Inquiry into the Independent Reviewer of Terrorism Laws Bill 2008 [No. 2]* (15 September 2008) 15.

113 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.

Australia's population and our different national security needs might be said to offer less work to an Australian Independent Reviewer than his or her United Kingdom counterpart. However, in having already identified the reasons why creation of the office is worthwhile here, those same factors – the number of new terrorism laws and its increasing application by law enforcement and intelligence agencies and consideration by the courts – also ensure that there is plenty on which to report in Australia.

The LCA Committee published its report on the Independent Reviewer Bill in October 2008. It recommended that 'the bill be supported in principle' but that a number of other recommendations be implemented prior to it being enacted.[114] These recommendations were largely consistent with the areas of improvement identified in submissions to the LCA Committee.[115] One issue that the LCA Committee did not address, however, was whether the office of the Independent Reviewer should be established within an existing agency.[116] The Commonwealth Ombudsman had submitted to the LCA Committee that there would be practical advantages to the office being located within either the Commonwealth Ombudsman or the Inspector-General of Intelligence and Security.[117] The LCA Committee simply suggested that the government 'consider the advantages and disadvantages of establishing the office of the IR within an existing agency ... with a view to maximising its effectiveness and efficiency in carrying out its role'.[118]

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114 Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Independent Reviewer of Terrorism Laws Bill 2008 [No. 2]* (October 2008) Recommendation 1.

115 Ibid 19-21.

116 Ibid 20.

117 Commonwealth Ombudsman, Submission to Senate Legal and Constitutional Affairs Committee *Inquiry into the Independent Reviewer of Terrorism Laws Bill 2008 [No. 2]* (12 September 2008) 4. This was also mentioned by the Inspector-General of Intelligence and Security in passing: Inspector-General of Intelligence and Security, Submission to Senate Legal and Constitutional Affairs Committee *Inquiry into the Independent Reviewer of Terrorism Laws Bill 2008 [No. 2]* (12 September 2008) 5.

118 Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia *Independent Reviewer of Terrorism Laws Bill 2008 [No. 2]* (October 2008) Recommendation 20.

In November 2008, the Clarke Inquiry into the Case of Dr Mohamed Haneef reported to the Commonwealth government. In this report, the Honourable John Clarke noted that 'the concept [of an Independent Reviewer] has merit'[119] and recommended that 'consideration be given to the appointment of an independent reviewer of Commonwealth counter-terrorism laws'.[120] He went on to argue that 'it would be more appropriate to establish such a role as a new position, as opposed to extending the current "intelligence" focus and specialisation of the Inspector-General of Intelligence and Security'.[121]

After the LCA Committee reported, a range of amendments were made to the Independent Reviewer Bill and it was passed by the Senate on 13 November 2008. It was introduced into the House of Representatives on 24 November 2008, where it has lain dormant.[122]

B *The 2009 Bill*

Throughout 2008, the Commonwealth Labor government failed to adopt a clear stance on whether it supported the establishment of an office of Independent Reviewer. As noted above, it blocked debate on the Independent Reviewer Bill. In late June 2008, a spokesperson for the Commonwealth Attorney General stated that:

> The government is currently considering the recommendations arising out of a number of recent legislative reviews ... [including] recommendations on how the legislation itself is subject to review. The government will consider the opposition's bill in its consideration of these recommendations.[123]

In December 2008, the government released its 'comprehensive response' to reviews conducted by the SLRC and the PJCIS in 2006

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119 Clarke, above n 31, 255.
120 Ibid Recommendation 4.
121 Ibid 255.
122 Commonwealth, *Parliamentary Debates*, Senate, 3 February 2010, 1 (Scott Ludlum).
123 Peter Veness, 'Anti-terror laws need overseer: Liberals,' *The Age* (Melbourne), 24 June 2008.

and 2007. Amongst other things, the government announced that it would establish 'a new statutory office in the Prime Minister's Portfolio, to be known as the National Security Legislation Monitor, reporting to Parliament'.[124] The Monitor would 'bring a more consolidated approach to ongoing review of the laws' and 'avoid the past practice of ad hoc reviews on particular aspects which has resulted in a less holistic approach and can be resource-intensive for both the reviewing body and the relevant agencies involved in the review'.[125] Accordingly, on 25 June 2009, the government introduced the National Security Legislation Monitor Bill 2009 ('Monitor Bill') into the Commonwealth Parliament. The Monitor Bill replicated, in broad terms, the content of the Independent Reviewer Bill, while also responding to most of the recommendations of the LCA Committee:

- Section 4 provided a comprehensive itemised list of specific legislative enactments as a definition of 'counter-terrorism and national security legislation';
- Section 6 provided that the Monitor was required to: (a) review the operation, effectiveness and implications of this legislation; and (b) consider whether this legislation contains appropriate safeguards for protecting the rights of individuals and 'remains necessary';
- Sections 21 to 24 established clear powers for the Monitor to hold hearings, summon a person to give evidence upon oath or affirmation and request production of a document or thing, and s 25 made it an offence for a person to fail to comply with these powers; and
- Section 29 required the Monitor to provide an annual report (as well as reports on individual inquiries) to the Prime Minister, which must then be tabled in the Commonwealth Parliament.

The Monitor Bill did not, however, reflect the recommendation of the LCA Committee that the office of the Independent Reviewer should consist of a panel of three reviewers. Instead, the Bill provided that the Monitor was to be appointed on a part-time basis

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124 Attorney-General's Department, Australian Government, *Government response to recommendations: Parliamentary Joint Committee on Intelligence and Security Review of Security and Counter-Terrorism Legislation* (December 2006) 2.

125 Ibid.

for a period of three years (with the possibility of reappointment for a further three years).[126] While part-time employment has the advantage of ensuring that the Monitor is financially independent from the executive branch of government, Lord Carlile has stated that '[i]t is beginning to be almost impossible for [the role of the United Kingdom Independent Reviewer] to be done by one person part-time'.[127] This problem is likely to be magnified in Australia, where the Monitor will be required to review the text and operation of Australia's entire body of counter-terrorism laws. In our opinion, appointing a panel of three part-time reviewers would provide the best means of ensuring both independence and an ability to engage in ongoing and holistic review of Australia's counter-terrorism laws.

The original title of the Monitor Bill reflected its key deficiencies. In contrast to the Independent Reviewer Bill, the Monitor Bill did not include (in either its title or text) the word 'independent'. After its inquiry into the new bill, the Senate Finance and Public Administration Committee ('FPA Committee) recommended in September 2009 that the office be amended to the 'Independent National Security Legislation Monitor'.[128] This recommendation was adopted by the Senate in February 2010.[129] Also in keeping with the recommendations of the FPA Committee, the Senate amended the Monitor Bill to expressly state that the Monitor may conduct inquiries on his or her own initiative[130] and for the PJCIS to refer matters to the Monitor.[131]

The greatest concern expressed in submissions to the FPA Committee was that the reporting arrangements in the Monitor Bill created an opportunity for the Prime Minister, if he or she were so

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126 National Security Legislation Monitor Bill 2009 ss11(1), 12.

127 Lord Alex Carlile QC, 'Terrorism: Cold Law or Bad Law?' (Paper delivered at the 2008 annual Gray's Inn Reading, Gresham College, 26 June 2008) <http://www.gresham.ac.uk/event.asp?PageId=108&EventId=737> 8 February 2010.

128 Senate Finance and Public Administration Committee, Parliament of Australia, *Inquiry into the National Security Legislation Monitor Bill 2009* (Cth) (September 2009) Recommendation 2.

129 Commonwealth, *Parliamentary Debates*, Senate, 3 February 2010, 1-11.

130 National Security Legislation Monitor Bill 2009 (Cth) s6.

131 National Security Legislation Monitor Bill 2009 s7A.

minded, to influence the content of the Monitor's reports and shield unfavourable reports from the eyes of Commonwealth parliamentarians. Even after amendment by the Senate, many aspects of these arrangements remain problematic. First, the Monitor must provide annual reports or reports on referred matters to the Prime Minister rather than directly to the Commonwealth Parliament.[132] As noted above, the Monitor will also be part of the Department of Prime Minister and Cabinet. Second, the original Bill provided that prior to giving an annual report to the Prime Minister, the Monitor must request the opinion of relevant Ministers as to whether the report contains information which is operationally sensitive or likely to prejudice Australia's national security. If so, the Monitor must extract any such information and provide it to the Prime Minister in a supplementary report. The Prime Minister must table an annual report in each House of the Commonwealth Parliament within 15 days of receiving it.[133] The only change that was made to this regime during the amendment process in the Senate was that the Monitor now has the *discretion* to consult with relevant Ministers as to the type of information which the report contains.[134] Third, while amendments in the Senate improved the Monitor Bill by requiring reports on referred matters to be tabled in the Commonwealth Parliament,[135] there remains no equivalent requirement for supplementary reports. Finally, the most problematic aspect of the Monitor Bill remains that the Prime Minister is empowered to direct the Monitor to provide him or her with an 'interim report' on a referred matter prior to the completion of a review.[136]

The amended Monitor Bill was passed by the Senate on 3 February 2010[137] and by the House of Representatives on 18 March 2010. The United Kingdom experience demonstrates the necessity,

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132 National Security Legislation Monitor Bill 2009 (Cth) ss29(1), 30(1); Independent National Security Legislation Monitor Bill 2010 (Cth) ss29(1), 30(1).

133 National Security Legislation Monitor Bill 2009 (Cth) s29.

134 Independent National Security Legislation Monitor Bill 2010 (Cth) s29. See especially s29(4).

135 Independent National Security Legislation Monitor Bill 2010 s30(6).

136 Independent National Security Legislation Monitor Bill 2010 s30(3).

137 Commonwealth, *Parliamentary Debates*, Senate, 3 February 2010, 1-11.

for the success of the office, of ensuring that the Monitor both is and is perceived to be independent. However, this endeavour is likely to be undermined by the combination of the reporting arrangements in the Monitor Bill and the fact that the office of the Monitor is to be located within the Prime Minister's portfolio.

V CONCLUSION

This article suggests that there is a strong case for the establishment of an Independent Reviewer or Monitor in Australia. The vast number of counter-terrorism laws enacted in Australia since 2002 (many of which contain worrying measures), the flawed process of counter-terrorism law-making and the piece-meal nature of reviews to date make a strong case for the establishment of a body with the ability to engage in independent, holistic and ongoing review.

The United Kingdom experience teaches us, however, that the greatest weakness of such an office is its dependence upon a particular individual. The Sydney Centre for International Law has described the appointment of an Independent Reviewer or Monitor as inherently 'risky'.[138] This is because 'the success of the monitor would stand or fall on an individual personality' and there 'is a risk of an independent reviewer providing idiosyncratic individual opinions, regardless of whether the person is a barrister, academic or former judge or public servant'.[139] The Centre went on to argue that it would be better to vest the function of reviewing Australia's counter-terrorism laws in an existing independent human rights organisation, such as the Australian Human Rights Centre.[140] However, given the breadth and complexity of the task that the Monitor will be required to carry out, it is surely appropriate to create an office with financial resources dedicated to this task and a body of employees who can develop expertise in the field.

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138 Sydney Centre for International Law (Ben Saul), Submission to the Senate Finance and Public Administration Committee *Inquiry into the National Security Legislation Monitor Bill 2009* (19 July 2009).

139 Ibid.

140 Ibid.

Instead of bestowing the review function upon an existing organisation, we focused in this article upon identifying ways in which the professionalism of an Australian Independent Reviewer or Monitor may be maximised, so that it may avoid the criticisms levelled against Lord Carlile that he is an 'advocate' for the United Kingdom government and its counter-terrorism laws. Of particular importance in this regard would be the appointment of a panel of reviewers, from a range of different backgrounds and with a range of different skills. Additionally, ensuring the maximum degree of independence of the office necessitates a reporting system free of any appearance of executive control or interference.

It will be many years before we can assess the success of Australia's Independent Reviewer or Monitor. In judging the success of this office, it is important to recognise that it is, of itself, not an answer. It simply adds a post-enactment review process which should go some way towards improving key aspects of the national security legal framework. Although we would imagine that this will lead to recommendations as to how the laws may be further enhanced for effectiveness, clarity and respect for rights, the responsiveness of government to the findings of the Independent Reviewer or Monitor cannot be guaranteed. Therefore, its success should not be judged merely by how many counter-terrorism laws on Australia's statute books are repealed or amended. Rather, a broader appraisal of the office should take place against such factors as improvement to the public's level of knowledge, greater pre-enactment discussion of human rights issues in the Commonwealth Parliament and the holding to account of the Commonwealth government for the content and operation of the laws it maintains in order to protect the Australian community safe from political violence.

In 2008, Lord Carlile powerfully set out his view of the role of an Independent Reviewer:

> There is a naive assumption in the minds of some that an Independent Reviewer is an angel of mercy when he or she gives the Government of the day a good kicking, and a devil of complicity when he or she or agrees with the Government. Some assume that I should only be there to give the Government a hard time, a job done well by civil liberties groups. Others assume that I am there to support Government. Both are wrong. I am there to give what I hope is always a considered and independent view.[141]

That description seems to us an entirely apt one – the Independent Reviewer should be fearlessly independent and not embedded with one side or other in the complex debates over counter-terrorism law and the preservation of individual's liberties. But additionally, we would stress the modesty of the potential impact which any Independent Reviewer or Monitor body is likely to have. The officeholder operates as a highly desirable check on the laws, not least because of the regularity and extent of the reviews to be performed – but the debate about how security is provided while rights are simultaneously protected remains one for elected representatives, the courts and also, importantly, the greater public.

[141] Lord Alex Carlile QC, above n 127.