



The University of Sydney

Faculty of Law



Law Building F10
Sydney University NSW 2006
Australia

Tel: +61 2 9351 0354
Facsimile: + 61 2 9351 0200
Email: bsaul@usyd.edu.au

Dr Ben Saul BA (Hons) LLB (Hons) (*Syd*) DPhil (*Oxon*)

Director, Sydney Centre for International Law

Committee Secretary
Senate Standing Committee on Finance and Public Administration
By email: fpa.sen@aph.gov.au

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Dear Committee Secretary

RE: Inquiry into the *National Security Legislation Monitor Bill 2009*

Thank you for the opportunity to make a submission to your inquiry into the *National Security Legislation Monitor Bill 2009*. The Sydney Centre for International Law is a leading centre for research and policy on international law in the Asia-Pacific region.

We strongly endorse the principle of the need for ongoing periodic review of the complex anti-terrorism laws which Australia has adopted since 2001. **However, it is our primary submission that a new independent monitor is not the best method of securing the most effective review of the laws and the identification of opportunities for the reform or amendment of the laws.**

In our view, the objectives of the bill would be better accomplished by tasking the Australian Law Reform Commission (ALRC) with ongoing periodic review of anti-terrorism laws. The ALRC would be the perfect body to conduct ongoing review of the anti-terrorism laws because it has the necessary institutional capacity, legal expertise, experience of broad and consultative law reform processes, a reputation for independence and integrity, and prior involvement (and thus accumulated expertise) in a range of security related inquiries.

In contrast, establishing a one-off monitor of terrorism laws would be institutionally inefficient (by unnecessarily creating new and potentially costly structures where more experienced structures already exist and can deliver economies), inadequate (because the position would likely be part-time and thus stretched) and risky (since the success of the monitor would stand or fall on an individual personality, rather than embedding the review function in a better resourced, professional, long-standing law reform body which is not dependent on an individual). Whereas the ALRC can deliver systematic, considered views based on consultative processes, 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.

National Security Legislation Monitor Bill 2009

If our recommendation to expand the mandate of the ALRC is not accepted, we would still welcome the establishment of an independent monitor as the next best thing. There is a need for independent scrutiny of such laws in order to improve their operation and effectiveness at countering terrorism, to increase public confidence in the laws, and to ensure that anti-terrorism measures are consistent with Australia's international agreements and human rights obligations.

The remainder of this submission assesses whether the 2009 Bill addresses the limitations of the *Independent Reviewer of Terrorism Laws Bill 2008*, as identified in the Centre's previous submission to the Senate Standing Committee on Legal and Constitutional Affairs' inquiry into the 2008 Bill.

1. The Limitations of the 2009 Bill

The proposed Bill establishes the office of the National Security Legislation Monitor, and confers on this officer the power to review '*the operation, effectiveness and implications of*' legislative provisions concerning counter-terrorism and national security (section 6(1)(a)).

While the Centre is encouraged by freedom and independence given to the Monitor to conduct investigations, greater clarity on the obligations and principles which guide the Monitor's discretion is needed. The Bill requires the Monitor to 'have regard to' international agreements and constitutional arrangements. Also, the Monitor's broad discretion is limited by a need to consider whether there are adequate human rights safeguards, and whether the legislation is 'necessary' (section 6(1)(b)). However, the Bill lacks any other minimum objective criteria against which to assess the '*operation, effectiveness and implications*' of terrorism legislation. Although we agree that the Monitor must retain some discretion without intervention from the Government, there is a need to introduce some positive obligations and guiding principles to maximise the efficiency of the review process.

2. Recommendations

In its previous submission, the Centre recommended that the independent monitor's functions include:

a. Reporting on Consistency with the International Covenant on Civil and Political Rights (ICCPR)

It is essential that the proposed review of national security legislation takes human rights into account. The 2009 Bill reinforces Australia's international obligations, but does not adequately emphasise human rights standards. Section 3 refers to international and specifically human rights obligations as within the objects of the Act. Section 8 specifies that the Monitor's functions must be performed with regard to '*Australia's obligations under international agreements*'. This section has the effect of bringing the ICCPR human rights standards within the scope of the Monitor's review. However, it does not go so far as to require the Monitor to report consistently with the ICCPR obligations.

The Bill should make direct reference to the ICCPR, to emphasise the importance of protecting fundamental human rights when enacting counter-terrorism measures. It is essential to ensure that the review is conducted with regard to recognised human rights standards (see the submission by the Human Rights Law Resource Centre to the 2008 *Independent Reviewer* inquiry). Terrorism laws have the very real potential to negatively impinge on fundamental human rights. Special provision for review based on human rights is important since terrorism laws can lack effective review mechanisms, and also human rights challenges cannot be raised directly in the courts given the absence of a federal Bill of Rights. Mandating compliance with Australia's obligations under the ICCPR will enhance the legitimacy of the government's anti-terrorism legislation, both within Australia and abroad.

b. Reporting on Consistency with International Anti-Terrorism Law Frameworks

The need for reporting consistently with international and regional anti-terrorism obligations is covered by section 8 on '*international agreements*'. Section 8 also refers to constitutional arrangements, to foster a '*national approach to countering terrorism*'. The Bill should further emphasise the need for a cooperative international approach by requiring the Monitor to have regard to relevant multilateral anti-terrorism frameworks at an international and regional level. There are resolutions from the United Nations General Assembly, Security Council, Commission on Human Rights and Special Rapporteurs indicating that states are specifically required to comply with human rights obligations in countering terrorism.

In particular, consideration should be given to (a) United Nations Security Council obligations concerning counter-terrorism and (b) transnational, sectoral anti-terrorism treaty obligations. These cooperative multilateral frameworks are designed to ensure that impunity for terrorist acts is eliminated by ensuring a consistent international response, and it is important for Australia to ensure that its legal frameworks are sufficiently comprehensive in this regard. In this sense, the role of the Independent Reviewer might be seen not only as reactive (that is, limited to critiquing existing laws), but proactive in supporting necessary legal frameworks.

c. Mandatory Review of Detention Powers

The Monitor's powers of review have a broad reach over all Commonwealth counter-terrorism and national security legislation, or any law to the extent that it relates to such legislation. There is no mandatory provision to review detention powers.

A specific provision should be made for mandatory review (within six months of the commencement of the Act) of detention powers under Division 2 of Part IC of the *Crimes Act 1914* (Cth) and Division 105 of the *Criminal Code Act 1995* (Cth). These Divisions of the *Crimes Act* and *Criminal Code Act* relating to the detention of persons are potentially the most invasive of human rights. It is therefore important to *ensure* that they are assessed by the Monitor in a timely manner. The urgency of such an assessment means that it should be made the Monitor's first priority.

d. Mandatory Review of Proposed Amendments to Terrorism Laws

The proposed Bill fails to include proposed amendments to national security legislation within the ambit of the Monitor's power. The Monitor should be given

power to review proposed amendments in regard to their ‘*operation, effectiveness and implications*’, including consistency with the rights protected by the ICCPR. Similarly, the Independent Reviewer in the United Kingdom is required to report on ‘*the implications for the operation of the Prevention of Terrorism Act of **any proposal** made by the Secretary of State for the amendment of the law relating to terrorism [emphasis added]*’. The Security Legislation Review Committee (SLRC) in its June 2006 Report has also recommended that part of the Independent Reviewer’s report should include comment on ‘*the implications for the operation and effectiveness of part 5.3 [of the Criminal Code] of any Government proposals for the amendment of terrorism laws*’.

3. Additional Safeguards

The establishment of an independent Monitor of terrorism laws is not a substitute for enacting safeguards within the laws themselves for the protection of human rights and civil liberties. We endorse the additional safeguards that the Law Council of Australia proposes in its submission to the 2008 *Independent Reviewer* inquiry (pp15-16).

Yours sincerely

Dr Ben Saul
Director, Sydney Centre

Ms Sadhana Abayasekara
Centre Researcher