



**Dr Ben Saul** BA (Hons) LLB (Hons) *Sydney* DPhil *Oxford*, Barrister  
*Director, Sydney Centre for International Law*

173–175 Phillip Street  
Sydney NSW 2000  
Australia

DX 983, Sydney  
Tel: +61 2 9351 0354  
Facsimile: + 61 2 9351 0200  
Email: bsaul@usyd.edu.au

Committee Secretary  
Senate Standing Committee on Legal and Constitutional Affairs  
Department of the Senate  
PO Box 6100  
Parliament House  
Canberra ACT 2600

19 September 2008

Dear Committee Secretary

**RE: Inquiry into the Independent Reviewer of Terrorism Laws Bill 2008 [No. 2]**

Thank you for this opportunity to make a submission to your inquiry into the Independent Reviewer of Terrorism Laws Bill 2008 [No. 2]. We apologize for lodging a late submission.

We strongly endorse the establishment of an independent reviewer, which, by increasing high level, ongoing scrutiny of terrorism laws, has the potential to improve their operation (thus countering terrorism more effectively) and to enhance public confidence in the law.

**1. The Importance of an Independent Reviewer of Terrorism Laws**

Since 2002, Australia has introduced a large number of anti-terrorism laws, which expand the scope of counter-terrorism powers, introduce new and unusual kinds of powers, and which impact on the rights and liabilities of people in Australia in significant ways. While these laws have enabled Australia to deal with new and emerging national security threats in new ways (though not always in *necessary* ways), there are continuing concerns that this broad conferral of power has not been accompanied by adequate formal review mechanisms.

While there have been a number of ad hoc inquiries (such as the Sheller Report, or Australian Law Reform Commission references) and parliamentary committee inquiries into specific bills, there is no rolling process of formal review of the anti-terrorism regime as a whole. The rapid accumulation of new laws over time has created a complicated patchwork of new legal powers and liabilities, and there is great value in establishing a mechanism for ongoing and comprehensive stock-taking and critique of their combined operation and impact. Such a mechanism could look beyond current controversies about the application of the laws in particular cases and instead focus on the systemic adequacy and impact of the law itself.

The introduction of an Independent Reviewer of Terrorism Laws is an important step in addressing these concerns. The advantages of an Independent Reviewer are threefold:

- First, it will provide an impartial and independent review mechanism specifically mandated to analyze Australia's counter-terrorism regime and identify any gaps, inconsistencies, over-reach, excess or disproportionality that may arise;
- Secondly, establishing a depoliticized review mechanism that is independent from the executive will increase public confidence in the government's anti-terrorism laws and the review process; and
- Thirdly, the review mechanism has the potential to ensure that Australia is carrying out its anti-terrorism activities in accordance with its obligations under international law, in particular with due regard to fundamental human rights.

Furthermore, this would bring Australia into line with the British model, where an Independent Reviewer, Lord Carlile QC, undertakes progressive annual reporting on different aspects of UK terrorism laws, pursuant to the *Terrorism Act 2000* (UK) and the *Prevention of Terrorism Act 2005* (UK). In Britain, the reviewer is widely regarded as a credible, authoritative and successful mechanism for identifying improvements in anti-terrorism laws.

## **2. The Proposed Bill and Its Limitations**

The proposed Bill establishes the office of the Independent Review, and under clause 8, confers on this officer the power to '*review the operation, effectiveness and implications of laws relating to terrorist acts*' and sets out that '*the Independent Reviewer must be free to determine priorities as he or she thinks fit.*'

While the Centre is encouraged by freedom and independence given to the officer to conduct investigations, the lack of any minimum objective criteria against which the officer is to assess the 'operation, effectiveness and implications' raises concern.

Although we agree that the Independent Reviewer must be '*free to determine priorities as he or she thinks fit*', without intervention from the Government, there is a need to introduce some positive obligations and guiding principles to maximize the efficiency of the review process. In the absence of any such obligations and principles, the effectiveness of the position is truly dependent on the particular Independent Reviewer and his or her discretion.

## **3. Recommendations**

To remedy this situation, we recommend that the Bill incorporate a number of additional provisions. These new provisions would require:

### ***a. Reporting on Consistency with the International Covenant on Civil and Political Rights***

The Bill should be amended to include provisions that would *require* the Independent Reviewer to report on the consistency of Australia's terrorism laws with the rights protected by the ICCPR, which Australia has ratified. This could be adopted into both clause 3 (Objects of Act) and clause 8 (Functions of Independent Reviewer). Given the very real potential for terrorism laws to negatively impinge on fundamental human rights, and community concerns over this, such an analysis should be mandatory, not at the reviewer's discretion.

These provisions are particularly necessary given the lack of effective review mechanisms within terrorism laws themselves, and also the inability to directly raise human rights challenges to excessive terrorism laws in the courts (given the absence of a federal bill of rights or human rights statute). These provisions would also aid Australia in complying with its obligations under international law. This in turn 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 Independent Reviewer should be empowered to have regard to relevant international anti-terrorism law frameworks in evaluating Australian anti-terrorism laws. 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***

An 'additional function' of the Independent Reviewer should be the 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), including a review of the consistency of these laws with the ICCPR.

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 Independent Reviewer in a timely manner. The urgency of such an assessment means that it should be made the Independent Reviewer's first priority.

#### ***d. Mandatory Review of Proposed Amendments to Terrorism Laws***

A second 'additional function' should be the mandatory review of any proposed amendments to terrorism legislation, in regard to its '*operation, effectiveness and implications*', including on the rights protected by the ICCPR.

Such a function would be similar to the function of the Independent Reviewer in the United Kingdom, who must 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*'.

***e. Regular Annual Reporting***

There is currently no provision in the Bill requiring the Independent Reviewer to give reports at regular intervals. It is dependent on request by either the responsible Minister or the Parliamentary Joint Committee on Intelligence and Security, or the Independent Reviewer's own discretion.

The SCRL in its June 2006 Report recommends that the Independent Reviewer be required to provide a report every 12 months on the '*operation, effectiveness and implications*' of existing terrorism legislation and any proposed amendments. This is consistent with the position in the UK.

We agree that a provision *requiring* the Independent Reviewer to report every 12 months is necessary to ensure that review of Australia's terrorism legislation is an ongoing and consistent process, and to provide the Parliament with up-to-date assessments of the laws. Of course, such a report should include an assessment of the implications of the terrorism laws on the rights under the ICCPR.

***f. Qualifications of the Reviewer***

Given the specialized nature of anti-terrorism law, and the special impacts of anti-terrorism laws on Australia's international human rights obligations, it is recommended that minimum qualifications for the position of independent reviewer should include (i) knowledge and experience of anti-terrorism laws and (ii) expertise in international human rights law.

Please be in touch if you require any further information.

Yours sincerely



**Dr Ben Saul**  
*Director, Sydney Centre*

**Ms Alicia Lyons**  
*Researcher, Sydney Centre*

**Ms Danielle Mawer**  
*Researcher, Sydney Centre*