An Independent Reviewer for Australian Terror Laws?

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The idea of creating an office of Independent Reviewer of Australia's anti-terrorism legislative scheme is one which has slowly but surely gathered momentum in recent years as the number of laws has grown and we have been able to see how police, intelligence agencies and courts experience them as a matter of practice.

In keeping with the trend of basing major aspects of Australia's national security laws on models observed overseas – particularly the United Kingdom – it should be no surprise that local calls for an Independent Reviewer draw directly on the existence of such an office in that jurisdiction.

What I propose to do in the time available is to identify the major sources of this proposal before considering why experiences and circumstances here give it some basic level of appeal. I will then go on to discuss the features of the office as it exists in the UK and some of the positive and rather less positive things about its operation. Lastly, I will give an overview of the relevant private member's bill which has been introduced into both houses of the Commonwealth

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Parliament this year and suggest ways in which it could be improved, while offering broad support for its enactment.

Who wants an Independent Reviewer and why?

☐Hon Petro Georgiou, Senators Judith Troeth and Gary Humphries;

The political advocates for an Independent Reviewer are currently found on the conservative side of federal politics – though it is clear that this is not a policy with party support but rather an issue being pushed by certain individuals. The Melbourne MP Petro Georgiou first called for an Independent Reviewer in October 2005 – during the very heated public debate over the Howard government's *Anti-Terrorism Act [No 2]* which introduced control orders and revamped sedition offences. [1]

The nub of Georgiou's argument is that 'the challenge of protecting security without undermining fundamental rights requires constant vigilance…[and] the reality is that the machinery of vigilance in Australia is deficient'.[2]

There is expert and bipartisan support for this contention but disappointingly both the Howard and now Rudd governments have been markedly cooler in their enthusiasm for the creation of an office of Independent Reviewer. This is

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1 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).

2 Parliament of Australia, House of Representatives, Hansard, 17 March 2008 (Petro Georgiou).

probably based upon the suspicion that the Reviewer may prove to be a thorn in their side – something not at all borne out by the UK experience.

☐The Security Legislation Review Committee – (the Sheller Committee) (2006);

What then of the 'expert and bipartisan' support for some form of independent review? The first is provided by the Security Legislation Review Committee's June 2006 report on the operation of Australia's counter-terrorism laws. This special committee chaired by the Hon Simon Sheller QC found some aspects of Part 5.3 of the Criminal Code had a 'disproportionate effect on human rights' or were vulnerable to challenge under administrative law and it recommended amendment and repeal of a number of provisions.[3] Its very first recommendation was Commonwealth legislation establishing a mechanism for periodic review of terrorism laws so as to give government 'an independent source of expert commentary'.[4]

The Sheller Committee noted that reviews of the counter-terrorism laws have been sporadic with critical issues being neglected. For example, no review has investigated the impact of the *National Security Information Act* on the fairness of trials for persons accused of terrorist crimes – despite a great deal of criticism from sectors of the legal profession over this law. Another example, now potentially addressed by the findings of the Clarke Inquiry, are the amendments made to the *Crimes Act* in 2004 increasing maximum police questioning and

[3] Security Legislation Review Committee, *Report of the Security Legislation Review Committee* (2006), 4.

[4] Ibid, 8.

detention times for terrorist offences. It will be interesting to see what Clarke says about that law but ideally, individuals should not have to suffer an ordeal such as Haneef's before proper scrutiny is given to terrorism legislation.

☐Parliamentary Joint Committee on Intelligence and Security (2006-07)

In December 2006, the Parliamentary Joint Committee on Intelligence and Security (PJCIS) responded to many of the matters raised by the Sheller committee and endorsed its position on review by recommending itself that the government appoint an Independent Reviewer to report annually to the Parliament on terrorism laws.

The Committee reiterated this recommendation in 2007 and said that not only would the office 'provide a more integrated and ongoing approach to monitor the implementation of terrorism law in Australia', but would also 'contribute positively to community confidence'.[5]

The Value of an IR in Australia

In identifying the support for an Australian Independent Reviewer, I have necessarily touched on the various reasons behind this. But it is valuable to construct a list independently – and perhaps more bluntly than those advocates. I would simply point to the combination of the following factors:

☐Lack of significant experience in terrorism law before 9/11;

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

We need to remember that, unlike a lot of other countries, Australia's great fortune over its history to be largely free of politically motivated violence meant that at the time of September 11, there were no national or state laws providing for the criminalisation of terrorism. The idea that we could in the space of a few years perfect our approach to the creation and implementation of laws in this extremely complex area seems overconfident.

☐Legislative hyperactivity;

Also to bear in mind is the speed with which we have not just created terrorism offences but an extensive legal framework for national security from threats of this sort. With over 35 separate enactments by the Commonwealth Parliament in the first 5 years since 2001, there has been extraordinary growth in this field. Understanding how the disparate parts of our terrorism laws sum to a whole is a difficult job – it seems reasonable to suggest, in light of their complexity and number, they require on-going review.

☐Incomplete review mechanisms employed to date

And although there *has* been substantial review of these laws that has not been without its problems. For one thing, selective acceptance of pre-enactment scrutiny has occasionally produced laws rather different from those initially proposed and reviewed – an Independent Reviewer would ensure that the law *as enacted* would receive some sober consideration.

The other aspect to this issue is the fragmented form of review to date. While the basic offences; the proscription power; the ASIO questioning and detention powers; and the sedition provisions have been reviewed, this has often been done by very different bodies and all on a once-off basis. Additionally, as indicated above, important components of the anti-terrorism regime have gone completely unreviewed. This patchiness denies the clear interrelation between the divisions of Part 5.3 of the Code and associated statutes.

- Accumulation of experience requiring reflection.

Lastly, we have clearly entered the next phase of anti-terrorism law in Australia – where the courts are now playing a part alongside the other arms of government. The 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.

The UK Experience

It is timely at this juncture to reflect on the work of the Independent Reviewer in the United Kingdom which the PJCIS viewed as 'a useful reference point for the development of an Australian model'[6] and on which Georgiou has based his Independent Reviewer Bill.

- Lord Alex Carlile of Berriew QC – his role and powers as IR;

[6] Parliamentary Joint Committee on Intelligence and Security, *Review of Security and Counter Terrorism Legislation* (December 2006), 21.

The position of Independent Reviewer existed in the United Kingdom to review earlier 'temporary' laws designed in response to terrorist violence associated with the Northern Ireland situation. The 'modern' (for want of a better expression) office was established under the permanent *Terrorism Act 2000* which replaced those 'emergency' instruments and has grown significantly in step with new legislation enacted since. The only incumbent of the office since these changes has been Lord Carlile of Berriew QC. The Reviewer's terms of reference are to consider whether (a) the Act has been used fairly and properly, taking into account the need of both effective powers to deal with terrorism and adequate safeguards for the individual and (b) whether any of the temporary powers in the Act can safely be allowed to lapse.

Lord Carlile was subsequently appointed as Independent Reviewer of the provisions for the indefinite detention of terrorist suspects in the *Anti-Terrorism, Crime and Security Act 2001* and then the system of 'control orders' in the *Prevention of Terrorism Act 2005* which replaced detention after the House of Lords declared it incompatible with the Human Rights Act. The control orders report contains Lord Carlile's opinion not just on the operation of the scheme but on its continued necessity. This is an important contribution to annual parliamentary debate for its renewal required by the Act's sunset clause.

The Independent Reviewer has acquired further reporting functions in relation to other laws – including the offence of glorification of terrorism under the *Terrorism*

Act 2006. Additionally, he also responds 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' before the Parliament.

Concern has been expressed about the existence of various obligations cast upon the Independent Reviewer which work to different agendas and timetables. There is no single enactment establishing the office and listing its various functions and powers.

Lord Carlile's personal interpretation of his role includes making recommendations…if [he thinks] that a particular section or legislative part is 'otiose, redundant, unnecessary or counter-productive'.[7] 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'.[8] Arguably there is a tension inherent in this statement since the detail of anti-terror laws – from essential definitions to the operation of things such as control orders – is inextricably connected to deeper questions about the toleration or criminalisation of political violence and also affects how strategies are to be assessed for 'success'.

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7 Lord Carlile of Berriew QC, Independent Reviewer of Terrorism Legislation, United Kingdom, *Report on the Operation in 2007 of the* Terrorism Act 2000 *and of Part I of the* Terrorism Act 2006 (2008), [21].

8 Lord Carlile of Berriew QC, Independent Reviewer of Terrorism Legislation, United Kingdom, *The Definition of Terrorism* (2007), [2].

The Reviewer 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. Lord Carlile has regularly noted the co-operation he receives and believes he has been sufficiently briefed.

☐Praise for the Office and Carlile;

On the whole, the office of the Independent Reviewer in the United Kingdom appears to be regarded as a success – certainly one does not see calls for its abolition. Clive Walker, an expert on UK 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'. [9] 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'.[10]

Additionally, it is said that the Independent Reviewer 'generates public discussion about terrorism laws' and the simple fact that the public knows there is a 'terrorism watchdog' free to make public statements without government approval provides reassurance.[11]

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9 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.

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

11 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*

☐Criticisms – the line between 'reviewer' and 'advocate' of terrorism laws.

However, the Independent Reviewer has not been without criticism. In particular, the UK Parliament's Joint Committee on Human Rights has made a number of recommendations for improved reporting requirements since it has frequently had barely more than a few days to examine the Reviewer's report before debate on the annual renewal of the control order legislation.

The Committee is also concerned over uncertainty as to who determines what information is included in the Independent Reviewer's reports. In June it complained that the Reviewer's report on the *Terrorism Act 2006* did not include a detailed analysis of the operation of that law's extended pre-charge detention. The Home Secretary responded by stating that it is for the reviewer, not the Government, to decide what information is in his report. However, Lord Carlile had justified the omission by saying that he had 'not been asked by Ministers to provide a detailed analysis of the system'.[12]

This connects to concerns about ensuring the independence of the Independent Reviewer – both in fact and as a matter of perception. So, the Committee has recommended that the Reviewer should be appointed by Parliament not the Home Secretary. As a consequence, it wants the Reviewer to report directly to

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Politicians, 1 November 2006, 3-4. This is a summary of the panel discussion in this seminar.

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

Parliament not the government. Finally, noting that there is more work than one Reviewer can reasonably do, the Committee recommended that a panel of Reviewers be set up. All recommendations were rejected by the Government.

The bulk of criticism of the Independent Reviewer has been directed not at the office but rather at the apparent unwillingness of Lord Carlile to express clear criticism of the laws devised by the executive. This has been highlighted by conflicting opinions about their operation, fairness and effectiveness having been given to the Parliamentary Committee in the course of its own inquiries and also the 2007 judicial opinions of the House of Lords in challenges to the control order scheme which expressed rather more disquiet than Carlile before or since about aspects of the laws – particularly the special advocates scheme.[13]

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. [14] After the Bill was passed by a mere nine votes, Lord Carlile stated that he was 'satisfied that Parliament has done the right thing' and 'this very highly protective new law is needed'. This led one commentator to remark that:

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13 United Kingdom Parliament, Joint Committee on Human Rights, *Tenth Report: Counter-Terrorism Policy and Human Rights (Ninth Report): Annual Renewal of Control Orders Legislation 2008* (2008), Chapter 4, [56].

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

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. [15]

The 'Georgiou Bill'

Turning now to the Bill for an Independent Reviewer of Australia's terrorism laws, I want to briefly describe it basic elements and then suggest how the UK experience might lead to its improvement in key respects.

☐The Office and Powers of the IR;

- The Independent Reviewer would be appointed by the Governor-General (after consultation between the Prime Minister and the Leader of the Opposition) for a 5 year period on either a full or part time basis.
- The Independent Reviewer would review the operation, effectiveness and implications of the 'laws relating to terrorism' – defined as those directed to the prevention, detection or prosecution of terrorist acts.
- Reviews may be conducted by the Reviewer either on his or her own motion, or at the request of either the Attorney-General or the Parliamentary Joint Committee on Intelligence and Security. The Bill expressly confirms that the Reviewer 'must be free to determine priorities as he or she thinks fit'.

[15] Inayat Bunglawala, 'Carlile's curious reasoning', *The Guardian*, 18 December 2007.

- The Reviewer must inform the Attorney-General of a proposed review and have regard to the work of other agencies to ensure co-operation and avoid duplication. The Reviewer has the power to obtain confidential information necessary for reviews.
- The Reviewer will provide an annual report and reports of reviews of laws to the Attorney-General which must be tabled in Parliament. Both the Attorney-General and PJCIS must respond to the recommendations.

☐How the Bill might be improved:

The Bill is certainly adequate for the purpose its proponents claim, but there are some elements which might be considered further.

■Better stipulate the subject of review;

In its attempt to confer maximum flexibility upon the Reviewer, the Bill risks creating an office which is not as useful as it might be. While I agree that the Independent Reviewer should be responsive to the priorities as she or he identifies them, it would still be beneficial for the Bill to specify essential areas to be addressed by the Reviewer in his or her annual reports. This would ensure a consistent level of review over the main components of the terrorism laws – such as the offences, the questioning and detention powers and control orders.

■Direction and secrecy of report;

It is questionable whether the Reviewer's reports should always go to the Minister, enabling the latter to decide when it is tabled before the parliament. This seems odd since the Bill provides that the PJCIS is able to request a report directly rather than through the Minister (which is the practice in the UK). If the Committee can commission the report – a good thing in that it weakens the suggestion that the Independent Reviewer is exclusively in service to the executive – then it would seem it should be delivered to it directly upon completion.

It is interesting that at present the Bill allows the Independent Reviewer to certify that certain parts of the report which may adversely affect security can be deleted from the version tabled by the Minister. This has not really been an issue in the UK despite the ready access which Carlile has had to classified material. While the Independent Reviewer will undoubtedly view sensitive material, it would seem preferable that she or he writes reports in such a way that neither risks disclosure of such information nor necessitates the suppression of any contents.

■More than a sole reviewer;

The Sheller Committee's first preference for ongoing independent review was a committee of persons not too dissimilar to itself. The PJCIS simply favoured a sole Independent Reviewer as does the Georgiou Bill.

There are sound reasons against a single reviewer. Walker has observed that a panel of reviewers enables 'a spread of expertise' and different perspectives.[16] The criticisms made of Lord Carlile's work in the role are worth recalling in this context. It would be harder to view the office as an 'advocate' of the government's laws if there were a trio or more of reviewers.

There is also the issue of workload – raised already in the United Kingdom. But this is also a relevant consideration under the Australian Bill. The size of the population and our different national security needs might be said to offer less work to an Australian Reviewer compared to her or his UK counterpart, but in having already identified the reasons why creation of the office is worthwhile here, those same factors – the amount of new terrorism law and its increasing consideration by the courts – also ensure that there is plenty on which to report.

■Tenure of the IR.

The Bill provides for a 5 year term, with the possibility of re-appointment. If the office of Independent Reviewer remains one filled by an individual then the potential prospect of allowing a 10 year incumbency warrants caution. Carlile's reappointment in the UK will mean that he alone has provided 'independent review' of the abundance of laws passed there since this decade. There is something to be said for capping the period in the position at 5 years.

[16] Walker, above n 9.

If a panel of, say, 3 persons were appointed, then tenure could be longer but should be staggered so that a range of expertise and familiarity with the laws and the review process is held by incumbents at any one time.

Conclusions

- Calls for an Independent Reviewer should be heeded;
- Important practical and symbolic functions would be fulfilled by such an office;
- As to the form of the office, lessons can be gained from the UK experience;

In the Lodhi appeal in 2006, Chief Justice Spigelman said that: 'The particular nature of terrorism has resulted in a special, and in many ways unique, legislative regime'.[17] This can be fairly agreed upon. If the creation of a special office of review seems a bit over the top, then that is entirely in keeping with the novelty and abundance of terrorism law which the Commonwealth has created in recent years.

The Labor majority shut down debate on the Georgiou Bill when he introduced it in the House of Representatives. But given the contentious political debates which have accompanied counter-terrorism law-making in Australia to date, both parties should support this private members bill – it presents one way forward in depoliticising national security and lifting the quality of the legislative framework which is so important to the protection of the community.

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[17] *Lodhi v R* [2006] NSWCCA 121, [66].