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Submission to the Independent Reviewer of Terrorism Laws Bill 2008

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About the Human Rights Law Resource Centre

The Human Rights Law Resource Centre (*HRLRC*) is an independent community legal centre that promotes and protects human rights through the practice of law.

The HRLRC provides and supports human rights litigation, education, training, research and advocacy services to:

- (a) contribute to the harmonisation of law, policy and practice in Victoria and Australia with international human rights norms and standards;
- (b) support and enhance the capacity of the legal profession, judiciary, government and community sector to develop Australian law and policy consistently with international human rights standards; and
- (c) empower people who are disadvantaged or living in poverty by operating within a human rights framework.

The four 'thematic priorities' for the work of the HRLRC are:

- (a) the development, operation and entrenchment of Charters of Rights at a national, state and territory level;
- (b) the treatment and conditions of detained persons, including prisoners, involuntary patients and persons deprived of liberty by operation of counter-terrorism laws and measures;
- (c) the promotion, protection and entrenchment of economic, social and cultural rights, particularly the right to adequate health care; and
- (d) the promotion of equality rights, particularly the rights of people with disabilities, people with mental illness and Indigenous peoples.

1. Executive Summary

- 1 The Human Rights Law Resource Centre (**HRLRC**) supports in principle the *Independent Reviewer of Terrorism Laws Bill 2008*.
- 2 The HRLRC considers that the operation, effectiveness and implications of terrorism laws should be subject to independent review to ensure that there is transparency in the manner in which those laws are interpreted, and to ensure that there is public confidence in the manner in which those laws are applied.
- 3 The HRLRC supports the adoption of an independent reviewed model similar to that operating in the United Kingdom. The UK Independent Reviewer has provided a valuable source of expert commentary on the operation of terrorism legislation in the UK. However, the HRLRC notes that inherent in the functions of the UK Independent Reviewer is an obligation to have regard to international human rights standards and obligations in assessing the operation and implications of terrorism laws.
- 4 While Australia remains the only Western developed democracy without a legislative or constitutional Charter of Human Rights, the HRLRC submits that, to ensure that the Independent Reviewer provides a meaningful contribution to the operation and understanding of the terrorism laws, the functions should be expressly defined to require the Independent Reviewer to have regard to international human rights standards and obligations.

2. Background

2.1 Sheller Committee

- 5 In 2005, the Attorney General established the independent Security Legislation Review Committee (**Sheller Committee**),¹ under the chairmanship of the Honourable Simon Sheller AO QC, to review the raft of security and counter terrorism legislation passed by Parliament since 2002. The purpose of the Sheller Committee was to 'review how the specified

¹ In accordance with section 4(1) of the *Security Legislation Amendment (Terrorism) Act 2002* (Cth).

legislation has worked, whether it has worked to achieve its intended purpose, and what relevantly follows or can be implied from this'.²

6 The Sheller Committee was comprised of (among others) the Inspector General of Intelligence and Security, the Privacy Commissioner, the Human Rights Commissioner, and the Commonwealth Ombudsman. Each of these committee members had particular experience in requiring government agencies to have regard to human rights in the performance of their functions.³

7 In its report of June 2006, the Sheller Committee commented that:

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 have an independent source of expert commentary on the legislation.⁴

8 As a result, the first of the Sheller Committee's 20 recommendations proposed that the '*Government establish a legislative based timetable for continuing review of the security legislation by an independent body*'.

2.2 Report of the Parliamentary Joint Committee on Intelligence and Security

9 In 2006, the Parliamentary Joint Committee on Intelligence and Security (**PJCIS**) conducted a further review of the operation, effectiveness and implication of the terrorism laws. In performing this review, the PJCIS was required to take into account the Sheller Committee Report.⁵

10 In its report of December 2006, the PJCIS noted that:

Overall the machinery of governance is well developed in Australia. But the current system is fragmented, limiting the capacity for independent, ongoing and comprehensive examination of how terrorism laws are operating. At the same time, it is clear that executive agencies must keep terrorism legislation under review and respond to new developments.⁶

² Security Legislation Review Committee, *Security Legislation Amendment (Terrorism) Act 2002* (Cth) and the *Criminal Code Act 1995* (Cth), *Report of the Security Legislation Review Committee* (2006) (**Sheller Committee Report**), 21.

³ Sheller Committee Report, above n 2, 21.

⁴ Sheller Committee Report, above n 2, 6.

⁵ *Security Legislation Amendment (Terrorism) Act 2002* (Cth), section 4(2).

⁶ Parliamentary Joint Committee on Intelligence and Security, *Review of Security and Counter Terrorism Legislation* (December 2006) (**PJCIS Report**), 19.

11 The PJCIS therefore adopted the Sheller Committee's recommendation to appoint an Independent Reviewer to provide comprehensive and ongoing oversight of the operation, effectiveness and implications of the terrorism laws. The PJCIS recommended that the appointed office be held by a single person similar to that in the UK, rather than by committee. On this point, the PJCIS noted that '*a single appointee would overcome the existing fragmentation by providing a consistent identifiable focal point for the community and the executive agencies*'.⁷

2.3 The UK model

12 In the United Kingdom, the Secretary of State may appoint a person to review the operation of relevant terrorism legislation. Recently, the Parliamentary Under Secretary to the Home Office stated that '*the terms of reference of the Independent Reviewer of terrorism laws... state that the reviewer should make detailed inquiries of people who use the Act, or are affected by it*'.⁸

13 The HRLRC notes that there is no single enactment establishing the office and listing its various functions and powers. However, the functions of the UK Independent Reviewer are public in nature. As such, the UK Independent Review is subject to the *Human Rights Act 1998* and, therefore, must not act in a manner that is incompatible with the *European Convention of Human Rights*. Accordingly, the UK Independent Reviewer is required to have regard to international human rights law norms and jurisprudence when reviewing the *implications for the operation* of the relevant terrorism legislation.⁹

14 An example of this can be seen in the UK Independent Reviewer's most recent review with respect to control orders, in which he commented that:

The key to the obligation is proportionality. In each case [the decision] must be proportionate to the risk to the national security presented by the controlee. The minimum obligations consistent with public safety provide the only acceptable basis for control orders.¹⁰

⁷ Ibid., 20.

⁸ United Kingdom, House of Lords Hansard, Volume 703, Column WA 81, Parliamentary Under-Secretary of State, Home Office (Lord West of Spithead) 8 July 2008.

⁹ *Prevention of Terrorism Act 2005* (UK), section 14.

¹⁰ Lord Carlile of Berriew QC, *Third Report of the Independent Reviewer Pursuant to section 14(3) of the Prevention of Terrorism Act 2005*, 18 February 2008, (available at <http://www.homeoffice.gov.uk/>) 15.

3. The Importance of Assessing Terrorism Laws against Human Rights

15 The particular nature of terrorism has resulted in a special, and in many ways unique, legislative regime.¹¹ It is important that, in establishing a regime that seeks to ensure security, the State does not legislate or exercise powers in a manner that unnecessarily or disproportionately infringe upon the fundamental rights of the individual.

16 Laws that limit and interfere with human rights must be closely monitored to ensure that they are exercised in a manner that is consistent with the accepted international human rights law principles of proportionality, necessity and reasonableness.¹²

17 To ensure that laws are properly monitored, it is important that holistic, transparent, independent and ongoing review mechanisms are established. Failing to establish such review mechanisms will overtime erode public confidence in legislation and, in turn, undermine the purpose for which the legislation is intended.

18 On this point, the Sheller Committee commented that it:

Has serious concerns about the way in which the legislation is perceived by some members of the Muslim and Arab communities... Misunderstanding and fearfulness will have a continuing and significant impact and lead to undermine the aims of the security legislation.¹³

19 The HRLRC considers that, given recent developments in Australia (for example the Haneef case), the concerns expressed by the Sheller Committee are likely to exist in many parts of the broader Australian community.

20 The HRLRC considers that establishing an Independent Reviewer will serve to uphold public confidence in the terrorism laws by not only acting as a 'watchdog' with the power to report on identifiable breaches of human rights standards, but also by providing transparency to the decision making process in particular cases.

¹¹ *Lodhi v R* [2006] NSWCCA 121, 61 (Spigelman CJ).

¹² The HRLRC notes that the Sheller Committee commented 'some parts of the amendments to Part 5.3 of the Criminal Code appear to have a disproportionate effect on human rights': Sheller Committee Report, above n 2, 4.

¹³ Sheller Committee Report, above n 2, 142. See also Edith Cowan University, *National Fear Survey* (August 2007).

4. The Role of the Independent Reviewer

- 21 The HRLRC supports the adoption of an Independent Reviewer similar to that in the UK. The HRLRC therefore supports in principle the *Independent Reviewer of Terrorism Laws Bill 2008*.
- 22 The HRLRC submits that a significant factor in the success of the UK Independent Reviewer is the obligation, under the *Human Rights Act 1998* (UK), that the Reviewer consider the human rights implications of the operation of terrorism laws. This in turn serves to ensure that there is transparency and public confidence in the manner in which terrorism laws are interpreted and applied.
- 23 Given that Australia has no legislative or constitutional equivalent to the *Human Rights Act 1998* (UK) requiring that public authorities give proper consideration to human rights and act compatibly with human rights, in order for the Independent Reviewer to provide a meaningful contribution similar to that in the UK, it is important that the functions are expressly defined to require the Independent Reviewer to have regard international human rights law standards.
- 24 Clause 9(3) of the Bill requires the Independent Reviewer to have regard to the functions of various authorities, many of which are themselves required to have regard to human rights. The HRLRC submits that the Independent Reviewer's functions should be clearly stated, and not inferred by reference to the external agencies.
- 25 In a recent paper, Associate Professor Andrew Lynch noted that in the UK, the Independent Reviewer has been criticised for an '*apparent unwillingness ... to express clear criticism of the laws devised by the executive*'.¹⁴ The HRLRC submits that expressly defining the functions of the Independent Reviewer will likely also serve avoid (at least in part) similar criticism arising in Australia.

¹⁴ Associate Professor Andrew Lynch, 'An Independent Reviewer for Australian Terror Laws' (Paper presented to the Federal Criminal Law Conference, Sydney, 5 September 2008), 11 (available at <http://www.gtcentre.unsw.edu.au/>).

26 The HRLRC therefore submits that the Bill be amended to expressly require the Independent Reviewer, in conducting a review, to have regard to relevant international human rights standards and obligations.¹⁵

5. The Independent Reviewer's power to conduct reviews

5.1 Power to require production of documents and provision of information

27 In order to properly perform his or her functions, the Independent Reviewer must have the power to investigate the manner in which the relevant enforcement agencies interpret and implement the terrorism laws. The creation of a power to conduct a review will be meaningless without appropriate powers to require production of documents, or to require a person to attend to give information.

28 The HRLRC therefore supports in principle the Independent Reviewer's powers to require the production of documents, and require a person to attend to give information, as set out in clause 10 to the Bill.

29 However, when strong powers are provided, it is important that appropriate safeguards are put in place to protect individuals. To this end, the powers set out in clause 10 to the Bill should be exercised in a manner that is proportionate to the rights of the individual in each case. In this regard, the HRLRC notes that the Independent Reviewer's power to require a person to attend to give information could potentially lead to an individual providing information that may tend to incriminate or expose that person to liability. The HRLRC assumes that it is the intention of the legislature that information provided to the Independent Reviewer for the purpose of a review will be subject to qualified privilege.

5.2 Independent Reviewer's power to conduct reviews and the application of the Optional Protocol to the Convention against Torture

30 By proposing to become a party to the *Optional Protocol to the Convention against Torture*,¹⁶ Australia has indicated that it proposes to be bound by the obligations contained

¹⁵ Including Australia's obligations under the *International Covenant of Civil and Political Rights* (signed by Australia on 18 December 1972 and ratified on 13 August 1980) and the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (ratified by Australia on 8 August 1989).

in the treaty. In particular, the Optional Protocol aims to ensure protection of the human rights of people deprived of their liberty, including persons subject to arrest and detention.

31 The Optional Protocol requires national preventative mechanisms to be established to review Australia's places of detention and ensure compliance with the standards established under the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*. The protocol requires national prevention mechanisms to:

(i) be independent;¹⁷ and

(ii) be properly resourced;¹⁸ and

(iii) have access to information, detention facilities and detainees, including the opportunity to conduct private interviews.¹⁹

32 The HRLRC considers that, given the Independent Reviewer's functions and powers to conduct reviews, it may be appropriate to use and develop the role of the Independent Reviewer to perform (at least in part) the review mechanisms required under the Optional Protocol.

¹⁶ Hon Federal Attorney-General Robert McClelland, 'Strengthening Human Rights and the Rule of Law' (Speech delivered to the Human Rights Law Resource Centre, Melbourne, 7 August 2008) (available at www.hrlrc.org.au) [26].

¹⁷ *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, article 8.

¹⁸ *Ibid.*, article 20.

¹⁹ *Ibid.*