

**Submission to the Australian Senate Standing
Committee on Legal and Constitutional Affairs in
relation to the Independent Reviewer of
Terrorism Laws Bill 2008**

12 September 2008

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Part A — Executive Summary and Recommendations

1 Executive summary

The Public Interest Law Clearing House (“**PILCH**”) welcomes the invitation from the Australian Senate Standing Committee on Legal and Constitutional Affairs (“**Committee**”) to make a submission in relation to the Independent Reviewer of Terrorism Laws Bill 2008 (“**Bill**”), a private member’s bill which seeks to establish an the office of an Independent Reviewer to conduct an integrated review of the operation, effectiveness and implications of laws in Australia relating to terrorism.

Since the events of 11 September 2001, Australia’s counter-terrorism laws have expanded in both number and scope at an alarming rate. While a number of oversight and review mechanisms exist, PILCH considers that those mechanisms are limited in scope and transparency, and are irregular and disconnected. PILCH thus believes that the existing review mechanisms are inadequate.

As a consequence, PILCH considers that an additional review mechanism in respect of Australia’s counter-terrorism framework is required and supports Bill’s proposal for the appointment of an independent reviewer. However, PILCH believes that the Bill can be improved in a number of ways and has made a series of specific recommendations in this regard.

Notwithstanding, PILCH believes that the appointment of an independent reviewer will safeguard the human rights of Australian citizens and provide a more thorough and coordinated approach to the oversight our counter-terrorism laws. Moreover, PILCH considers that the appointment of an independent reviewer will result in better laws and increased community confidence in the efficacy and fairness of Australia’s counter-terrorism regime.

2 Recommendations

2.1 PILCH submits that the Committee adopt the following recommendations in respect of the proposed form of the Bill:

- (a) the appropriateness and efficacy of Bill should be measured against Australia’s obligations under international human rights law instruments, in particular under the ICCPR;
- (b) the Bill be amended to expressly require the Independent Reviewer, in conducting a review, to have regard to relevant international human rights law standards;

- (c) the definition of “terrorist laws” in section 4 of the Bill should be clarified to ensure that the full set of legislation set out in Annexure A is covered, plus any new legislation which impacts upon the prevention, detection or prosecution of a terrorist act;
- (d) the appointment of an independent reviewer in addition to existing review mechanisms;
- (e) the amendment of section 6 of the Bill to require the Independent Reviewer to have minimum appropriate qualifications, knowledge or experience in criminal or counter-terrorism law or practice, human rights and modern policing and intelligence gathering techniques;
- (f) the Independent Reviewer should be required to have regard to a non-exhaustive list of relevant considerations when determining review priorities;
- (g) the nature of the apparently coercive powers of the Independent Reviewer under sections 10(1) and 10(5) should be clarified and the legal consequences for a person who fails to comply, provides false information or refuses to answer questions put by the Independent Reviewer should be specified; and
- (h) the reporting functions of the Independent Reviewer should prescribe minimum requirements in respect of comprehensive reviews of the entire national security and counter-terrorism law framework and new laws relating to terrorist acts, as well as by specifying timing requirements for those reports.

Part B – About PILCH and this submission

3 About PILCH

- 3.1 PILCH is a leading Victorian, not-for-profit organisation which is committed to furthering the public interest, improving access to justice and protecting human rights by facilitating the provision of pro bono legal services and undertaking law reform, policy work and legal education.
- 3.2 PILCH coordinates the delivery of pro bono legal services through six schemes:
- (a) the Public Interest Law Scheme (PILS);
 - (b) the Victorian Bar Legal Assistance Scheme (VBLAS);
 - (c) the Law Institute of Victoria Legal Assistance Scheme (LIVLAS);
 - (d) PILCH Connect (Connect);
 - (e) the Homeless Persons' Legal Clinic (HPLC); and
 - (f) Seniors Rights Victoria (SRV).
- 3.3 PILCH's objectives are to:
- (a) improve access to justice and the legal system for those who are disadvantaged or marginalised;
 - (b) identify matters of public interest requiring legal assistance;
 - (c) seek redress in matters of public interest for those who are disadvantaged or marginalised;
 - (d) refer individuals, community groups, and not for profit organisations to lawyers in private practice, and to others in ancillary or related fields, who are willing to provide their services without charge;
 - (e) support community organisations to pursue the interests of the communities they seek to represent; and
 - (f) encourage, foster and support the work and expertise of the legal profession in pro bono and/or public interest law.
- 3.4 In 2007-2008, PILCH assisted over 2000 individuals and organisations to access free legal and related services. Without these much needed services, many Victorians would find it impossible to navigate a complex legal system, secure

representation, negotiate a fine, challenge an unlawful eviction, contest a deportation or even be aware of their rights and responsibilities.

4 Scope of this submission

4.1 PILCH has reviewed and considered the requirement for and proposed functions of the office of an independent reviewer of the exercise of powers under Australia's counter-terrorism legislation, as proposed by the Bill.

4.2 This submission is limited to a consideration of key areas to which PILCH can offer particular insight and expertise, based on its work described in section 3 above.

4.3 This submission is divided into the following parts:

- (a) **Part C — counter-terrorism laws affected:** identifies the relevant Australian counter-terrorism legislation to which an independent reviewer may or should have regard under the Bill;
- (b) **Part D — current review mechanisms:** identifies the current non-independent review mechanisms within current counter-terrorism legislation, and seeks to highlight:
 - (i) the inadequacies of such mechanisms; and
 - (ii) features of an independent review function which would make such reviews more effective;
- (c) **Part E — previous recommendations regarding reviews:** briefly identifies recommendations or submissions previously made regarding the requirement for, or benefits associated with, judicial, executive or independent review functions in respect of the exercise of powers granted under counter-terrorism legislation, in particular those set out in the *Report of the Security Legislation Review Committee* (June 2006) ("**Sheller Report**");
- (d) **Part F — scope of proposed functions and powers:**
 - (i) briefly analyses the proposed appointment method, functions and powers of the office of the independent reviewer, including reporting and investigative functions, and the ability to make recommendations in respect of the exercise of powers under counter-terrorism legislation; and

- (ii) identifies any changes or additional elements which PILCH considers would help to achieve, or better achieve, the benefits sought to be achieved by the creation of the office of the Independent Reviewer; and
 - (e) **Part G — case studies:** highlights three recent instances of the exercise of powers under counter-terrorism legislation (in relation to David Hicks, Mohammed Haneef and Jack Thomas), in which the existence of an Independent Reviewer may have provided a meaningful protection against or accountability mechanism in respect of the treatment of those persons, or those who might in future be subject to the exercise of those or similar powers.
- 4.4 In preparing this submission, PILCH has considered relevant legislation and case law in relation to counter-terrorism laws.
- 4.5 PILCH acknowledges the valuable assistance provided to this submission by the Mallesons Human Rights Law Group.¹

¹ Note: The opinions expressed in this submission are solely those of PILCH, and are not those of Mallesons Stephen Jaques or its staff.

Part C – A human rights framework

5 Australia's international human rights obligations

- 5.1 PILCH considers that a necessary starting point for the Committee is a consideration of Australia's human rights obligations, particularly in relation to Australia's obligations under the major international human rights instruments.
- 5.2 Australia is a party to various international human rights conventions, including most relevantly for this submission the International Covenant on Civil and Political Rights ("ICCPR").²
- 5.3 PILCH notes and endorses the submission by the Human Rights Law Resource Centre ("HRLRC"). In particular, PILCH supports the HRLRC's recommendations that:
- (a) the Bill be amended to expressly require the Independent Reviewer, in conducting a review, to have regard to relevant international human rights law standards; and
 - (b) the role of the Independent Reviewer defined by the Bill have regard to the role of 'independent reviewers' (or similar officers) in jurisdictions such as Canada, the United Kingdom and New Zealand, and the ways in which terrorism laws in those jurisdictions have been enhanced and improved by an independent reviewer assessing the human rights implications of such legislation, including against both international and domestic human rights instruments.

Recommendation 1

The Committee should measure the appropriateness and efficacy of Bill against Australia's obligations under international human rights law instruments, in particular under the ICCPR.

Recommendation 2

The Bill be amended to expressly require the Independent Reviewer, in conducting a review, to have regard to relevant international human rights law standards.

² Opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

Part D — Counter-terrorism laws affected

6 Relevant legislation

- 6.1 Annexure A lists Australia's key national security or counter-terrorism legislation, and includes a short statement of the key objectives of each act, as understood by PILCH. This list has been compiled based on the legislation discussed in the Sheller Review, together with an analysis of all national security or counter-terrorism legislation passed since the date of the Sheller Review (June 2006).
- 6.2 Based on the subject matter comprised by the list set out in Annexure A, PILCH considers that the following areas would properly form the subject of review by an independent reviewer:
- (a) the process for listing of terrorist organisations and the list of terrorist organisations;
 - (b) the process for initiating preventative detention and control orders;
 - (c) the functions of the Australia Security Intelligence Organisation (ASIO), including:
 - (i) the nature and extent of information collated by ASIO;
 - (ii) the activities of ASIO in connection with obtaining warrants to detain and question a person who may have information in relation to a terrorist activity;
 - (d) the nature and extent of border surveillance and controls by Customs on the movement of people and goods;
 - (e) the nature and extent of terrorism offences, treason offences and offences relating to membership or other specified links to terrorist organisations;
 - (f) the nature and extent of offences relating to persons providing or collecting funds and are reckless as to whether those funds will be used to facilitate a terrorist act;
 - (g) the process for law enforcement and intelligence agencies to obtain warrants, emergency authorisations and tracking device authorisations for the installation and use of surveillance devices;

- (h) the application of Australian criminal laws to conduct by Australian citizens in foreign jurisdictions, whether they are overseas for personal or national representative reasons;
 - (i) any process in respect of which the Australian Protective Service and / or the Australian Federal Police may request a person's personal details, stop and search a person suspected of possessing a weapon, and seize weapons;
 - (j) the process and practice for the transfer of Australian citizens convicted by foreign military tribunals to serve any sentence of imprisonment in Australia; and
 - (k) the nature and extent of protection of information classified as "security sensitive".
- 6.3 However, PILCH's preferred position is that the Independent Reviewer should be permitted to have regard to the full set of Australia's laws in respect of national security and counter-terrorism, including laws enacted for an unrelated purpose which may nonetheless impact upon Australia's approach to counter-terrorism or the human rights of Australian citizens.
- 6.4 As a consequence, PILCH considers that the definition of "terrorist laws" in section 4 of the Bill should be clarified to ensure that the full set of legislation set out in Annexure A is covered, plus any new legislation which impacts upon the prevention, detection or prosecution of a terrorist act.

Recommendation 3

PILCH considers that the definition of "terrorist laws" in section 4 of the Bill should be clarified to ensure that the full set of legislation set out in Annexure A is covered, plus any new legislation which impacts upon the prevention, detection or prosecution of a terrorist act.

Part E — Current review mechanisms

7 Current review mechanisms

7.1 The following bodies have formally reviewed, are in the process of formally reviewing or intend to formally review, Australia's national security and counter-terrorism laws:

- (a) Security Legislation Review Committee ("**SLRC**");
- (b) The Parliamentary Joint Committee on Intelligence and Security ("**PJCIS**");
- (c) Coalition of Australian Governments ("**COAG**");
- (d) Australian Law Reform Committee ("**ALRC**"); and
- (e) Queensland Public Interest Monitor ("**PIM**").

Security Legislation Review Committee ("SLRC")

7.2 The Attorney-General is required, under the *Security Legislation Amendment (Terrorism) Act 2002* (Cth), to instigate a public and independent review of the operation of Security Acts relating to terrorism.

7.3 Accordingly the SLRC, established in 2005, reviews the operation, effectiveness and implications of amendments made by the:

- (a) *Security Legislation Amendment (Terrorism) Act 2002* (Cth);
- (b) *Suppression of the Financing of Terrorism Act 2002* (Cth);
- (c) *Criminal Code Amendment (Suppression of Terrorist Bombings) Act 2002* (Cth);
- (d) *Border Security Legislation Amendment Act 2002* (Cth);
- (e) *Telecommunications Interception Legislation Amendment Act 2002* (Cth); and
- (f) *Criminal Code Amendment (Terrorism) Act 2003* (Cth).

7.4 PILCH notes that these Acts represent only 6 out of 29 of Australia's key national security or counter-terrorism related Acts as comprised by Annexure A.

- 7.5 On 21 April 2006 the Committee presented the Sheller Report to the former Attorney-General and the PJCIS. PILCH understands that the findings of the Sheller Report are currently under consideration by the Australian Government.
- 7.6 See further section 9 in relation to a summary of the comments and recommendations of the Sheller Report.

Parliamentary Joint Committee on Intelligence and Security (“PJCIS”)

- 7.7 The PJCIS is appointed under the *Intelligence Services Act 2001* (Cth) (“**IS Act**”).³ Under section 29 of the IS Act, the functions of the Committee include:
- (a) reviewing any matter in relation to ASIO, ASIS, DIGO, DIO, DSD or ONA referred to the Committee by the responsible Minister or a resolution of either House of the Parliament;
 - (b) reviewing the operation, effectiveness and implications of amendments made by:
 - (i) *Security Legislation Amendment (Terrorism) Act 2002* (Cth);
 - (ii) *Border Security Legislation Amendment Act 2002* (Cth);
 - (iii) *Criminal Code Amendment (Suppression of Terrorist Bombings) Act 2002* (Cth);
 - (iv) *Suppression of the Financing of Terrorism Act 2002* (Cth),as soon as possible after the third anniversary of the day on which the *Security Legislation Amendment (Terrorism) Act 2002* (Cth) receives Royal Assent;
 - (c) reviewing, by 22 January 2016, the operation, effectiveness and implications of Division 3 of Part III of the *Australian Security Intelligence Organisation Act 1979* (Cth); and
 - (d) reporting the Committee's comments and recommendations to each House of the Parliament and to the responsible Minister of the relevant legislation.

³ See <http://www.aph.gov.au/house/committee/pjcis/reports.htm> for a list of PJCIS' inquiries and reports.

Coalition of Australian Governments (“COAG”)

- 7.8 COAG describes itself as the peak intergovernmental forum in Australia. It comprises of the Prime Minister, State Premiers, Territory Chief Ministers and the President of the Australian Local Government Association.
- 7.9 The role of COAG is to “initiate, develop and monitor the implementation of policy reforms that are of national significance and which require cooperative action by Australian governments”.⁴
- 7.10 Minutes from a COAG meeting held on 10 February 2006 state that COAG intends to conduct a review of Australia’s counter-terrorism legislation in 2010.⁵ The minutes outline the structure and form of the intended review, the preferable backgrounds of the members of the review committee, purpose and scope of the review alongside time-frame and funding arrangements.

Australia Law Reform Commission (“ALRC”)

- 7.11 In 2006 the ALRC reviewed the revised sedition offence provisions of the *Anti-Terrorism Act (No. 2) 2005*. The review was at the request of the former Attorney General.
- The ALRC Report was tabled on 13 September 2006.⁶

Public Interest Monitor (“PIM”)

- 7.12 Queensland is the only Australian jurisdiction which currently has a PIM.⁷
- 7.13 See further section 9 in relation to a summary of the comments and recommendations of the Sheller Report in respect of public interest monitors.

⁴ See COAG website at <http://www.coag.gov.au> as at 11 September 2008.

⁵ The minutes can be viewed at: http://www.coag.gov.au/coag_meeting_outcomes/2006-02-10/docs/attachment_g_counter_terrorism.pdf.

⁶ Australian Law Reform Commission, *Fighting Words: A Review of Sedition Laws in Australia* (ALRC Report 104) (13 September 2006), available at: <http://www.austlii.edu.au/au/other/alrc/publications/reports/104/ALRC104.pdf>.

⁷ See *Crime and Misconduct Act 2001* (Qld) and *Police Powers and Responsibilities Act 2000* (Qld)

8 Shortcomings and inadequacies in existing review mechanisms

8.1 In summary, PILCH is of the view that:

- (a) the existing review mechanisms described above demonstrate insufficient independence from the executive government and parliament;
- (b) the inquiry powers of the PJCS and the SRLC are excessively limited by the relevant legislation setting out those powers;
- (c) reviews of the national security and counter-terrorism legislative framework occur at irregular intervals, and that there is no continuous monitoring of that framework on a comprehensive basis;
- (d) the existing reviews appear to be disconnected, or insufficiently coordinated, in terms of both timing and scope; and
- (e) committee members of the relevant bodies are unable to examine certain closed material and confidential information.

8.2 As a consequence, PILCH submits that:

- (a) the current review framework in relation to the national security and counter-terrorism legislative framework is insufficiently comprehensive and effective; and
- (b) that an additional review mechanism in respect of that framework is required.

Part F — Previous recommendations regarding reviews

9 Sheller Report

9.1 The Sheller Report recommended that national security and counter-terrorism legislation be subject to a formal on-going review process. The Sheller Report noted that the three main models for such a review were by:

- (a) an independent reviewer;
- (b) a special advocate; or
- (c) a public interest monitor.

Independent Reviewer

9.2 In relation to the option of an Independent Reviewer, the Sheller Report noted that under the comparable UK model, the Independent Reviewer reports annually to the Secretary of State, and the report is tabled before Parliament.

9.3 The report of the UK Independent Reviewer analyses:

- (a) 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; and
- (b) the extent (if any) to which the Secretary of State has made use of his power to make non-derogating control orders in urgent cases without the permission of the court (by virtue of section 3(1)(b)).

9.4 The UK Independent Reviewer is able to see closed material including some products of criminal intelligence obtained from technical and human sources of various kinds.

9.5 The Sheller Report recommended that if such a position was created in Australia that it be attached to the office of the Inspector General of Intelligence and Security or the office of the Commonwealth Ombudsman. The Report also recommended that the Independent Reviewer be required to provide a report to the Attorney-General every twelve months, which the Attorney-General should be obliged to table in parliament.

9.6 The Sheller Report further recommended that the report of an Australian Independent Reviewer should deal with:

- (a) the operation and effectiveness of Part 5.3 of the Criminal Code; and

- (b) 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.

Special Advocate

- 9.7 The Sheller Report noted that the role of the Special Advocate would be to act as contradictor to any claim of public interest immunity and any statutory claim for discovery of evidence of any description before the court.
- 9.8 In the United Kingdom, the Special Advocate is a specifically appointed lawyer, who is instructed to represent a person's interests in relation to material that is kept secret from that person and his ordinary lawyers but is analysed by a court or similar body at an adversarial hearing held in private.
- 9.9 The independence from government of a Special Advocate would be an essential attribute of the office given that the government will normally be a party in the proceedings in which the Special Advocate is playing a role. The procedure for appointment of a Special Advocate and other features of the office that can bear upon the perception of its independence can become important issues.
- 9.10 The Special Advocate has the advantage of being able to go behind the curtain of secrecy. He or she is independent of both the investigator and the detainee. He or she also acts as the contradictor to any claims of public interest immunity.
- 9.11 The Sheller Report notes that the disadvantages of the UK Special Advocate model were that:
 - (a) the detainee does not have the choice of who will represent him or her;
 - (b) there can be no contact between the detainee and the Special Advocate once the Special Advocate views the closed material, which means that the Special Advocate cannot properly represent the detainee;
 - (c) the Special Advocate lacks the resources of an ordinary legal team for the purpose of conducting a full defence in secret (for example, for inquiries or research);
 - (d) the Special Advocate has no power to call witnesses; and.
 - (e) the appointment of Special Advocates by the Attorney-General can raise concerns about the appearance of fairness of the process in cases where the government is the prosecutor and the Attorney-General personally represented in the proceedings.

Public Interest Monitor

9.12 The Report notes that the role of a Public Interest Monitor (PIM) is to balance the following competing expectations:

- (a) the community expectation that modern investigative agencies will have appropriate powers and technology available to them in combating contemporary crime; and
- (b) the erosion of fundamental rights of the individual that the granting of such powers necessarily involved will be minimised to the greatest possible extent.

9.13 The functions of a PIM would be to:

- (a) monitor compliance with the relevant legislation;
- (b) appear at hearings and ask questions, cross-examine witnesses and make submissions;
- (c) gather statistical information; and
- (d) provide reports on non-compliance with the legislation.

9.14 PILCH considers that the Bill represents the first serious attempt to implement the Sheller Report's recommendation that an independent reviewer, special advocate or public interest monitor be appointed to oversee Australia's terrorism laws.

10 PILCH supports the appointment of an independent reviewer

10.1 Based on its assessment of:

- (a) the inadequacy of the existing review mechanisms in relation to providing effective review and oversight of the national security and counter-terrorism law framework, as described in section 8 above; and
- (b) the findings of the Sheller Report, as described in section 9 above,

PILCH wishes to indicate to the Committee its support for the appointment of an independent reviewer of national security and counter-terrorism legislation

10.2 PILCH considers that the appointment of an independent reviewer will supplement the existing review structures currently in place, and provide the following additional benefits:

- (a) greater independence from executive government and parliament;
- (b) an increased ability to examine and consider closed material containing confidential information;
- (c) a comprehensive, continuous and coordinated monitoring and review of all aspects of Australia's terrorism laws, including the ability to coordinate other existing review processes;
- (d) provision of regular reports to Parliament and parliamentary committees;
- (e) increased community participation and confidence in review of legislation potentially affecting civil liberties and personal freedoms;
- (f) reviews can include both purposive and process-related considerations;
- (g) greater scope for incorporating or supplementing national security and counter-terrorism legislation reviews with reviews of related legislation.⁸

Recommendation 4

PILCH supports the appointment of an independent reviewer. However, the independent reviewer should not replace the existing review mechanisms, but instead be appointed in addition to them.

⁸ For example, the Sheller Reports notes that "if an independent reviewer...has been appointed, the review to be commissioned by the COAG in late 2010, could be expanded in its scope to include all of Part 5.3 of the Criminal Code": *Sheller Report*, 201; see also section 15.6, the case study in relation to Mr Haneef, where a coordinated review of the *Crimes Act 1914* (Cth) and the *Migration Act 1957* (Cth) would have been of benefit.

Part G — Functions, powers and capacities

11 Key features of the office proposed by the Bill

- 11.1 The role of the Independent Reviewer under the draft Bill is to conduct and “ongoing and integrated” review of the operation, effectiveness and implications of laws relating to terrorism.
- 11.2 In conducting his or her review, the Independent Reviewer may obtain confidential information and consult with a variety of governmental authorities (and require them to provide answers and documents as required) to ensure a cooperative and comprehensive approach.
- 11.3 After completing each review of the operation, effectiveness and implications of a law relating to terrorism, the Independent Reviewer must report their findings to the Minister.
- 11.4 The Minister must then:
 - (a) present to each House of the Parliament a copy of the report, with sections redacted where the Independent Reviewer has certified that there may affect adversely national security or certifies that they should not be published on other compelling grounds; and
 - (b) present to each House of the Parliament a response to the report (responses to redacted sections shall be made only to the Independent Reviewer).
- 11.5 The PJCIS must also analyse the report and include it in its annual report to the Parliament.
- 11.6 The Independent Reviewer is to also prepare an annual report detailing their activities in the previous year and present this report to the Minister soon after 30 June each year.

12 PILCH’s key concerns in relation to the proposed Bill

Transparency of appointment of Independent Review

- 12.1 Sections 6 and 7 of the Bill relate to the appointment of the Independent Reviewer.

- 12.2 The appointment under section 6 is an executive appointment, to be made by the Governor-General following consultation between the Prime Minister and Opposition Leader of the day.
- 12.3 To fill an interim vacancy in the office of up to 12 months, the Prime Minister (following consultation with the Opposition Leader of the day) may appoint an Acting Independent Reviewer.
- 12.4 Section 12 provides that an Independent Reviewer's maximum term of office will be 10 years (two 5-year terms), and may be part-time or full time. Sections 13 and 14 deal with the Independent Reviewer's ability to resign that office, or be removed by the Governor-general for misbehaviour, mental or physical incapacity, insolvency, failure to disclose conflicts of interest or extended absence or additional employment.
- 12.5 PILCH is concerned that the Independent Reviewer may be appointed by the executive government rather than an open and public ally accountable selection process, without the need to satisfy any requirement for:
- (a) broader public consultation; or
 - (b) the expertise of the proposed candidate.
- 12.6 Analogous appointments are often made after considerable community and sector specific consultation, whether by legislative imperative or convention. For example, in appointing the new Chief Justice of the High Court, the Attorney-General, the Honorable Robert McClelland MP, consulted with State and Territory Attorneys-General; the Chief Justice and other Justices of the High Court; the Chief Justices of the Federal Court and of the Family Court and the Chief Federal Magistrate; the Chief Justices of the State and Territory Supreme Courts; the Law Council of Australia; the Australian Bar Association; State and Territory Bar Associations and Law Societies; Australian Women Lawyers; the National Association of Community Legal Centres; National Legal Aid; and Deans of law schools.⁹
- 12.7 PILCH considers such consultation imperative in identifying the best candidates for key statutory appointments and that the obligation for the executive to consult should be enshrined in legislation.

⁹ Attorney-General for Australia media release, 'New Chief Justice of the High Court', 30 July 2008

- 12.8 In addition to the individuals and organisations mentioned in paragraph 12.6, above, PILCH considers that consultation should occur with the organisations identified in section 9(3) of the Bill prior to the appointment of an Independent Reviewer.

Recommendation 5

PILCH recommends that section 6 of the Bill be amended to require community and sector-specific consultation prior to the appointment of the Independent Reviewer.

- 12.9 Further, the experience and expertise of such appointees is not left to chance for equivalent appointments. For example, the appointment of a Human Rights Commissioner under the *Human Rights and Equal Opportunity Commission Act 1986* cannot occur unless the Governor-General is satisfied of that candidates has 'appropriate qualifications, knowledge or experience'.¹⁰
- 12.10 Likewise, before appointing Commissioners to the Australian Competition and Consumer Commission, the Governor-General must be satisfied of the person's 'knowledge of, or experience in, industry, commerce, economics, law, public administration or consumer protection'.¹¹
- 12.11 PILCH considers that the Independent Reviewer should have, at a minimum, appropriate qualifications, knowledge or experience in criminal or counter-terrorism law or practice, human rights and modern policing and intelligence gathering techniques.

Recommendation 6

PILCH recommends that section 6 of the Bill be amended to require the Independent Reviewer to have minimum appropriate qualifications, knowledge or experience in criminal or counter-terrorism law or practice, human rights and modern policing and intelligence gathering techniques

¹⁰ Human Rights and Equal Opportunity Commission Act 1986, s8B

¹¹ Trade Practices Act 1974, s7(3)

Matters to which reviewer must have regard in conducting reviews

- 12.12 Section 9 of the Bill only sets out practical and procedural requirements in relation to any review of the operation, effectiveness and implications of laws relating to terrorist acts conducted by the Independent Reviewer.
- 12.13 Section 8 specifically provides that the “Independent Reviewer must be free to determine priorities as he or she thinks fit”.
- 12.14 PILCH considers that the Independent Reviewer should, within the broad discretion afforded under section 8 of the Bill, be required to have regard to a non-exhaustive list of relevant considerations when determining review priorities, including but not limited to:
- (a) Australia’s international human rights obligations;
 - (b) the extent to which the laws under review alter fundamental legal principles, including:
 - (i) *habeas corpus*;
 - (ii) the right to silence;
 - (iii) the right of a person to be notified of a charge in respect of which they are being held, or to be released from custody;
 - (iv) the right to be informed of the nature of the charge in respect of which a person has been detained; and
 - (v) the right to legal representation during questioning;
 - (c) whether the relevant laws are effective and workable, both within their own terms, and in combination with other legislation;
 - (d) whether there are any less-restrictive means by which the objectives of the relevant legislation could be achieved;
 - (e) any other legislation which is relevant to a comprehensive consideration of the operation, effectiveness and implications of laws relating to terrorist acts.

Recommendation 7

PILCH considers that the Independent Reviewer should be required to have regard to a non-exhaustive list of relevant considerations when determining review priorities, including but not limited to:

- Australia's international human rights obligations;
- the extent to which the laws under review alter fundamental legal principles;
- whether the relevant laws are effective and workable, both within their own terms, and in combination with other legislation; and
- whether there are any less-restrictive means by which the objectives of the relevant legislation could be achieved.

Does the Bill itself alter fundamental principles?

- 12.15 Section 10 of the Bill, in particular sections 10(1) and 10(5), give the Independent Reviewer powers to require the provision of documents or the attendance on the Independent Reviewer for the purpose of answering questions which appear to be in the nature of coercive information-gathering powers.
- 12.16 Section 10(6) provides that a person will not be liable to penalty under any other legislation if that person complies with such a request from the Independent Reviewer.
- 12.17 However, it is unclear what consequences would flow from a failure by a person to comply with a request made by the Independent Reviewer under sections 10(1) or 10(5).
- 12.18 Further, while noting that the office of the Independent Reviewer is not a judicial office, it is unclear what the legal consequences would be for a person who:
- (a) failed to comply with a request from the Independent Reviewer; or
 - (b) who gave false information or refused to answer questions put by the Independent Reviewer.
- 12.19 As a consequence, PILCH considers that:
- (a) the nature of the apparently coercive powers of the Independent Reviewer under sections 10(1) and 10(5) should be clarified; and

- (b) the legal consequences for a person who fails to comply, provides false information or refuses to answer questions put by the Independent Reviewer should be specified.

Recommendation 8

PILCH considers that:

- the nature of the apparently coercive powers of the Independent Reviewer under sections 10(1) and 10(5) should be clarified; and
- the legal consequences for a person who fails to comply, provides false information or refuses to answer questions put by the Independent Reviewer should be specified.

Nature of reports to be presented by the Independent Reviewer

12.20 PILCH considers that the reporting functions of the Independent Reviewer are not sufficiently well-defined and prescriptive to ensure the Bill implements a comprehensive review and reporting mechanism in relation to the national security and counter-terrorism law framework.

12.21 Section 11(1) and (2) of the Bill require:

- (a) the Independent Reviewer to report to the relevant Minister at the conclusion of each review of the operation, effectiveness and implications of a law relating to terrorism; and
- (b) that Minister, as soon as reasonably practicable after receipt of that report, to:

- (i) present that report to each House of Parliament; and
- (ii) present a response to that report,

in each case subject to:

- (iii) the report having been certified as being capable of such presentation; and / or
- (iv) the deletion of any part of the report which is certified as potentially adversely affecting national security or as not being appropriate for release on other compelling grounds.

- 12.22 Under section 11(3), the Independent Reviewer must also, as soon as practicable after 30 June, present an annual report in relation to all of the Independent Reviewer's activities in the previous year, and the Minister must table that report, subject again to the certification requirements described in the previous section.
- 12.23 Section 11(4) requires the PJCIS to consider and include in its annual report to parliament each report of the Independent Reviewer which has been presented to parliament.
- 12.24 PILCH considers that the reporting functions of the Independent Reviewer would be improved by:
- (a) setting out minimum reporting requirements in relation to the national security and counter-terrorism law framework, including:
 - (i) prescribing that a comprehensive review of and report in relation to the entire national security and counter-terrorism law framework be undertaken every 3 years;
 - (ii) a requirement that the Independent Reviewer develop, together with all existing review bodies, a review and reporting schedule for specific matters arising under the national security and counter-terrorism legislation, in particular in respect of provisions which have the potential to have a significant impact of the enjoyment by individuals of their civil liberties and human rights;
 - (b) requiring the Independent Reviewer to report on the conduct of a comprehensive review of the operation, effectiveness and implications of each new law relating to terrorism within 2 years of its entry into force;
 - (c) permitting the Independent Reviewer to include in its reports details of any desirable legislative changes which arise as a result of the relevant review; and
 - (d) requiring the Independent Reviewer, subject to complying with the certification and deletion process and requirements set out in the Bill, to publish each report as soon as reasonably practicable after that report is tabled in parliament by the relevant Minister.

Recommendation 9

PILCH considers that the reporting functions of the Independent Reviewer set out in the Bill are not sufficiently well-defined, and would be improved by prescribing minimum requirements in respect of comprehensive reviews of the entire national security and counter-terrorism law framework and new laws relating to terrorist acts, as well as by specifying timing requirements for those reports.

Part H — Case studies

13 David Hicks

- 13.1 David Hicks, an Australia citizen, was detained in Guantanamo Bay, Cuba, then in Yatala Prison, Adelaide, following his capture by the US military in Afghanistan and subsequent military trial. He was released from Yatala on 29 December 2007.
- 13.2 Prior to his release, on 21 December 2007, Federal Magistrate Donald imposed an interim control order on Mr Hicks.¹² Donald FM was satisfied that, on the balance of probabilities, the imposition of the interim control order would substantially assist in preventing a terrorist act, and that Mr Hicks had received training from a listed terrorist organisation. He was further satisfied that the terms of the control order were reasonably necessary and appropriate for the purposes of protecting the public from terrorism.¹³
- 13.3 The control order was stated by Donald FM to have been imposed on the grounds that, because Mr Hicks had trained with listed terrorist organisations in 2000-2001, he had the capability to carry out, and instruct others to carry out, terrorist acts. This capability could lead extremists to seek guidance from him, or to the exploitation or manipulation of Mr Hicks by terrorist groups. FM Donald found that the control order was likely prevent this by assisting Mr Hicks to reintegrate into Australian society.¹⁴ The interim control order was confirmed ex parte at a hearing on 19 February 2008, which Mr Hicks failed to attend, and will expire on 21 December 2008.
- 13.4 PILCH considers that several unsatisfactory aspects of the control order process as seen in relation to Mr Hicks could be addressed by the existence of an independent reviewer.
- (a) First, only limited evidence was able to put to the Federal Magistrate on behalf of Mr Hicks: his failure to attend the confirmation hearing meant that only letters written by him many years ago were put into evidence on his behalf.

¹² Order of FM Donald in *Jabbour v Hicks*, file no ADG347/2007, dated 21 December 2007.

¹³ See *Criminal Code* (Cth) s 104.4(1).

¹⁴ Order of FM Donald in *Jabbour v Hicks*, file no ADG347/2007, dated 21 December 2007.

- (b) Secondly, although the control order expires after 12 months, the grounds on which it was imposed are unlikely to change over time - Mr Hicks will always have received training from a terrorist organisation - meaning he cannot anticipate with any clarity whether one will be re-imposed.
- 13.5 An independent reviewer may be able to assist in respect of each of these matters by ensuring that:
 - (a) all relevant evidence in relation to the likelihood of a person carrying out, or instructing others to carry out, terrorist acts is presented to the relevant tribunal, both when an initial control order is imposed and on any subsequent re-imposition of that control order; and
 - (b) all relevant information in relation to the listed terrorist organisation with which the relevant person was found to be associated is also made available to the tribunal, which in particular will be relevant (in any hearing in respect of the re-imposition of a control order) in determining whether the relevant surrounding circumstances have changed since the initial control order was imposed.

14 Mohamed Haneef

- 14.1 Dr Mohamed Haneef was employed as a registrar at a Gold Coast hospital under Australia's temporary skilled migrant program.¹⁵ On 2 July 2007, he was arrested by the Australian Federal Police ("AFP"). His arrest was based on his association with two men arrested in connection with the failed terror attacks on Glasgow airport on 29 June 2007. The men were his second cousins and he had lived with them for a time in the UK. He had also given them a mobile phone SIM card with some unused credit before his departure from the UK.
- 14.2 Dr Haneef was arrested and detained pursuant to powers under the *Crimes Act 1914* (Cth), which allow for up to four hours' detention, without charge, for the purpose of ascertaining whether he had committed a terrorism offence.¹⁶ On 3 July 2007, a magistrate extended Dr Haneef's detention for a further 48 hours.¹⁷ On 5 July a magistrate effectively extended Dr Haneef's detention once again, by making an order that time during which Dr Haneef's questioning was 'reasonably

¹⁵ Details about the procedural background to Mr Haneef's case are available *Minister for Immigration & Citizenship v Haneef* [2007] FCAFC 203.

¹⁶ *Crimes Act 1914* (Cth) s 23CA.

¹⁷ *Crimes Act 1914* (Cth) s 23DA.

delayed' be disregarded in calculating the maximum allowable length of his detention.¹⁸ On 9 July the AFP applied again to have time disregarded, but no decision on this application was ever made.

- 14.3 On 14 July, Dr Haneef was charged under s 102.7(2) of the *Criminal Code* (Cth) with intentionally providing resources to a terrorist organisation, by providing his second cousins with the SIM card. On 16 July 2007, a magistrate granted him bail. Immediately following the grant of bail, the Minister for Immigration and Citizenship cancelled Dr Haneef's visa on "character grounds". As a result, Dr Haneef chose not to post bail and to remain in police custody, rather than be taken into immigration detention.
- 14.4 On 27 July 2007, the charge was dismissed, and Dr Haneef was released from police custody and taken into immigration detention, until he elected to leave Australia on 28 July. On 30 August 2008, the AFP confirmed that Dr Haneef had been cleared as a suspect in the failed attack on Glasgow airport.
- 14.5 An independent reviewer may have assisted in relation to the public accountability and scrutiny of the actions of the AFP, in ensuring that Dr Haneef, who was ultimately cleared of all terrorism allegations, was not subject to detention without charge, and was not charged with offences which were later shown to have been baseless.
- 14.6 However, as the outcome in Dr Haneef's case — that is, his inability to remain in Australia — ultimately turned on the exercise of powers under the *Migration Act 1958* (Cth), and not laws relating to terrorist acts, the reviewer's ability to investigate may have been limited.

15 Jack Thomas

- 15.1 Joseph "Jack" Thomas was arrested in November 2004. He was charged with offences against Part 5.3 of the *Criminal Code* (Cth) and against the *Passports Act 1938* (Cth). On 26 February 2006, a jury in the Supreme Court of Victoria convicted him of intentionally receiving funds from a terrorist organisation¹⁹ and of possessing a falsified passport.²⁰ He was acquitted of two further charges.²¹

¹⁸ *Crimes Act 1914* (Cth) s 23CB.

¹⁹ *Criminal Code* (Cth) s 102.6(1).

²⁰ *Passports Act 1938* (Cth) s 9A(1)(e).

²¹ Under s 102.7(1) of the *Criminal Code* (Cth).

On 18 August 2006 these convictions were quashed by the Court of Appeal of Victoria, because the admissions used to found the case against Mr Thomas, which were obtained in circumstances that rendered them involuntary, should have been held inadmissible.²² As a result, Mr Thomas was released from custody.

- 15.2 On 27 August 2006, an interim control order was imposed on Mr Thomas by Federal Magistrate Mowbray. The grounds for the order were that Mr Thomas, having admitted to training with Al Qa'ida in 2001, is an 'available resource that can be tapped into to commit terrorist acts'.²³ His vulnerability while reintegrating into the community was found to leave him susceptible to exploitation by extremists; therefore, imposing the control order was held to protect the public and substantially assist in the prevention of terrorism.²⁴
- 15.3 The order was imposed ex parte on Mr Thomas, a resident of Melbourne, by a magistrate in Canberra. A hearing was set down to confirm the interim control order, but prior to this taking place, Mr Thomas lodged a constitutional challenge²⁵ to the enabling legislation.²⁶ The challenge was unsuccessful, and in August 2007, rather than face the confirmation hearing, Mr Thomas gave a voluntary undertaking to the Federal Court with more relaxed conditions than were imposed by the interim control order.
- 15.4 On 20 December 2006, a retrial was ordered in Mr Thomas' case following an interview conducted by the ABC's Four Corners program. An appeal against this order was refused on 16 June 2008.²⁷
- 15.5 An independent reviewer may have assisted in Mr Thomas' case by comprehensively and rigorously investigating the way evidence against him was obtained and used in the prosecution for terrorism offences. Similarly to David Hicks' case, the independent reviewer may also have assisted in independently

²² *R v Thomas* (2006) 14 VR 475.

²³ Order of FM Mowbray in *Jabbour v Hicks*, file no CAG47/2006, dated 27 August 2006..

²⁴ Ibid.

²⁵ *Thomas v Mowbray* [2007] HCA 33.

²⁶ *Criminal Code* (Cth) Div 104.

²⁷ *R v Thomas (No 4)* [2008] VSCA 107.

assessing the appropriateness of using of control orders to deprive a person of liberty, without a jury, where they are not serving any sentence.

- 15.6 Mr Thomas' case also raises the issue of conditions being imposed on him other than in open court, by way of an ex parte hearing and voluntary undertaking.

Recommendation 8

The Bill should not preclude the independent reviewer from assessing the impact of laws other than 'laws relating to terrorist acts', as these can interact in their operation with laws such as the *Migration Act 1958* (Cth). As a consequence, the independent reviewer should also be permitted to, at a minimum, have regard to the impact of any other laws which are relevant to or otherwise referred to or relied on in the context of proceedings in respect of a person who has been charged with a terrorism offence.

Annexure — Key Australian Counter-terrorism legislation

The following list sets out Australia's key counter-terrorism legislation, together with the key objectives of each act.

Anti-Terrorism Act (No. 2) 2005

This act amends the Criminal Code to allow for the listing of organisations that advocate the doing of a terrorist act as terrorist organisations, establishes procedures for preventative detention and control orders, updates the offence of sedition and other measures.

The Anti-Terrorism Act 2004

This legislation amends the Crimes Act 1914 to strengthen the powers of Australia's law enforcement authorities, setting minimum non-parole periods for terrorism offences and tightening bail conditions for those charged with terrorism offences as well as other initiatives.

The Anti-Terrorism Act (No. 2) 2004

This legislation amends the Criminal Code Act 1995 to make it an offence to intentionally associate with a person who is a member of a listed terrorist organisation as well as other initiatives.

The Anti-Terrorism Act (No. 3) 2004

This legislation amends the Passports Act 1938, the Australian Intelligence Security Act 1979 and the Crimes Act 1914 to alter Australia's counter-terrorism legal framework as well as other initiatives.

The Australian Security Intelligence Organisation Act 1979

This legislation sets out the functions of the Australia Security Intelligence Organisation (ASIO).

The ASIO Legislation Amendment Act 2003

This legislation amends the Australian Security Intelligence Organisation Act 1979 to increase the power of ASIO to collect information.

The Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003

This legislation empowers ASIO to obtain a warrant to detain and question a person who may have information in relation to a terrorist activity.

The Border Security Legislation Amendment Act 2002

This legislation deals with border surveillance, the movement of people, the movement of goods and the controls Customs has in place to monitor this activity.

The Crimes Act 1914

This legislation deals with crime, the powers of the authorities to

investigate it and many other related issues including sabotage, treachery, disclosure of information and other issues.

The Crimes Amendment Act 2002

This legislation allowed forensics to be used to identify victims of the Bali bombings.

The Criminal Code Amendment (Anti-Hoax and Other Measures) Act 2002

This legislation amends the Criminal Code Act 1995 to insert new offences directed at the use of postal and similar services to perpetrate hoaxes, make threats and send dangerous articles.

The Criminal Code Amendment (Espionage and Related Matters) Act 2002

This legislation amends and strengthens Australia's espionage laws.

The Criminal Code Amendment (Offences Against Australians) Act 2002

This legislation amends the Criminal Code by inserting new provisions to make it an offence to murder, commit manslaughter or intentionally or recklessly cause serious harm to an Australian outside Australia.

The Criminal Code Amendment (Suppression of Terrorist Bombings) Act 2002

This legislation amends the Criminal Code Act 1995 to make it an offence to place bombs or other lethal devices in prescribed places with the intention of causing death or serious harm or causing extensive destruction which would cause major economic loss.

The Security Legislation Amendment (Terrorism) Act 2002

This legislation amends the Criminal Code Act 1995 to create new terrorism offences, modernise treason offences, creates offences relating to membership or other specified links to terrorist organisations and other initiatives.

The Suppression of the Financing of Terrorism Act 2002

This legislation amends the Criminal Code Act 1995, the Extradition Act 1988, the Financial Transactions Reports Act 1988, the Mutual Assistance in Criminal Matters Act 1987 and the Charter of the United Nations Act 1945. The amendments insert a new offence which targets persons who provide or collect funds and are reckless as to whether those funds will be used to facilitate a terrorist act and other initiatives.

The Surveillance Devices Act 2004

This legislation establishes procedures for officers to obtain warrants, emergency authorisations and tracking device authorisations for the

installation and use of surveillance devices in relation to criminal investigations and other initiatives.

The Telecommunications Interception Legislation Amendment Act 2002

This legislation amends the Telecommunications (Interception) Act 1979 to permit law enforcement agencies to seek telecommunications interception warrants in connection with the investigation of terrorism offences and other initiatives.

The Criminal Code Amendment (Terrorism) Act 2003 (Constitutional Reference of Power)

This legislation is seeks to remove any uncertainty regarding the constitutional status of the counter-terrorism legislation.

The Crimes (Overseas) Act 1964

This legislation provides that certain Australian criminal laws apply to conduct committed by Australian civilians who are serving overseas under an arrangement between the Australian Government and the United Nations.

The Australian Federal Police and Other Legislation Amendment Act 2004

This legislation amends the Australian Federal Police Act 1979 and the Crimes Act 1914 to finalise integration of the Australian Protective Service into the Australian Federal Police and other initiatives.

The Australian Protective Service Amendment Act 2003

This legislation gives Australian Protective Service and Australian Federal Police the powers to request a person's personal details, stop and search a person suspected of possessing a weapon, seize weapons and other initiatives.

The International Transfer of Prisoners Amendment Act 2004

This legislation puts in place arrangements to work with the US to transfer Australian citizens convicted by a military tribunal to serve any sentence of imprisonment in Australia.

The Maritime Transport and Offshore Facilities Security Act 2003

This legislation establishes a scheme to safeguard against unlawful interference with maritime transport and establishes security levels.

The Aviation Transport Security Act 2004

This legislation establishes a number of mechanisms to safeguard against unlawful interference against aviation.

The Aviation Transport Security (Consequential Amendments and Transitional Provisions) Act 2004

This legislation introduces a number of amendments and transitional provisions.

The Crimes Amendment Act 2005

This legislation amends the Crimes Act 1914 to enable Commonwealth participating agencies to request assumed identity documents.

The National Security Information Legislation Amendment Act 2005

This legislation extends protection of security sensitive information under the *National Security Information (Criminal Proceedings) Act 2004*.

The National Security Information (Criminal and Civil Proceedings) Act 2004

This legislation seeks to protect information from disclosure in federal criminal proceedings where the disclosure would be likely to prejudice Australia's national security.