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**Joint Submission to the Finance and Public Administration
Legislation Committee on its Inquiry into the**

National Security Legislation Monitor Bill 2009

July 2009

Public Interest Law Clearing House

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About the Human Rights Law Resource Centre

The Human Rights Law Resource Centre (**HRLRC**) is the first national specialist human rights law centre in Australia. It aims to promote human rights in Australia – particularly the human rights of people who are disadvantaged or living in poverty – through the practice of law.

The HRLRC's activities include human rights casework, litigation, policy analysis and advocacy, education, training and research.

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.

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About PILCH

The Public Interest Law Clearing House (**PILCH**) is an independent, not-for-profit organisation that is committed to furthering the public interest, improving access to justice and protecting human rights. PILCH does this by facilitating the provision of *pro bono* legal services, and by undertaking law reform, policy work and legal education.

PILCH's objectives include to:

- (a) improve access to justice and the legal system for the marginalised and disadvantaged;
- (b) identify matters of public interest requiring legal assistance;
- (c) seek redress in matters of public interest;
- (d) refer individuals, community groups and not for profit organisations to lawyers in private practice and to others in ancillary or related fields 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.

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1. Introduction and Summary of Recommendations

1.1 Introduction

1. PILCH and the HRLRC welcome the invitation from the Senate Standing Committee on Finance and Public Administration (**Committee**) to make a submission in relation to the *National Security Legislation Monitor Bill 2009 (Bill)*, which seeks to establish the position of the National Security Legislation Monitor (**Monitor**) to review the operation, effectiveness and implications of counter-terrorism and national security legislation.
2. PILCH and the HRLRC independently made submissions to the Senate Legal and Constitutional Affairs Committee Inquiry into the *Independent Reviewer of Terrorism Laws Bill 2008 (No 2)* in September 2008.
3. Since the events of 11 September 2001, Australia's counter-terrorism laws have expanded significantly in both number and scope. While a number of oversight and review mechanisms exist, PILCH and the HRLRC consider that those mechanisms are ad hoc and limited in their scope and transparency. PILCH and the HRLRC consider that the existing review mechanisms are inadequate to ensure the proper protection and promotion of human rights.
4. As a consequence, PILCH and the HRLRC consider that an additional review mechanism in respect of Australia's counter-terrorism framework is required and support the Bill's proposal for the appointment of a Monitor. PILCH and the HRLRC commend the positive changes that have been made to the Bill since the report of the Senate Standing Legal and Constitutional Affairs Committee. However, PILCH and the HRLRC are concerned that not all of the recommendations of the Senate Standing Legal and Constitutional Affairs Committee have been adopted. PILCH and the HRLRC believe that the Bill can be improved in a number of ways and have made a series of specific recommendations in this regard.

1.2 Recommendations

5. PILCH and the HRLRC submit that the Committee adopt the following recommendations in respect of the proposed form of the Bill:

Recommendation 1:

PILCH and the HRLRC strongly support the appointment of a National Security Legislation Monitor. The National Security Legislation Monitor should not replace the existing review mechanisms, but instead be appointed in addition to them.

Recommendation 2:

PILCH and the HRLRC consider that the definition of 'counter-terrorism and national security legislation' in clause 4 of the Bill should be clarified to ensure that any legislation which might impact upon the prevention, detection or prosecution of a terrorist act is covered, including new legislation.

Recommendation 3:

PILCH and the HRLRC consider that the Bill should be amended to expressly require the Monitor, in conducting a review, to consider the human rights impacts of Australia's counter-terrorism and national security legislation and the compatibility of such legislation with international human rights standards and obligations.

Recommendation 4:

PILCH and the HRLRC recommend that clause 6 of the Bill be amended to explicitly provide the Monitor powers to initiate his or her own reviews. This would also enable compliance with review obligations under the *Optional Protocol to the Convention against Torture*.

Recommendation 5:

PILCH and the HRLRC consider that the Monitor 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 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.

Recommendation 6:

PILCH and the HRLRC recommend that clause 11 of the Bill be amended to require community and sector-specific consultation prior to the appointment of the Monitor.

Recommendation 7:

PILCH and the HRLRC consider that the reporting functions of the Monitor 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 specifying timing requirements for the reports.

2. Background

2.1 Sheller Committee

6. 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 legislation has worked, whether it has worked to achieve its intended purpose, and what relevantly follows or can be implied from this'.²
7. 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

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

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.

8. 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

9. 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

10. 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

11. 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

12. 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 United Kingdom (**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 United Kingdom model

13. In the UK, the Secretary of State may appoint a person to review the operation of relevant terrorism legislation (**Independent Reviewer**). Recently, the Parliamentary Under Secretary to the Home Office stated that 'the terms of reference of the Independent Reviewer of

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.

⁷ *Ibid.*, 20.

terrorism laws... state that the reviewer should make detailed inquiries of people who use the Act, or are affected by it'.⁸

14. The HRLRC and PILCH note that there is no single enactment establishing the office and the various functions and powers are derived from the provisions of the *Terrorism Act 2000* (UK) and the *Prevention of Terrorism Act 2005* (UK). The functions of the UK's Independent Reviewer are public in nature. As such, the Independent Review is subject to the legal obligations placed on 'public authorities' in the *Human Rights Act 1998* (UK) and, therefore, must not act in a manner that is incompatible with the human rights enshrined in that legislation. Accordingly, the UK's 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
15. An example of this can be seen in the 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 contolee. The minimum obligations consistent with public safety provide the only acceptable basis for control orders.¹⁰

2.4 Report of the Senate Standing Committee on Legal and Constitutional Affairs

16. In 2008, the Senate Standing Committee on Legal and Constitutional Affairs (**SSCLCA**) conducted an inquiry into the *Independent Reviewer of Terrorism Laws Bill 2008 (No. 2)* (**Independent Reviewer Bill**), a private member's bill which sought to establish an Office of the Independent Reviewer to conduct an integrated review of the operation, effectiveness and implications of laws in Australia relating to terrorism.
17. In its report of October 2008, the SSCLCA expressed support, in principle, for the Independent Review Bill subject to the implementation of recommendations 2 to 5 set out below:¹¹

Recommendation 2: That the Bill be amended to comprehensively describe the role and function of the Independent Reviewer, and enumerate the criteria by which legislation should be reviewed.

Recommendation 3: That the Bill be amended to detail:

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.

¹¹ Senate Standing Committee on Legal and Constitutional Affairs, *Inquiry into Independent Reviewer of Terrorism Laws Bill 2008 [No. 2]* (October 2008) (**SSCLCA Report**), xi.

- the legal status of the Independent Reviewer;
- the legislation intended to fall under its purview;
- remuneration of the Independent Reviewer;
- resourcing of the Independent Reviewer; and
- the immunity or otherwise of the Independent Reviewer from civil liability.

Recommendation 4: That the Bill be amended so that the role of Independent Reviewer is carried out by a panel of three people with relevant expertise, and that their terms of service be staggered where possible.

Recommendation 5: That the Bill be amended so that, in addition to reporting to Parliament on inquiries undertaken by the Independent Reviewer in respect of terrorism legislation, an Annual Report on the activities of the Independent Reviewer is tabled in Parliament.

3. The Importance of a Human Rights Framework

18. In the Australian context, the particular nature of terrorism has resulted in a special, and in many ways unique, legislative regime.¹² It is important that, in establishing a regime that seeks to ensure the security of individuals, the State does not legislate or exercise powers in a manner that unnecessarily or disproportionately infringes upon fundamental human rights.¹³
19. Any laws that engage and potentially limit 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.¹⁴
20. To ensure that laws are properly monitored, it is important that holistic, transparent, independent and ongoing review mechanisms are established. Failing to establish such

¹² *Lodhi v R* [2006] NSWCCA 121, 61 (Spigelman CJ).

¹³ It is notable in this regard that the UN Human Rights Committee, in its April 2009 review of Australia, expressed concern that ‘some provisions of the *Anti-Terrorism Act (No 2) 2005* and other counter-terrorism measures adopted by the State party appear to be incompatible with the Covenant rights, including with non-derogable provisions. The Committee is particularly concerned at: a) the vagueness of the definition of terrorist act; b) the reversal of the burden of proof in certain cases contrary to the right to be presumed innocent; c) the fact that “exceptional circumstances”, to rebut the presumption of bail relating to terrorism offences, are not defined in the *Crimes Act*, and; d) the expanded powers of the Australian Security Intelligence Organization (ASIO), including so far unused powers to detain persons without access to a lawyer and in conditions of secrecy for up to seven-day renewable periods. (art. 2, 9 and 14)’. The Committee recommended that ‘**The State party should ensure that its counter-terrorism legislation and practices are in full conformity with the Covenant**’: see Human Rights Committee, *Concluding Observations on Australia*, UN Doc CCPR/C/AUS/CO/5, para 11.

review mechanisms will, over time, erode public confidence in legislation and, in turn, undermine the purpose for which the legislation is intended.

21. 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.¹⁵

22. PILCH and the HRLRC consider that, given recent developments in Australia (such as the case of Dr Haneef), the concerns expressed by the Sheller Committee are likely to exist in many parts of the broader Australian community.

23. PILCH and the HRLRC consider that establishing a Monitor will serve to uphold public confidence in Australia's 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 much needed transparency to the decision making process in particular cases.

3.1 Benefits of a National Security Legislation Monitor

24. PILCH and the HRLRC wish to indicate to the Committee their support for the appointment of a Monitor of national security and counter-terrorism legislation.

25. PILCH and the HRLRC consider that the appointment of a Monitor will supplement the existing review structures currently in place,¹⁶ 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;

¹⁴ 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.

¹⁵ Sheller Committee Report, above n 2, 142. See also Edith Cowan University, *National Fear Survey* (August 2007).

¹⁶ For example, the Security Legislation Review Committee; the Parliamentary Joint Committee on Intelligence and Security; Coalition of Australian Governments; the Australian Law Reform Committee; and the Queensland Public Interest Monitor.

- (f) reviews that include both purposive and process-related considerations; and
- (g) greater scope for incorporating or supplementing national security and counter-terrorism legislation reviews with reviews of related legislation.¹⁷

Recommendation 1:

PILCH and the HRLRC strongly support the appointment of a National Security Legislation Monitor. However, the National Security Legislation Monitor should not replace the existing review mechanisms, but instead be appointed in addition to them.

4. Key concerns in relation to the proposed Bill

4.1 Definition of 'counter-terrorism and national security legislation'

26. Clause 4 of the Bill provides a definition of 'counter-terrorism and national security legislation' that lists a number of provisions of Commonwealth laws which have been enacted to address the threat of terrorism and security related concerns. However, PILCH and the HRLRC are concerned that this may have the effect of limiting the ability of the Monitor to properly and adequately consider the impact that other laws not included in the definition may have on the operation, effectiveness and implications of counter-terrorism and national security legislation. The scope of the Monitor's role should not be unreasonably limited where, for example, the impact of laws not specifically included in the definition of clause 4 may have an unforeseen and/or unintended consequence.
27. PILCH and the HRLRC's preferred position is that the Monitor should be permitted to have regard to the full set of Australia's laws in respect of national security and counter-terrorism. This should include laws enacted for an unrelated purpose which may, nonetheless, impact upon Australia's approach to counter-terrorism or the human rights of Australian citizens. Clause 6(1)(a) provides that the Monitor is to review (i) Australia's counter-terrorism and national security legislation and (ii) 'any other law of the Commonwealth to the extent that it relates to Australia's counter-terrorism and national security legislation'. PILCH and the HRLRC are concerned that the scope of clause 6(1)(a)(ii) may not cover laws that do not

¹⁷ 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.

relate to Australia's counter-terrorism and national security legislation but nevertheless impact upon Australia's approach to counter-terrorism or the human rights of Australian citizens.

Recommendation 2:

PILCH and the HRLRC consider that the definition of 'counter-terrorism and national security legislation' in clause 4 of the Bill should be clarified to ensure that any legislation which might impact upon the prevention, detection or prosecution of a terrorist act is covered, including new legislation.

4.2 Role of a Monitor

28. PILCH and the HRLRC support the adoption of a Monitor similar to that of the Independent Reviewer in the UK. PILCH and the HRLRC submit that a significant factor in the success of the UK Independent Reviewer is the legal obligation, by operation of 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.
29. 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. Thus, the HRLRC and PILCH consider that, in order for the Monitor to provide a meaningful contribution similar to that in the UK, it is important that the functions are expressly defined to require the Monitor to have regard to international human rights law standards.
30. Clause 3 outlines the main objectives of the Bill. One of the objectives is for the Monitor to assist Ministers in ensuring that Australia's counter-terrorism and national security legislation is consistent with Australia's international obligations, including human rights obligations. PILCH and the HRLRC commend this objective as it enshrines the centrality of human rights obligations to the review functions of the Monitor.
31. Clause 6 outlines the functions of the Monitor. Firstly, the Monitor is to review the 'operation, effectiveness and implications' of Australia's counter-terrorism and national security legislation.¹⁸ Secondly, the Monitor is to consider whether there are appropriate safeguards for protecting rights of individuals and whether the legislation remains necessary. PILCH and the HRLRC commend the specificity in which the Monitor's functions have been detailed.

32. Nevertheless, PILCH and the HRLRC are concerned that clause 6 does not require the Monitor review the impact of Australia's counter-terrorism and national security legislation on international human rights standards and obligations. Although this role of the Monitor is perhaps implicit in given the objects of the Bill, an express provision would avoid any ambiguity. Accordingly, PILCH and the HRLRC submit that clause 6 should be amended to expressly require the Monitor to review the impact of Australia's counter-terrorism and national security legislation on international human rights standards and obligations.¹⁹

Recommendation 3:

PILCH and the HRLRC consider that the Bill should be amended to expressly require the Monitor, in conducting a review, to consider the human rights impacts of Australia's counter-terrorism and national security legislation and the compatibility of such legislation with international human rights standards and obligations.

4.3 Appointment of an individual Monitor

33. The SSCLCA recommended that the role of the Independent Reviewer should be carried out by a panel of three people with relevant expertise, and that their terms of service be staggered where possible.²⁰ The SSCLCA favoured the appointment of a panel instead of an individual appointee as it 'offers the opportunity to stagger new appointments, therefore promoting continuity over time, but also reduces the risk of perceived lack of independence'.²¹ This recommendation was not adopted; under the Bill the Monitor is a single appointee. While PILCH and the HRLRC do not have a strong preference for either model, it is considered that a transparent, and publicly accountable selection process, combined with comprehensively described functions, would assist to avoid any perception of lack of independence.

4.4 Power to initiate reviews

34. PILCH and the HRLRC note that clause 6 does not contain an explicit provision enabling the Monitor to initiate his or her own reviews. In this regard, there appears to be an inconsistency

¹⁸ and any other law of the Commonwealth to the extent that it relates to Australia's counter-terrorism and national security legislation *National Security Legislation Monitor Bill 2009*, s 6(2)(a)(ii).

¹⁹ 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).

²⁰ SSCLCA Report, above n 11, xi.

²¹ SSCLCA Report, above n 11, 20.

- between the Explanatory Memorandum which states 'clause 6 also provides that the Monitor will be able to initiate his or her own reviews',²² and the absence of any such provision in the Bill. PILCH and the HRLRC assume that implicit in clause 6 is the power of the Monitor to initiate his or her own reviews. Aside from the Explanatory Memorandum, such an assumption is supported by a statement in the Second Reading speech that '[t]he Monitor may initiate his or her own investigations'.²³ PILCH and the HRLRC consider such a fundamental power should be explicitly provided for in clause 6.
35. The HRLRC and PILCH note that Australia, in recently signing the *Optional Protocol to the Convention against Torture*,²⁴ has indicated that it agrees with the principles, standards and obligations contained in that treaty. The Optional Protocol aims to ensure protection of the human rights of people deprived of their liberty, including persons subject to arrest and detention. Many of the principles contained in the Optional Protocol may be of both indirect and direct relevance to the role of the Monitor.
36. 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:
- (a) be independent;²⁵ and
 - (b) be properly resourced;²⁶ and
 - (c) have access to information, detention facilities and detainees, including the opportunity to conduct private interviews.²⁷
37. PILCH and the HRLRC consider that, given the Monitor's functions and powers to conduct reviews, it may be appropriate to use and develop the role of the Monitor to perform (at least in part) the review mechanisms required under the Optional Protocol.

²² Explanatory Memorandum, National Security Legislation Monitor Bill 2009 (Cth) 4.

²³ Parliament of Australia, Senate, *Hansard*, 25 June 2009, 10 (Penny Wong).

²⁴ 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].

²⁵ *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, article 8.

²⁶ *Ibid.*, article 20.

²⁷ *Ibid.*

Recommendation 4:

PILCH and the HRLRC recommend that clause 6 of the Bill should be amended to explicitly provide the Monitor powers to initiate his or her own reviews. This would also enable compliance with review obligations under the *Optional Protocol to the Convention against Torture*.

4.5 Matters to which the Monitor must have regard

38. PILCH and the HRLRC welcome the insertion of clause 8 which provides that regard must be had to international obligations under international agreements and constitutional arrangements. However, PILCH and the HRLRC consider that greater clarity should be afforded to 'international obligations' under clause 8. PILCH and the HRLRC submit that clause 8 should also contain a general reference to Australia's human rights obligations and include a non-exhaustive list of those obligations.²⁸.
39. In addition, PILCH and the HRLRC consider that the Monitor should be required to have regard to other relevant considerations when determining review priorities, including but not limited to:
- (a) 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;
 - (b) whether the relevant laws are effective and workable, both within their own terms, and in combination with other legislation;
 - (c) whether there are any less-restrictive means by which the objectives of the relevant legislation could be achieved;

²⁸ 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).

- (d) any other legislation which is relevant to a comprehensive consideration of the operation, effectiveness and implications of laws relating to terrorist acts.
40. The SSCLCA also recommended that the Bill should enumerate the criteria by which legislation should be reviewed.²⁹

Recommendation 5:

PILCH and the HRLRC consider that the Monitor 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 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.

4.6 Transparency of appointment of a Monitor

41. The appointment under clause 11 is an executive appointment, to be made by the Governor-General following consultation between the Prime Minister and Opposition Leader of the day.
42. PILCH and the HRLRC are concerned that a Monitor may be appointed by the executive government rather than an open and publicly accountable selection process, and without the need to satisfy any requirement for broader public consultation.
43. 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 Honourable Robert McClelland MP, consulted widely with State and Territory Attorneys-General, the judiciary and peak legal bodies.³⁰

²⁹ SSCLCA Report, above n 11, 20.

³⁰ The Attorney-General 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;

44. PILCH and the HRLRC consider 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.
45. In appointing the Monitor, PILCH and the HRLRC consider that consultation should occur with the organisations identified in clause 10 of the Bill and with relevant community and sector-specific parties.

Recommendation 6:

PILCH and the HRLRC recommend that clause 11 of the Bill be amended to require community and sector-specific consultation prior to the appointment of the Monitor.

46. PILCH and the HRLRC welcome the insertion of clause 11(3) which imposes a standard of expertise to be established before a Monitor is appointed. Clause 11(3) provides that a person must not be appointed as the Monitor 'unless the person is, in the Governor- General's opinion, suitable for appointment because of the person's qualifications, training or experience.'
47. PILCH and the HRLRC notes that the experience and expertise of appointees is similarly controlled 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'.³¹
48. 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'.³²
49. PILCH and the HRLRC consider that the Monitor 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. Therefore, PILCH and the HRLRC submit that it is important that clause 11(3) be retained.

the National Association of Community Legal Centres; National Legal Aid; and Deans of law schools. See, Attorney-General for Australia media release, 'New Chief Justice of the High Court', 30 July 2008.

³¹ *Human Rights and Equal Opportunity Commission Act 1986*, s8B.

³² *Trade Practices Act 1974*, s7(3).

4.7 Power to require production of documents and provision of information

50. In order to properly perform his or her functions, the Monitor must have the power to investigate the manner in which the relevant enforcement agencies interpret and implement counter-terrorism and national security legislation. 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.
51. PILCH and the HRLRC therefore support in principle the Monitor's powers to require the production of documents, to require a person to attend to give information and to examine a person on oath or affirmation, as set out in clauses 23, 22 and 24 of the Bill.
52. 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 clauses 22 and 24 of the Bill should be exercised in a manner that is proportionate to the rights of the individual in each case. PILCH the HRLRC note that the Monitor'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 Monitor for the purpose of a review will be subject to qualified privilege.
53. In this regard, PILCH and the HRLRC welcome clause 25(6) which enshrines the privilege against self incrimination. PILCH and the HRLRC acknowledge the insertion of clause 25 which outlines the legal consequences for a person who fails to attend a hearing or comply with a request made by the Monitor. However, it is noted that there is no consequence stipulated for a person who provides false information.

4.8 Nature of reports to be presented by the Monitor

54. PILCH and the HRLRC consider that the reporting functions of the Monitor 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.
55. Under clause 29 the Monitor must prepare and give to the Prime Minister an annual report on the operation, effectiveness and implications of Australia's counter terrorism and national security legislation and whether it contains appropriate safeguards for protecting individuals' rights and remains necessary (clause 6(1)(a) and (b)). The annual report must be given to the Prime Minister as soon as practicable after 30 June, which must then be presented to each House of the Parliament. The annual report must not contain information which is prohibited from disclosure in subclause 29(3). If such information is excluded, the Monitor must prepare a supplementary report setting out that information for the Prime Minister.

56. Clause 30 provides that the Monitor must report to the Prime Minister on a reference, and may provide an interim report prior to the final report, and the Prime Minister can direct that an interim report be prepared.
57. PILCH and the HRLRC note that there are no reporting requirements provided for reviews initiated by the Monitor.
58. PILCH and the HRLRC consider that the reporting functions of the Monitor would be improved by setting out minimum reporting requirements in relation to the national security and counter-terrorism law framework, including:
- (a) prescriptive reporting requirements for reviews initiated by the Monitor.
 - (b) 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;
 - (c) a requirement that the Monitor 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;
 - (d) requiring the Monitor 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;
 - (e) permitting the Monitor to include in its reports details of any desirable legislative changes which arise as a result of the relevant review; and
 - (f) requiring the Monitor, to publish each report as soon as reasonably practicable after that report is tabled in parliament.

Recommendation 7:

PILCH and the HRLRC consider that the reporting functions of the Monitor 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 specifying timing requirements for the reports.