
*Monitoring Australia’s national security and counter-terrorism laws in the 21st century*¹

Introduction

When Chief Justice Murray Gleeson AC accepted an invitation some years ago to give the ABC’s annual Boyer Lectures, he chose to speak about the rule of law and he began in a striking way in his first Boyer Lecture, ‘*A Country Planted Thick with Laws*’ as follows: ²

In Robert Bolt’s play *A Man for All Seasons*, the central character is Thomas More, the Lord Chancellor of England who defied Henry VIII on the issue of the legality of his marriage - and was beheaded. Seeking to justify to a critical relative his apparently stubborn adherence to law, religious and secular, in the face of danger, not only to his own life, but also to the welfare of his family, More refers to the laws of England as a shelter. He says:

> This country’s planted thick with laws from coast to coast...and if you cut them down...d’you really think you could stand upright in the winds that would blow then?

The imagery of law as a windbreak carries an important idea. The law restrains and civilises power.

> .... Our system of government is infused by the principle of legality... Law is not the enemy of liberty; it is its partner... One of the ways in which the law seeks to promote justice and individual liberty is in its function as a restraint upon the exercise of power, whether the

---

¹ The views in this are my own.

power in question is that of other individuals or corporations, or whether it is the power of
governments. Many Acts of Parliament, and many rules of judge-made law, limit the
capacity of corporations, or individuals, or bureaucracies, to do what they will. The basic law
of Australia, the Commonwealth Constitution, limits legislative and executive and judicial
power. When the jurisdiction of a court is invoked, and the court becomes the instrument of
a constraint upon power, the role of the court will often be resented by those whose power
is curbed. This is why judges must be, and must be seen to be, independent of people and
institutions whose power may be challenged before them. The principle that we are ruled by
laws and not by people means that all personal and institutional power is limited.

... Many Australians are so accustomed to living in a community governed upon those
principles that they fail to make the connection when they see, sometimes close to home,
vioence and disorder, in societies where the rule of law either does not exist, or cannot be
taken for granted. In our society, threats to the rule of law are not likely to come from large
and violent measures. They are more likely to come from small and sometimes well-
intentioned encroachments upon basic principles, sometimes by people who do not
understand those principles.

Those fundamental ideas, expressed by a great lawyer, are always in my mind when I
undertake my work as Independent National Security Legislation Monitor, a role I have
undertaken since the beginning of 2017. I wish to speak to you now about my work as
INSLM, drawing directly on a recent address to the Lowy Institute and on my recent public
hearings on loss of citizenship for terrorist conduct, and in particular:

• The INSLM role and its origins;
• Current threats;
• How I go about my work;
• Existing inquiries;
• Other issues;
• The overarching theme of trust in a democratic society.
The INSLM role and its origins

Once upon a time, namely in 2001, there were no federal anti-terrorism laws and thus no such prosecutions, ASIO had shrunk with the end of the cold war, Al Qaeda was hardly a household name and ISIL didn't exist.

The attacks on 9/11 changed many things, and they certainly began a process of legislative and government reaction to terrorism activities which has continued to this day and has resulted in over 80 separate statutes being passed, over 100 prosecutions commenced and 73 or so people – 10% of them children - being convicted, with many receiving lengthy sentences.

And that is not all: there are:

(a) new or updated laws concerning espionage and sabotage;
(b) a variety of laws to deal with the still sizeable cohort of foreign fighters, their supporters and dependants; and
(c) new laws to counter organised criminals and terrorists taking action to ‘go dark’ as far as the surveillance by police and intelligence authorities is concerned, although, on a recent trip to London I was told the preferred terms are not ‘going dark’ but ‘going spotty’ or even ‘going different’.

The new laws, like the new threats, were and are often unsettling in their novelty and reach, and raise legitimate questions.

• Do they go too far?
• Do they work?
• Do they properly deal with legitimate human rights concerns?

In a sceptical world, it is no longer enough for any government or minister to say ‘just trust us’ or ‘if you knew what I know you would be satisfied’.
So it was that, in addition to the roles of the independent judiciary, parliamentary committees, the Ombudsman and his intelligence community counterpart, the Inspector-General of Intelligence and Security, in 2010 Australia adapted the role of the United Kingdom’s Independent Reviewer of Terrorism Legislation, by enacting the Independent National Security Legislation Monitor Act which provides for the appointment of a part-time INSLM. With my appointment to that role in early 2017, I followed two eminent lawyers, namely the Honourable Roger Gyles AO QC and, before him, Bret Walker SC.

Fundamentally, to adopt the language of former Independent Reviewer David Lord Anderson QC, both roles share the following features:

- **first**, independence – which is obviously critical, and which, I should say, is properly respected;
- **second**, an entitlement to see everything of relevance whether it is Cabinet documents, legal advice or the most highly classified intelligence material – this is one answer to the person unconvinced by a Minister who says ‘if you could see what I see’ as both the INSLM and Reviewer can and do see just that; and
- **third**, the requirement for an unclassified version of the report, which goes to the government, to be made public, in my case tabling of the unclassified report must occur within 15 sitting days so that the Parliament and the public can see and decide for themselves.

As INSLM I don’t investigate complaints or look at bills, rather, I independently:

- review the operation, effectiveness and implications of national security and counter-terrorism laws;
- and consider whether such laws
  a. contain appropriate protections for individual rights,
  b. remain proportionate to terrorism or national security threats, and
  c. remain necessary.
Many reviews can be conducted of my own motion. However, the Prime Minister and the Attorney-General can send me anything related to counter-terrorism or national security – a much broader concept - and the increasingly important Parliamentary Joint Committee on Intelligence and Security (PJCIS) can also send me certain matters, and they in fact have recently sent me their first reference, namely, the encryption review.

**Current Threats**

Because I must form a view whether particular laws remain proportionate to terrorism or national security threats or both, I receive regular briefings as of right from police, policy and intelligence agencies on all matters of relevance to my reviews. As has been the case for the past four years, the current threat of a terrorist act occurring in Australia remains at the ‘probable’ level.

My views are that:

(a) The credible threat of one or more terrorist attacks will remain a significant factor in the Australian national security and counter-terrorism landscape for the reasonably foreseeable future;

(b) While more complex or extensive attacks cannot be ruled out and must be prepared for, attacks by lone actors using simple but deadly weapons, with little if any warning, are more likely;

(c) There can be no guarantee that the authorities will detect and prevent all attacks although most have been;

(d) There is also the risk of opportunistic, if unconnected, ‘follow-up’ attacks in the immediate aftermath of a completed attack, at a time when police and intelligence agencies are fully occupied in obtaining evidence and returning the attacked locality to normality.

(e) The threats come mainly from radical and violent Islamist action – which is not to be confused with the great world religion of Islam which practices peace, and there are also increasing concerns about radical, violent, right wing activity.
(f) The implications of the recent atrocities in Christchurch and Sri Lanka are yet to be fully worked out, as are the likely roles of the remnant foreign fighters of the so-called Caliphate.

(g) The recent arrests this month marked in the words of the Minister for Home Affairs, the ‘16th major terrorist attack that was planned that's been thwarted by the police’.  

Pausing there, it would be remiss of me not to both express my condolences to victims of terrorist acts from our society and acknowledge, with gratitude, the often dangerous and selfless work by those who seek to prevent such acts.

How I go about my role

My role is a part–time one, about 2 days a week on average. I have a small staff and retain counsel assisting from the private bar, and solicitors assisting from the AGS, to help me with each particular reference. That has many benefits, not least as it provides invaluable assistance and sounding boards for me, and creates an informed cohort of able lawyers from whom future Monitors could be drawn.

I approach my role holistically, in the sense of interacting with all parts of the interconnected structure which seeks to protect us from national security and counter-terrorism threats. The recently retired President of the Queen’s Bench Division of the High Court of England and Wales, Sir Brian Leveson said in April:

“there is no single criminal justice system. It is a system of systems: a normative system, with Parliament and the courts determining the nature of criminal law; a preventive, detective, and investigative system operated by the police; a prosecutorial system, operated by the DPP and Crown Prosecution Service; an adjudicative system, made up of, and requiring effective access to, legal aid, the legal profession for defence representation, and the courts; and, a punitive and rehabilitative system operating with the Prison Service. As

3 July 2019.  
with any ecosystem, its vitality is a product of the effective interaction between its constituent parts and of their individual vitality. A structural weakness in their interaction, a fundamental weakness in any one or more parts, will undermine the system as a whole. Cures to problems in one part of the system may have an adverse impact on the operation of other parts of the system or on the system as a whole. Reform should not be viewed in isolation. It needs to be a co-ordinated, co-operative endeavour. If it is not we run the risk of compounding problems or creating new ones.\textsuperscript{ii}

I agree with those views. Applying them to my role, this involves regular engagement and consultation, in a scrupulously independent, firm and apolitical way, with:

- Parliament and its committees, especially the PJCIS and its UK equivalent the ISC,
- relevant Ministers,
- the judiciary here and in the UK,
- national security focused Departments (PM&C, AGD, Home Affairs, Defence and DFAT and the Home Office in the UK) and Agencies (ASIO, ASIS, ASD, MI5, MI6, GCHQ, Police: State and Federal and the Metropolitan Police);
- the CDPP and the CPS in the UK;
- academics,
- Human Rights bodies especially the Human Rights Commissioner,
- civil society generally; and
- certainly not least the IGIS and my UK counterparts as Independent Reviewers, both past and present.

Reviews also involve consideration of international law relating to human rights and security, Australian constitutional law, and Australian and comparative human rights law, criminal law and procedure and the law of evidence. I think it is some of the most interesting law reform in the country.

When a new review begins, whether it is by way of my ‘own motion’ power or a referral from the Prime Minister, the Attorney-General, or the PJCIS, having assembled the new team for that review, I and my office then usually proceed as follows:
• first, assemble a relevant brief of material. Given I do not consider bills but rather monitor the operation of acts, I have the benefit of the second reading speeches and explanatory memoranda and almost always these days, one or more reports from the PJCIS;
• second, send out what amounts to interrogatories and subpoenas to the relevant departments and agencies about the operation of the laws: the agencies indicate what can and cannot be made public;
• third, hold separate private hearings with the agencies to discuss the documents and written answers provided to me;
• fourth, invite submissions both confidential and public, the latter being posted on my website;
• fifth, conduct public hearings, which are now live streamed and which begin with me setting out my prima facie views;
• sixth, writing the report (usually a single public report but sometimes a classified report as well) and sometimes consulting on draft recommendations;
• seventh, delivering the report, usually in person, to either the Prime Minister or the Attorney-General, at which time I usually give them a short oral briefing on what I have found – after all as s 3 of the INSLM Act states ‘The object of this Act is to appoint an Independent National Security Legislation Monitor who will assist Ministers in ensuring that Australia’s counter-terrorism and national security legislation’ meets the relevant requirements as to necessity, proportionality and protection of human rights.
• Eighth, orally briefing the PJCIS who are usually provided with an embargoed copy of the report for their purposes;
• Ninth, and finally, waiting for the public report to be tabled in Parliament within 15 sitting days at which point it is posted on my website.

That typically takes 6-12 months, and sometimes longer. Some reviews are fixed in time by legislation, often by reference to when the PJCIS must do its own review, so although at one
stage a government announced that the Monitor’s work was completely done, I can confidently say that the role has many years of work ahead. [15]

**The Citizenship review**

I have recently concluded the public hearings in this review which concerns two quite different provisions in the Australian Citizenship Act- the conviction based model and the operation of law model. I invite you to look at my opening remarks on my website. I am now proceedings to finalise the report and the unclassified version will be delivered and then tabled.

**The TOLA Review**

The *Telecommunications and Other Legislation Amendment (Assistance and Access) Act 2018* (Cth) (TOLA) commenced in early December last year having been introduced as a Bill on 20 September 2018. The PJCIS urgently considered its terms - however, having received advice from the government that there was an immediate need to provide agencies with additional powers and to pass the Bill in the last sitting week of 2018, it cut short its consideration and recommended enactment with some amendments, with the proviso that there be further review by both the Committee and my Office. This year, the PJCIS referred review of the Act to me.

Some background may be helpful

- At present, oversight of interception and surveillance powers is spilt across three broad lines; oversight for law enforcement, oversight for intelligence agencies and state and territory oversight:
- Generally speaking, the interception and surveillance activities of law enforcement are independently approved by an ‘eligible judge’ or a member of the Administrative Appeals Tribunal (AAT). The Commonwealth Ombudsman, or in some cases a State and Territory oversight agency, inspects and oversees law enforcement use of these powers.
- Intelligence agencies, like ASIO, do not have their powers approved by a judicial body. In most cases the Commonwealth Attorney-General approves the exercise of

---

4 Such as judges of courts of federal courts and State Supreme courts.
ASIO functions and the Inspector-General of Intelligence and Security reviews the exercise of intelligence and powers and the propriety of their activities. Accordingly, ASIO and other intelligence agencies are not accustomed to prior judicial approval of their functions.

- The Commonwealth does not have a clear constitutional power to regulate all surveillance activities or State and Territory law enforcement. While interception is covered by a particular constitutional head of power, broader surveillance activities (including digital surveillance which does not interact with the Australian communication system) can be regarded as matter for State or Territory Parliaments.

The key features of the TOLA Act that have received attention are the new ability of federal intelligence agencies and Australian police to get technical assistance from a designated communications provider, either by agreement or ultimately by compulsion, to require that provider to take certain steps to help the authorities, perhaps by giving access to an app, or a service offered by an ISP, or an encrypted communication. Today is not the day to go into any detail on how this complex Act works: the 2019 report on the Act by the PJCIS is a good summary of the many controversies which attend the Act.

May I suggest at least the following principles, some derived from the report by David Anderson, called ‘A Question of Trust’, will guide this review

- **First**, just as in the physical world we do not accept lawless ghettos where the law does not apply, so also it should be in the virtual world: in this context it means intrusive surveillance powers - conferred by law and with clear thresholds and safeguards - which already apply in the physical world should in principle apply in the analogous virtual world unless there are good reasons otherwise, an example of such a good reason would be *if*, I emphasise *if*, the operation of the law would unduly undermine, say, the integrity of the financial and banking system.

- **Second**, what the law permits and forbids must be clear.

- **Third**, oversight and safeguards are vital and there are comparative models of interest.

This is a very complex review and I welcome wide participation.

**Key Questions**

May I finish by asking some key questions which go beyond my current review.
First, how can the role of Parliament and key committees such as the PJCIS in scrutinising counter terrorism and national security laws be enhanced?iv

Second, how best to achieve the desirable aim ‘that material which can properly be made public should be widely available for scrutiny’: one way to start, as I suggested in my latest report to the Prime Minister is following the UK practice of regularly making accessible figures on numbers of arrest and convictions.v I was pleased to see the AFP Deputy Commissioner who gave evidence to me recently did set out current figures.

Third, how best to enhance the vital role of the guardians whether that is the judiciary, or the bodies like the Inspector-General of Intelligence and Security, to whom whistleblowers may legitimately turn to with any concerns they may have about illegality or maladministration?vi

Fourth, how to ensure proper safeguards against misuse of internet technology?vii

I suggest that one answer to all of those questions is to measure them against the critical issue of trust in a democratic society. As David Anderson has written:

Public consent to intrusive laws depends on people trusting the authorities, both to keep them safe and not to spy needlessly on them...

Trust in powerful institutions depends not only on those institutions behaving themselves (though that is an essential prerequisite), but on there being mechanisms to verify that they have done so. Such mechanisms are particularly challenging to achieve in the national security field, where potential conflicts between state power and civil liberties are acute, suspicion rife and yet information tightly rationed...

Respected independent regulators continue to play a vital and distinguished role. But in an age where trust depends on verification rather than reputation, trust by proxy is not enough. Hence the importance of clear law, fair procedures, rights compliance and transparency.viii

I look forward as INSLM to playing my part on the issue of trust, as far as the INSM Act permits me to. It is a privilege to do so.
The necessity of the prov
 experimentation. That is no longer the case.

imposing a term of imprisonment on an adult or child convicted of a terrorism offence to fix a non-parole period of at least three-quarters of the duration of the head sentence, hence the ‘75% rule’. At the time s 19AG was enacted, parole was almost automatic. That is no longer the case. This change diminishes dramatically the necessity of the provision. Section 19AG precludes any judicial discretion in setting a child’s
non-parole period. I concluded that Section 19AG in its current form, as it applies to children, is in breach of Australia’s obligations under the CRC and recommended that it no longer apply to those under 18 at the time of offending.

**Federal Court:** I recommended that in all terrorism matters tried on indictment, the Federal Court of Australia should have jurisdiction concurrent with the courts of the States and Territories, including because of:

- the disparity in the approaches taken in the eight State and Territory jurisdictions;
- the complexity of federal legal and procedural issues which typically arise in terrorism cases;
- the truly national nature of terrorism offences;
- the fact that the Federal Court already has jurisdiction to make Control Orders under Div 104 of the *Criminal Code* and is shortly to be given concurrent jurisdiction in criminal prosecutions for breaches of the *Corporations Act* (Cth); vi

the recent appointment of specialist criminal law judges to the Federal Court.

**Judicial Education:** As Chief Justice Ferguson of the Supreme Court of Victoria said in her submission to the inquiry: ‘Terrorism trials generally involve a high level of legal and evidentiary complexity and require significant pre-trial management. Cross-jurisdictional learning is an important tool.’ I concluded that enhancing judicial training in terrorism matters, including on the unique issues arising in the trial of children, is highly desirable. The Judges of England and Wales who regularly try terrorism matters told me that they welcome the participation of Australian judges in their annual training. The details of such training are matters for the independent judiciary. I therefore recommended that monies be made available to the appropriate Australian judicial education bodies to allow English and Australian judges expert in the conduct of terrorism trials to travel each year to the other jurisdiction to observe the conduct of terrorism trials and to provide or receive judicial continuing legal education with a view to encouraging appropriate improvements and innovations in the conduct of such trials.

**Openness:** A key function of the INSLM is in monitoring whether relevant laws remain ‘proportionate to any threat of terrorism or threat to national security, or both’. In a sceptical age, in both Australia and the United Kingdom it is not infrequently said that the terrorism and national security threats are overstated. It is important for public confidence that as much as possible is authoritatively revealed, provided the national interest is not thereby damaged. The public and its elected representatives have a strong interest in being told by government with regularity and accuracy how often counter-terrorism powers are used, and equally statistics as to consequential arrests, convictions and other limitations upon liberty, and I have so recommended.

vi Apart from my inquiry, there is for example the important Digital Platforms Inquiry of the ACCC: https://www.accc.gov.au/focus-areas/inquiries/digital-platforms-inquiry

vii *A Question of Trust* 13.3-13.4.