Monitoring Australia's national security and counter-terrorism laws in the 21st century

*Dr James Renwick CSC SC**

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

> 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:
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> > 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?
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> The imagery of law as a windbreak carries an important idea. The law restrains and civilises power.
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> .... 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 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.
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> …
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> 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, violence 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.[1]

Those fundamental ideas, expressed by a great lawyer, are always in my mind when I undertake my work as Independent National Security Legislation Monitor (INSLM) — a role I have undertaken since the beginning of 2017.[2] This article discusses my work as INSLM, drawing directly on a recent address to the Lowy Institute and on my evidence to recent public hearings on loss of citizenship for terrorist conduct — in particular:

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1 Chief Justice Murray Gleeson, *A Country Planted Thick with Laws*, Boyer Lectures, ABC, 19 November 2000 <https://www.abc.net.au/radionational/programs/boyerlectures/lecture-1-a-country-planted-thick-withlaws/3476934>

2 And which concluded on 30 June 2020.

- the INSLM role and its origins;
- current threats;
- how I go about my work;
- existing inquiries;
- other issues; and
- 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, the Australian Intelligence Security Organisation (ASIO) had shrunk with the end of the cold war, Al Qaeda was hardly a household name and ISIL did not 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 being commenced and 73 or so people — 10 per cent of them children — being convicted, with many receiving lengthy sentences.

And that is not all. There are:

- new or updated laws concerning espionage and sabotage;
- a variety of laws to deal with the still sizeable cohort of foreign fighters, their supporters and dependants; and
- 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 'going spotty' or even 'going different', not 'going dark'.

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 (IGIS), 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 2010* (Cth) (INSLM 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 Hon 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;
- secondly, 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 any minister who says, 'if you could see what I see', as both the INSLM and Independent Reviewer can and do see just that; and
- thirdly, 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 do not investigate complaints or look at Bills; rather, I independently:

a. review the operation, effectiveness and implications of national security and counter-terrorism laws; and

b. consider whether such laws:

    i. contain appropriate protections for individual rights;

    ii. remain proportionate to terrorism or national security threats; and

    iii. 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. The increasingly important Parliamentary Joint Committee on Intelligence and Security (PJCIS) can also send me certain matters, and in fact they havesent me their first reference — namely, the encryption review.

Current threats

Because I must form a view on 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:

- 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.
- 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.
- There can be no guarantee that the authorities will detect and prevent all attacks, although most have been.
- 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.
- The threats come mainly from radical and violent Islamist action — which is not to be confused with the great world religion of Islam, which practises peace — and there are also increasing concerns about radical, violent, right-wing activity.
- The implications of the recent atrocities in Christchurch, New Zealand, 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.
- The arrests in July 2019 are in the words of the Minister for Home Affairs the '16th major terrorist attack that was planned that's been thwarted by the police'.[3]

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 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 two days a week on average. I have a small staff and retain counsel assisting from the private bar and solicitors assisting from the Australian Government Solicitor 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 Independent 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. I note that the recently retired President of the Queen's Bench Division of the High Court of England and Wales, Sir Brian Leveson, has said:

> 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

3 Tom Steinfort, Interview with the Hon Peter Dutton MP, Minister for Home Affairs (Television Interview, *Today Show*, 3 July 2019) <https://minister.homeaffairs.gov.au/peterdutton/Pages/Interview-with-Tom-Steinfort,-Today-Show.aspx>.

> 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 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.[4]

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 Intelligence and Security Committee;
- relevant ministers;
- the judiciary here and in the UK;
- national security focused departments (the Department of the Prime Minister and Cabinet, the Attorney-General's Department, the Department of Home Affairs, the Department of Defence and the Department of Foreign Affairs and Trade; and the Home Office in the UK), agencies (ASIO, the Australian Secret Intelligence Service, the Australian Signals Directorate, MI5, MI6, GCHQ) and police services (state police, the Australian Federal Police (AFP) and the UK Metropolitan Police);
- the Commonwealth Director of Public Prosecutions and the Crown Prosecution Service 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 — then, having assembled the new team for that review, I and my office usually proceed as follows:

1. We 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.

4 Sir Brian Leveson, President of The Queen's Bench Division, 'The Pursuit of Criminal Justice' (Criminal Cases Review Commission Annual Lecture, Faculty Of Laws, University College London, 25 April 2018) <https://www.judiciary.uk/wp-content/uploads/2018/04/speech-leveson-ccrc-lecture-april-2018.pdf>.

2. We 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.

3. We hold separate private hearings with the agencies to discuss the documents and written answers provided to me.

4. We invite submissions, both confidential and public —the latter being posted on my website.

5. We conduct public hearings, which are now live streamed and which begin with me setting out my prima facie views.

6. We write the report (usually a single public report but sometimes a classified report as well) and sometimes consult on draft recommendations.

7. We deliver 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.

8. We orally brief the PJCIS, which is usually provided with an embargoed copy of the report for its purposes.

9. We wait 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 six to 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 Independent Monitor's work was completely done, I can confidently say that the role has many years of work ahead.

The citizenship review

I have recently concluded the public hearings in this review, which concerns two quite different provisions in the *Australian Citizenship Act 2007* (Cth) — 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 proceeding 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 PJCIS 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'[5] or a member of the Administrative Appeals Tribunal. 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 ASIO functions and the IGIS 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 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; and 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*, that will guide this review:[6]

1. 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 the operation of the law would unduly undermine, say, the integrity of the financial and banking system.

2. What the law permits and forbids must be clear.

3. Oversight and safeguards are vital and there are comparative models of interest.

5 Such as judges of federal courts and state supreme courts.

6 David Anderson QC, Independent Reviewer of Terrorism Legislation, *A Question of Trust: Report of the Investigatory Powers Review* (The Crown, London, 2015) <https://terrorismlegislationreviewer.independent.gov.uk/wp-content/uploads/2015/06/IPR-Report-Print-Version.pdf>.

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

Key questions

I conclude by asking some key questions which go beyond my current review.

1. How can the role of Parliament and key committees such as the PJCIS, in scrutinising counter-terrorism and national security laws, be enhanced?[7]

2. How can we best 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 by following the UK practice of regularly making accessible figures on numbers of arrest and convictions. I was pleased to see that the AFP Deputy Commissioner, who gave evidence to me recently, did set out current figures.

3. How can we best enhance the vital role of the guardians, whether that is the judiciary or the bodies like the IGIS, to whom whistleblowers may legitimately turn with any concerns they may have about illegality or maladministration?

4. How do we ensure proper safeguards against misuse of internet technology?[8]

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 …

7 There is the ever-decreasing time available for scrutiny of Bills and an increasing number of Bills. I am also interested to see what the government says about the important recommendations of the 2017 Independent Intelligence Review concerning an expanded role for the PJCIS: see Department of the Prime Minister and Cabinet, *2017 Independent Intelligence Review* (Commonwealth of Australia, 2017) <https://www.pmc.gov.au/sites/default/files/publications/2017-Independent-Intelligence-Review.pdf>:
'Recommendation 23: The role of the Parliamentary Joint Committee on Intelligence and Security (PJCIS) be expanded by amending relevant legislation to include:

a. a provision enabling the PJCIS to request the Inspector-General of Intelligence and Security (IGIS) conduct an inquiry into the legality and propriety of particular operational activities of the National Intelligence Community (NIC) agencies, and to provide a report to the PJCIS, Prime Minister and the responsible Minister;
b. a provision enabling the PJCIS to review proposed reforms to counter-terrorism and national security legislation, and to review all such expiring legislation;
c. provisions allowing the PJCIS to initiate its own inquiries into the administration and expenditure of the 10 intelligence agencies of the NIC as well as proposed or existing provisions in counter-terrorism and national security law, and to review all such expiring legislation;
d. provisions enabling the PJCIS to request a briefing from the Independent National Security Legislation Monitor (the Monitor), to ask the Monitor to provide the PJCIS with a report on matters referred by the PJCIS, and for the Monitor to provide the PJCIS with the outcome of the Monitor's inquiries into existing legislation at the same time as the Monitor provides such reports to the responsible Minister; and
e. a requirement for the PJCIS to be regularly briefed by the Director-General of the Office of National Intelligence, and separately by the IGIS.'

8 Apart from my inquiry, there is, for example, the important Digital Platforms Inquiry of the ACCC: Australian Competition and Consumer Commission, *Digital Platforms Inquiry: Project Overview* <https://www.accc.gov.au/focus-areas/inquiries/digital-platforms-inquiry>.

> 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 …
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> 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.[9]

As INSLM I look forward to playing my part on the issue of trust, as far as the INSLM Act permits me to. It is a privilege to do so.

9 Anderson, above n 6, 13.3–13.4.