



**Castan Centre for Human Rights Law
Monash University**

**Submission to the Senate Legal and Constitutional
Affairs Committee**

***Inquiry into the Provisions of the Independent National
Security Legislation Monitor Repeal Bill 2014***

**Prepared by Dr Patrick Emerton
Senior Lecturer, Monash University Faculty of Law and
Associate, Castan Centre for Human Rights Law**

This submission concerns the Independent National Security Legislation Monitor Repeal Bill 2014 (Cth) (hereafter, the Bill). The contention of this submission is that the Bill should be rejected.

The creation of the office of the Independent National Security Legislation Monitor reflected a recognition that the provisions of Australia's anti-terrorism laws set out in section 4 of the *Independent National Security Legislation Monitor Act 2010* (Cth) (hereafter, the Act) are extraordinary elements of Australia's justice system, and hence stand in need of ongoing and active justification. This recognition is reflected in the other provisions of the Act: this can particularly be seen in section 6(b)(iii) of the Act, which requires the Independent National Security Legislation Monitor (henceforth, the Monitor) to consider whether the legislation in question remains necessary.

Australia's anti-terrorism legislation has been a source of ongoing controversy throughout its enactment and application. It is widely recognised as being extremely far-reaching in the scope of criminality that it establishes (for instance, the raft of preparatory and ancillary offences found in Divisions 101, 102 and 103 of the *Criminal Code* (Cth)); in the severity of the penalties associated with the offences (for instance, the maximum penalty of life imprisonment for the preparatory and ancillary offences found in sections 101.6, 103.1 and 103.2 of the *Criminal Code* (Cth)); in the investigatory powers, including powers of detention, conferred upon both policing and non-policing agencies (for instance, by Part IC of the *Crimes Act 1914* (Cth), Division 105 of the *Criminal Code* (Cth) and by Division 3 of Part III of the *Australian Security Intelligence Organisation Act 1979* (Cth)); in the regime of control orders that it establishes (Division 104 of the *Criminal Code* (Cth)); and in other changes that legislation effects to the ordinary content and procedures of Australia's justice system (such as the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth)).

This submission will not rehearse all these points of controversy. They are well known, and the Committee's past inquiries into these various enactments have received a wide range of submissions, including many submissions from the Castan Centre for Human Rights Law, dealing with them. Nothing has changed in respect either of the content of the legislation, or national or international circumstances, to make those controversies any less, nor to lessen the extraordinary character of the legislation that gives rise to them.

The Explanatory Memorandum accompanying the Bill asserts that “Comprehensive oversight of relevant counter-terrorism and national security legislation will remain despite this repeal.” Adequate ongoing oversight, it is said, will be undertaken by the Inspector-General of Intelligence and Security (hereafter, the Inspector-General), Parliamentary Committees, and the Parliament itself, and also by the executive power to appoint ad hoc reviews. This submission rejects this assertion, not because it doubts that integrity or effectiveness of these bodies, but because they are not properly configured in relation to the task.

The Inspector-General’s role is primarily that of an ombudsman, overseeing the operational integrity of ASIO and other intelligence agencies. Although the work of the Inspector-General may from time-to-time issue in recommendations for legislative change, that is not the office’s focus. Its focus is on the integrity and legality of the activities of intelligence agencies within the existing legislative framework taken as a given.

Parliamentary Committees and the Parliament itself are of course the highest and most thoroughgoing oversight bodies in the Australian system of government. But it is unrealistic to expect them to undertake the ongoing role of oversight of extraordinary legislation such as Australia’s anti-terrorism laws. That is the reason for creating specialised bodies which then report to the Parliament (whether directly or by way of the responsible Minister: see sections 29(5) and 30(6) of the Act). It is the work of such specialised bodies that then provide the Parliament with the material that it needs to set its own priorities for inquiry, investigation, oversight and – where appropriate – amendment or repeal of extraordinary legislation.

Finally, ad hoc executive reviews are not adequate to this particular task either. Part of the concern with Australia’s anti-terrorism law is the tremendous power it grants to various aspects of the executive. This includes ASIO (via Division 3, Part III of the *Australian Security Intelligence Organisation Act 1979* (Cth)); the Attorney-General, who exercise power not only in relation to ASIO warrants but also in relation to the proscription of organisation (section 102.1 of the *Criminal Code* (Cth)), to control orders (section 104.2 of the *Criminal Code* (Cth)) and to both civil and criminal proceedings raising national security matters (via the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth)); and the Australian Federal Police (via, for instance, Part IC of the *Crimes Act 1914* (Cth) and Divisions 104 and 105 of the *Criminal Code* (Cth)). The existence of an ongoing statutory office-holder such as the Monitor creates a counterbalance to these other executive

bodies and offices. It guards against any understandable tendency on their parts to regard the legislation under which they exercise their powers as desirable and necessary.

The actual conduct of the office by the existing Monitor, and his readiness to hear from a wide range of persons, including members of communities severely affected by the practical operation of anti-terrorism laws such as Melbourne's Kurdish community,¹ reinforces these reasons for regarding the office as a very important one, with a distinctive competence in relation to keeping Australian's extraordinary anti-terrorism laws under ongoing review, and providing both the Parliament and the rest of the executive with a reliable and independent source of information about and evaluation of the operation, effectiveness and consequences of those laws.

For these reasons, this submission urges that the Bill be rejected.

¹ Independent National Security Legislation Monitor, *Annual Report 7th November 2013*, p 166.