

28 January 2015



Ms Sophie Dunstone
Committee Secretary
Senate Legal and Constitutional Affairs Legislation Committee
PO Box 6100
Parliament House
CANBERRA ACT 2600

By email: legcon.sen@aph.gov.au

Dear Ms Dunstone

Inquiry into the Independent National Security Legislation Monitor (Improved Oversight and Resourcing) Bill 2014

1. Thank you for the opportunity to provide comments to Senate Committees on Legal and Constitutional Affairs (the Committee) inquiry into the Independent National Security Legislation Monitor (Improved Oversight and Resourcing) Bill 2014 (the Bill).
2. The Law Council endorses many of the Bill's objectives which highlight the importance of the role of the Independent National Security Legislation Monitor (INSLM) which continues to be a necessary and effective form of scrutiny of Australia's national security and counter terrorism legislation.
3. On this basis, the Law Council provides the following comments.

Ability to review proposed legislation

4. Currently, the Independent National Security Legislation Monitor Act 2010 (INSLM Act) empowers the INSLM to review and report on proposed counter-terrorism or national security laws if referred by:
 - the Prime Minister, generally;¹ or

¹ Section 7, *Independent National Security Legislation Monitor Act 2010*.

- the Parliamentary Joint Committee on Intelligence and Security (PJCIS), in the course of considering gaps and anomalies in existing legislation that proposed laws may seek to remedy.²
5. This approach does not allow the INSLM to initiate, on his or her own motion, advice to Government on proposed counter-terrorism and national security legislation. Doing so would be of great assistance to law enforcement and security agencies, the Government, the Parliament and the public. It would enable stakeholders to obtain independent advice and high level expertise to help ensure that proposed laws are more likely to operate in an effective and accountable manner, consistent with human rights and counter-terrorism and international security obligations.³
 6. Accordingly the INSLM Act should be amended to permit own motion reports on proposed laws in addition to the current review of existing laws.⁴
 7. Also, the Law Council considers that a change is required to clauses 3 and 6 of the Bill to permit the INSLM to determine whether proposed counter-terrorism and national security legislation ‘is likely to be’ (rather than ‘would be’) effective in: deterring and preventing terrorism and terrorism-related activity which threatens Australia’s national security; and responding to terrorism and terrorism related activity. Determining the effectiveness of proposed legislation is a speculative exercise as its provisions are not yet in operation and therefore cannot be objectively tested. Such a change is consistent with the intent of Bill, as the Explanatory Memorandum notes the purpose is ‘to make it clear that it is one of the objects of the Act for the Monitor is to explore the likely effect of proposed legislation’.⁵

Amending the objects clause to require an assessment of proportionality

8. The Law Council does not consider the amendment in clause 3 of the Bill is necessary. Subparagraph 3(c)(i) of the INSLM Act states that one of the objects of the Act is for the INSLM to ‘assist Ministers in ensuring Australia’s counter-terrorism and national security legislation is consistent with Australia’s international obligations, including human rights obligations’.
9. Under section 8 of the INSLM Act, the INSLM is required to consider ‘Australia’s obligations under international agreements’, including ‘human rights obligations’. It has been suggested that many human rights may be legitimately limited as long as the limitation meets certain standards, including that they are prescribed by law, necessary

² Such a referral would also have to be consistent with the PJCIS’s mandate to perform its functions under subsection 29(1) of the *Intelligence Services Act 2001*, see section 7A, *Independent National Security Legislation Monitor Act 2010*.

³ The office of the INSLM was created to ensure that Australia’s counter-terrorism and national security laws that were enacted or enhanced since 11 September 2001 operate in an effective, accountable manner and are consistent with Australia’s international obligations, including our human rights, counter-terrorism and international security obligations – see The Hon. Robert McClelland MP, *Second Reading Speech to the Independent National Security Legislation Monitor Bill 2010*, 17 March 2010, p 2846.

⁴ Section 6(1), *Independent National Security Legislation Monitor Act 2010*.

⁵ Explanatory Memorandum to the Bill, at [50].

and proportionate to achieving a legitimate objective.⁶ Accordingly, the objects of the INSLM Act already entail an assessment of proportionality. This is also reflected in the functions of the INSLM in subparagraph 6(1)(b)(ii) of the INSLM Act.

10. There also appears to be a technical deficiency in the amendments in the Bill, whereby the ‘is or would be’ formulation in clause 3(a), (b) and (c) should be matched by a ‘contains or would contain’ formulation in clause 3(d). This change is required to ensure the INSLM can examine whether proposed legislation would contain appropriate safeguards.

Referrals to the INSLM by the Australian Human Rights Commission

11. The Law Council supports an efficient and effective dialogue between the Australian Human Rights Commission (AHRC), and the INSLM, particularly on compliance with Australia’s international obligations.
12. However, the Law Council does not support the proposal for the AHRC to refer matters to the INSLM, as it may not be appropriate for a statutory authority to require the INSLM to conduct inquiries, and this may lessen the independence of the INSLM. The statutory mandate of the INSLM is to provide advisory recommendations to Ministers of the Crown⁷ and to the PJCIS.

Referrals to the INSLM by the Senate Committees on Legal and Constitutional Affairs

13. The Law Council understands that the Committee regularly conducts reviews that relate to counter-terrorism and national security legislation. There is value in the Committee being able to refer matters to the INSLM for review.
14. If the Committee is added as a referring body, the INSLM should be sufficiently resourced to address more investigations, particularly, as the Bill would allow the INSLM to examine proposed legislation.

Full-time position, vacancy and staffing

15. The Law Council supports amending the INSLM Act to permit the INSLM to be appointed on a full-time or a part-time basis. Flexibility in making appointments may encourage well-qualified individuals to offer their services. Such matters should be able to be discussed between nominees, the Prime Minister and the Opposition Leader. Accordingly, the Law Council does not support Schedule 1, Item 14 of the Bill because it does not support this requirement for flexibility.
16. The Law Council supports measures in the Bill that require vacancies in the position of the INSLM to be filled as quickly as possible. It is valuable for there to be an incumbent in the office of the INSLM when counter-terrorism proposals are progressed.

⁶ Parliamentary Joint Committee on Human Rights, Guidance Note 1: Drafting statements of compatibility; December 2014, p. 1.

⁷ Section 3, *Independent National Security Legislation Monitor Act 2010*.

Tabling of INSLM reports and Government Response

17. The Law Council supports tabling of declassified INSLM reports which are the result of a reference by the PJCIS. Tabling is an accountability mechanism providing information to Members of Parliament and the public.
18. If this Committee is enabled to refer matters to the INSLM for review, declassified INSLM reports which are the result of a reference by the Committee should also be tabled.
19. Tabling or publication of more urgent or particular declassified INSLM own motion reports should also be required.
20. The Law Council supports timely Government response to INSLM report recommendations. The recommendations of the former INSLM, with some exceptions, have not received a formal Government response. A lack of timely response, as noted by the former INSLM, is undesirable.⁸

Other matters

21. The INSLM Act should be reformed in two further respects noted by the former INSLM, Mr Bret Walker SC.⁹
22. First, there should be an express power for the INSLM to report on a matter or matters within the statutory mandate but more urgently or particularly than by the annual report.
23. Second, subsection 12(2) of the INSLM Act should be repealed and replaced by a prohibition on reappointment to aid independence of the office. A corollary of this suggested change is to consider increasing the term of office to four or five years to again promote independence.

Yours faithfully

MARTYN HAGAN
SECRETARY-GENERAL

⁸ Independent National Security Legislation Monitor, *Annual Report 7 November 2013*, p. 6; reiterated in Independent National Security Legislation Monitor, *Annual Report 28 March 2014*, p. 2.

⁹ Independent National Security Legislation Monitor, *Annual Report 28 March 2014*, pp. 2-3.