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# Public Law & Policy Research Unit

## **Submission to the Legal and Constitutional Affairs Committee inquiry into the Independent National Security Legislation Monitor (Improved Oversight and Resourcing) Bill 2014**

This submission was produced by the Public Law and Policy Research Unit at the University of Adelaide.

*The Public Law & Policy Research Unit (PLPRU) at the University of Adelaide contributes an independent scholarly voice on issues of public law and policy vital to Australia's future. It provides expert analysis on government law and policy initiatives and judicial decisions and contributes to public debate through formulating its own law reform proposals.*

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### **1. Introduction**

Since 11 September 2001, all industrial nations have reconsidered the threat of international terrorism to their internal security. Australia has experienced three major periods of counter-terrorism legislative activity. The first two, in 2002 and 2005, followed the September 11 attacks and the London bombings. The third occurred in 2014, with the rise of the Islamic State and the potential threat posed by the return of radicalised Australians from Iraq and Syria. New terrorism offences and new powers of investigation have necessarily encroached on individual freedoms that are central to a functioning democratic system of government. Increasing the state's power over the individual is not to be taken lightly. In an environment of increased security, the Independent National Security Legislation Monitor (INSLM) plays the vital role of monitoring and reporting to the Commonwealth government and the Parliament on the

operation of National Security Legislation, and in particular, the degree of its impact on individual freedom. As we enter the third era of counter-terrorism legislative activity, it is timely to reassess and propose amendments to the role of the INSLM.

## **2. Need for expanded remit to include scrutiny of proposed laws**

Under s 6(1) of the *Independent National Security Legislation Monitor Act 2010* (Cth), the INSLM's functions are currently limited to reviewing existing counter-terrorism and national security legislation. The amendments proposed in the Independent National Security Legislation Monitor (Improved Oversight and Resourcing) Bill 2014 would enable the INSLM to engage proactively (upon receiving a reference from either the Senate Legal and Constitutional Affairs Committee or the Australian Human Rights Commission) in reviewing proposed changes to Australia's counter-terrorism and national security laws (see amendments to ss 3 and 6(1) of the *Independent National Security Legislation Monitor Act 2010* (Cth)).

The recent passage of a number of important and complex national security laws in the second half of 2014 demonstrates the need for this expanded function. Between July and December 2014, four important pieces of national security legislation were introduced to the Parliament and three of those Bills were passed.<sup>1</sup> These Bills were each passed through an expedited legislative process that truncated the time available to Parliament and its committees to review the legislation.

It is arguable that the role of scrutinizing *proposed* legislation is already performed by parliamentary committees such as the Senate's Legal and Constitutional Affairs Committee (SLCAC), the Parliamentary Joint Committee on Intelligence and Security (PJCIS), the Senate's Standing Committee for the Scrutiny of Bills (SSCSB) and the Parliamentary Joint Committee on Human Rights (PJCHR) and hence would be doubling up, superfluous or encroaching on their domain. These committees are central to our system of parliamentary scrutiny but they, and their members, cannot be understood either as independent, in the same vein as the Commonwealth Ombudsman for example,<sup>2</sup> or as having sufficient time or detailed expertise to offer comprehensive scrutiny of complex national security legislation. Furthermore these committees are often constrained by their remits which are too narrow to enable such comprehensive scrutiny.

In regard to members' expertise, it should be remembered that membership of parliamentary committees is one of many roles performed by members of parliament. While it is possible that some members may develop sufficient expertise through lengthy membership on a particular parliamentary committee, some appointments may last only a matter of weeks or months depending on members' workload and commitments. Parliamentary committees and their members have access to committee-specific resources but these do not extend beyond the committee's specific remit. For

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<sup>1</sup> *National Security Legislation Amendment Act (No 1)*; *Counter-Terrorism Legislation (Foreign Fighters) Act 2014*; *Counter-Terrorism Legislation Amendment Act (No. 1) 2014*; *Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014*.

<sup>2</sup> In regard to independence, it is important to remember that members of parliamentary committees are members of political parties and hence have political commitments and ties which may bear on the level of independence they can exert when performing their duties.

this reason, parliamentary committees must rely heavily on the expertise of independent bodies such as the INSLM.

As a result of their particular remits, none of the above parliamentary committees have the requisite scope, authority, expertise or resources to perform a comprehensive form of scrutiny for proposed national security legislation. The PJCHR, for example, must scrutinize *all* legislation for its human rights compliance and hence its scrutiny and expertise is very wide-ranging. The PJCHR relies on the assistance of a part-time external legal advisor who is an expert on international human rights law rather than national security legislation. The PJCHR is hampered by its very particular procedures whereby its scrutiny of proposed legislation is based in part on Statements of Compatibility submitted by the relevant Minister which set out the government's justifications for any potential violations of human rights. Where these Statements are not adequate, the PJCHR has little scope to scrutinize these justifications and is often slowed down by its need to request further information from the government. In 2014 the PJCHR struggled to report on the three national security bills before they were passed, with the report on the *National Security Legislation Amendment Bill (No 1)* being tabled after it had passed both houses.

Like the PJCHR, the SSCSB must scrutinize *all* bills but it is not hampered by the need to consider Statements of Compatibility. Its remit is shaped by narrow common law and administrative law principles which do not facilitate a broad assessment of the proportionality of proposed legislation in regard to its human rights impact. The SLCAC has a broad remit in that, amongst other things, it deals with bills referred to it by the Senate in relation to the Attorney General's portfolio and the Immigration and Citizenship portfolio. In 2014 the Senate did not refer the *National Security Legislation Amendment Bill (No 1)* to the SLCAC despite attempts by the minor parties and independents to initiate such a reference. The Senate did refer the *Counter-Terrorism Legislation (Foreign Fighters) Bill* to the SLCAC but the Committee did not take up this reference, deciding to leave this to the PJCIS to which the Bill was also referred. Like the SLSAC, the PJCIS is not authorised to initiate its own references; despite this, in 2014 it received references for all three pieces of counter-terrorism legislation but all within very tight time frames. The PJCIS does not scrutinise proposed national security legislation for its proportionality or its protection or abrogation of human rights. It is worth noting that the current membership of the PJCIS does not include any members of non-major parties. In all the 2014 reports tabled by the above parliamentary committees regarding proposed national security legislation, much reliance was placed on the expert views of the INSLM who is equipped with a broad scope of inquiry and access to relevant information. This points to the need to expand the INSLM's remit to include scrutiny of *proposed* laws so as to strengthen the nature of parliamentary scrutiny performed by these parliamentary committees. With its existing knowledge of national security legislation, and its high level of security clearance, the INSLM is uniquely well placed to provide independent and expert assistance to Parliament and its committees, which are often time-pressed during the passage of this legislation.

There is a logical connection between the INSLM's current role of monitoring existing legislation, and an expanded role of reviewing proposed legislation. Engaging the INSLM at this earlier stage of the legislative process enables the INSLM to shape security

legislation as well as reviewing its effectiveness. The review function can only be enhanced by the INSLM's engagement earlier in the legislative process.

The expansion of the INSLM's review function would enable it to advise Parliament about how proposed reforms would interact with existing national security laws. For example, in the 2014 reforms, a number of changes were implemented to the control order regime to broaden the regime's reach and lower the threshold to apply for control orders.<sup>3</sup> The 2012 Report of the INSLM had recommended the repeal of the control order regime.<sup>4</sup> Parliament would have been greatly assisted by an INSLM review of the proposed changes against the current national security threat, particularly in light of the recommendations made in the 2012 Report.

Providing the INSLM with the function of reviewing proposed legislation would also be of great assistance to the government. National security legislation is highly sensitive and is often at the margins of what is constitutionally permitted. The INSLM is in a strong position to offer both practical advice on the most effective operation of security laws, and also to assess whether proposed laws are within constitutional bounds.

### **3. Ensuring the office of INSLM is not left vacant**

The INSLM is appointed for a period not exceeding 3 years.<sup>5</sup> Brett Walker SC, the first INSLM, was appointed on 21 April 2011 and his term of office expired on 20 April 2014.<sup>6</sup> It was not until 7 December 2014 that the Prime Minister announced that the Hon Roger Gyles AO QC would take up the position of INSLM,<sup>7</sup> and the office remained vacant for approximately 7 months.

The proposed Bill requires the government to make a recommendation to the Governor-General regarding a new appointment before the end of three calendar months after the office is vacated. A period of three months provides a balance between allowing the government sufficient time to find a suitable candidate for the role and making sure that the position does not stay vacant for extended periods. A vacancy for an extended period could place additional time pressures on the office of the INSLM to comply with the reporting requirements set out in the Act.<sup>8</sup> If the proposed amendment was passed and the government chose to ignore the requirement to make an appointment within three calendar months, it raises the questions as to who might have sufficient legal standing to bring an action to compel the government to make an appointment to the office of the INSLM.

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<sup>3</sup> These changes were contained in the *Counter-Terrorism Legislation (Foreign Fighters) Act 2014* and the *Counter-Terrorism Legislation Amendment Act (No. 1) 2014*.

<sup>4</sup> Bret Walker *National Security Legislation Monitor Annual Report 2012* (20 December 2012, tabled 14 May 2013).

<sup>5</sup> *Independent National Security Legislation Monitor Act 2010* (Cth) s 12.

<sup>6</sup> Department of Prime Minister and Cabinet, *Independent National Security Legislation Monitor* <<https://www.dpmc.gov.au/pmc/about-pmc/core-priorities/national-security-and-international-policy/independent-national-security-legislation-monitor>>.

<sup>7</sup> Prime Minister Tony Abbott, 'Appointment of Independent National Security Legislation Monitor' (Media Release, 7 December 2014) <<https://www.pm.gov.au/media/2014-12-07/appointment-independent-national-security-legislation-monitor>>.

<sup>8</sup> The INSLM is required to produce an annual report as well as report on any matter referred to them by the Prime Minister: see *Independent National Security Legislation Monitor Act 2010* (Cth) s 29.

#### **4. Proposal to make the position a full-time appointment**

Although we support an expanded role for the INSLM, and support attempts to ensure the position is as far as possible always filled, we do not support the amendment making the position a full-time rather than a part-time appointment. The workload of the INSLM will vary considerably depending on the security circumstances, and on whether or not the government responds to any changes in circumstances through enacting new laws. In these circumstances, we believe that it is preferable that the position be part-time and flexible, responding to legislation monitoring and review requirements as they arise. One of the potential consequences of changing the position to full-time is that the pool of candidates will change. It is unlikely, for example, that a barrister of the seniority and calibre of Bret Walker SC would accept the appointment to the role if it is changed to a full-time position.