



# **Proposal to repeal the *Independent National Security Legislation Monitor Act 2010 (Cth)***

**Removing the Independent National Security Monitor weakens Australia's human rights protections**

Submission to Senate Standing Committee on Legal and Constitutional Affairs' Inquiry into the provisions of the *Independent National Security Legislation Monitor Repeal Bill 2014 (Cth)*

**5 May 2014**



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## WHO WE ARE

The Australian Lawyers Alliance ('ALA') is a national association of lawyers, academics and other professionals dedicated to protecting and promoting justice, freedom and the rights of the individual.

We estimate that our 1,500 members represent up to 200,000 people each year in Australia. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief.

The ALA started in 1994 as the Australian Plaintiff Lawyers Association, when a small group of personal injury lawyers decided to pool their knowledge and resources to secure better outcomes for their clients – victims of negligence.

The ALA is represented in every state and territory in Australia. More information about us is available on our website.<sup>1</sup>



## INTRODUCTION

The Australian Lawyers Alliance ('ALA') welcomes the opportunity to provide a submission to the Senate Standing Committee on Legal and Constitutional Affairs in its inquiry into the provisions of the *Independent National Security Legislation Monitor Repeal Bill 2014* (Cth) ('the Bill').

**We believe that repealing the *Independent National Security Legislation Monitor Act 2010* (Cth) ('the Act') weakens Australia's human rights protections and should be abandoned in full.**

In December 2008, the government announced that it would establish a new statutory office in the Prime Minister's portfolio, known as the National Security Legislation Monitor. It was said that the Monitor, when reporting to Parliament, would 'bring a more consolidated approach to ongoing review of the laws', and 'avoid the past practice of ad hoc reviews on particular aspects which has resulted in a less holistic approach, and can be resource-intensive for both the reviewing body and the relevant agencies involved in the review'.<sup>2</sup>

Accordingly, on 25 June 2009, the Commonwealth government introduced the *National Security Legislation Monitor Bill 2009*. In September 2009, it was recommended by the Senate Finance and Public Administration Committee that the office be amended to the 'Independent National Security Legislation Monitor' ('INSLM'). This recommendation was adopted by the Senate in February 2010.

The reasoning behind the introduction of the INSLM in 2008 continues to be fundamentally important in Australia today. We provide a short submission in this instance regarding the current role of the INSLM, and the need for the INSLM as an independent safeguard to ensure compliance with international law, and to protect Australians against human rights abuses.

As Andrew Lynch and Nicola McGarrity have stated:

'The officeholder operates as a highly desirable check on the laws, not least because of the regularity and extent of the reviews to be performed – but the debate about how security is provided while rights are simultaneously protected, remains one for elected representatives, the courts and, also, importantly, the greater public.'<sup>3</sup>



## SUMMARY OF RECOMMENDATIONS

1. Current arrangements are not sufficiently transparent and interconnected to ensure effective holistic review of relevant legislation.
2. If the Independent National Security Legislation Monitor is removed, no independent body will conduct a comprehensive and holistic review and evaluation of relevant legislation.
3. Independent safeguards are required to ensure compliance with international law, especially in light of anti-terror laws, which usually conflict with human rights, and which have often been rolled out at a hasty pace in Australia.
4. The absence of a Charter for Human Rights in Australia already leaves Australians and people living in Australia openly vulnerable to human rights violations. The removal of an effective protective mechanism also removes any capability to monitor any systemic or legislative failure to recognise or enforce rights.
5. A tough on crime approach can be a political exercise that requires review from an independent source.
6. The existence of the Independent National Security Legislation Monitor restores and increases public confidence in government capacity to both protect and enforce their rights. It also promotes effective discussion and community awareness of relevant laws.
7. Annual reporting of the INSLM is an effective way to ensure timely evaluation of relevant laws and ventilate and promote public and parliamentary discussion.
8. International approaches to independent security monitoring have revealed that scrutiny is essential to ensure compliance with human rights obligations.



## THE TERMS OF REFERENCE

We note that the proposed Bill inviting individuals and organisations to send in their submissions is not accompanied by Terms of Reference.

We note with concern that this may lead to broad rather than specific commentary regarding the repeal.

We note that the consequences of the repeal will have a dire impact on the monitoring and fulfilment human rights in Australia.

## ABOUT THE PROPOSED BILL

The Bill proposes to repeal the whole of the Act and to abolish the Office of the INSLM.

### PART 1, SECTION 3

Part 1 of the Act focuses on Preliminary information. Section 3 outlines the object of the Act:

The object of the Act is to appoint an INSLM who will assist Ministers in ensuring that Australia's counter-terrorism and national security legislation:

- (a) Is effective in deterring and preventing terrorism and terrorism-related activity which threatens Australia's security; and
- (b) Is effective in responding to terrorism and terrorism-related activity; and
- (c) Is consistent with Australia's international obligations, including:
  - (i) Human rights obligations; and
  - (ii) Counter-terrorism obligations; and
  - (iii) International security obligations; and
- (d) Contains appropriate safeguards for protecting the rights of individuals.





## Australia needs independent safeguards to ensure legislation does not infringe on human rights

Since 11 September 2001, the Commonwealth government has enacted more than 50 new counter-terrorism laws. This reaction by the Commonwealth government in an attempt to be seen as 'tough' on terror, has created a need for the Parliament and executive to receive expert advice on an ongoing basis about the effectiveness and impact of the laws which have been put in place. This is demonstrated in Section 3 of the Act.

In the Second Reading Speech for the *Independent Reviewer of Terrorism Laws Bill* 2008 (Cth), Senator Judith Troeth noted that:

'Obviously, our response to the threat of terrorism cannot simply be more and more stringent laws, more police, and more intelligence personnel. Rather, we need to provide adequate safeguards to ensure scrutiny, accountability, and transparency.'<sup>4</sup>

The INSLM is a safeguard that aims to ensure the protection of our security and our rights. Without this, Australia's current arrangements are not sufficiently transparent and interconnected, and therefore will not ensure effective holistic review of relevant legislation. We believe that protection of individual's rights and adherence to the basic principles of the rule of law is essential in light of counter-terrorism law reform.

## PART 2, DIVISION 1, SECTION 6

Part 2, Division 1 of the Act focuses on the establishment, functions and powers of the INSLM. Section 5 of the Act outlines the functions of the INSLM:

(1) *The INSLM has the following functions:*

(a) *To review, on his or her own initiative, the operation, effectiveness, and implications of:*

- i. *Australia's counter-terrorism and national security legislation; and*
- ii. *Any other law of the Commonwealth to the extent that it relates to Australia's counter-terrorism and national security legislation;*

(b) *To consider, on his or her own initiative, whether any legislation*



*mentioned in paragraph (a):*

- i. Contains appropriate safeguards for protecting the rights of individuals; and*
  - iii. Remains proportionate to any threat of terrorism or threat to national security, or both; and*
  - iv. Remains necessary;*
- (c) If a matter relating to counter-terrorism or national security is referred to the Monitor by the Prime Minister – to report on the reference;*
- (d) To assess whether Australia’s counter-terrorism or national security legislation is being used for matters unrelated to terrorism and national security.*

### **Australia needs an INSLM to independently review relevant legislation**

The Greens’ Legal Affairs spokeswoman, Penny Wright has asserted that ‘the government should not be hiding from independent advice about human rights infringements.’<sup>5</sup> The protection the INSLM provides to Australians against abuses of legislation should not be unduly removed. Without it, no independent body will conduct a comprehensive and holistic review and evaluation of relevant legislation.

## **PART 2, DIVISION 1, SECTION 8**

Section 8 of the Act notes that regard is to be had to international obligations and constitutional arrangements:

*When performing the INSLM’s functions, the Monitor must have regard to:*

- (a) Australia’s obligations under international agreements (as in force from time to time), including:*
- i. Human rights obligations; and*
  - ii. Counter-terrorism obligations; and*
  - iii. International security obligations; and*
- (b) Arrangements agreed from time to time between the Commonwealth, the States, and the Territories, to ensure a national approach to countering*



*terrorism.*

**Scrutiny of anti-terror laws is essential to protect Australia's human rights obligations.**

Australia does not possess a national instrument of human rights protection which can be enforced by the courts, such as a Charter of Human Rights or Bill of Rights. The absence of this protection leaves Australians openly vulnerable to human rights violations. Further, the removal of an effective protective mechanism also removes any capability to monitor any systemic or legislative failure to recognise or enforce rights.

While the Joint Parliamentary Committee on Human Rights evaluates legislation from a human rights perspective, it must be remembered that its reports are non-binding.

In and of itself, the Joint Parliamentary Committee does not retain the adequate resourcing or expertise to assess the holistic picture of how new legislation intersects and impacts with existing legislation in the arena of national security, or more specifically, the anti-terrorism field, which is a complex legal area.

It also must be remembered that a majority of Australia's anti-terrorism legislation was introduced prior to the Committee's commencement and prior to the requirement that legislation be introduced with a statement of compatibility with human rights. It also must be remembered that much of this legislation was highly reactionary and introduced at undue speed. Similarly, the evaluation of compliance with human rights norms cannot be entrusted to departments to self-monitor. Statements of compatibility with human rights in conjunction with the introduction of new legislation that have been drafted on some occasions have been inadequate in their lack of attention to detail, broad assumptions with lack of supporting evidence and omissions of reference to international customary law.

We note too, that other international mechanisms that have a role to play in other nations in the monitoring of inhumane treatment or torture do not exist in Australia. For example, the national preventative mechanisms (NPMs), groups proposed to exist under the Optional Protocol for the Convention Against Torture, Cruel and Inhuman and Other Degrading Treatment or Punishment (OPCAT), were to be permitted entry to any detention centre or prison to monitor conditions and the treatment of prisoners. Although OPCAT has been ratified by Australia, there is an absence of NPMs to monitor the treatment of asylum seekers, prisoners, foreign fishers; persons who have committed offences and those assessed by ASIO as a threat to Australian society.





Scrutiny of Australia's anti-terror legislation is of particular importance, particularly when turning to Australia's international human rights obligations and ensuring compliance with international law. 'Some aspects of these [anti-terror] laws have been found by UN human rights bodies and independent domestic review bodies to unduly infringe upon fundamental rights and freedoms, including the right to a fair trial, freedom from arbitrary detention, freedom from torture, freedom of association and the right to non-discrimination.'<sup>6</sup> These laws need to continually be assessed and reviewed by an independent body to ensure Australia is complying with its human rights obligations. These laws, being unable to receive the benefits from the existence of a human rights act, need an independent safeguard, such as the INSLM, as a scrutiny mechanism.

## SUCCESS OF INTERNATIONAL APPROACHES

### The United Kingdom

In the UK, counter-terrorism legislation is subject to review against the *Human Rights Act 1998* (UK), which implements the UK's obligations under the *European Convention for the Protection of Human Rights and Fundamental Freedoms*. In addition to the human rights instrument, the UK office of the Independent Reviewer was created in the mid-1980s to review laws designed in response to terrorist violence.

The UK Independent Reviewer's specific terms of reference under the *Terrorism Act 2000* (UK) are to consider whether:

- (a) *The Act has been used fairly and properly during the reporting period, taking into account the need to ensure that there are both effective powers to deal with terrorism, and adequate safeguards for the individual; and*
- (b) *Whether any of the temporary powers in Part VII of the Act can safely be allowed to lapse.*<sup>7</sup>

Clive Walker, an expert on the UK counter-terrorism laws, has said that the Independent Reviewer encourages 'rational policy-making' by 'provid[ing] information on the working of the legislation, and some thoughtful recommendations from time to time about its reform'.<sup>8</sup> The reports produced by the Independent Reviewer have 'figured prominently in parliamentary deliberations on anti-terrorism legislation',<sup>9</sup> becoming a key source of information, particularly for parliamentarians. Lynch and McGarrity add that the Independent Reviewer in the UK 'generates public discussion about terrorism laws, and the simple fact that the public knows



there is a “terrorism watchdog” free to speak publicly without government approval gives it some reassurance in relation to the application of the laws’.<sup>10</sup>

The UK demonstrates that a crucial element required for the success of the office, is ensuring that the Monitor is, and is perceived to be, independent.

### Canada

While the UK has both human rights legislation and an Independent Reviewer, Canada has the *Canadian Charter of Rights and Freedoms*. This enshrines Canadian’s basic rights into the Canadian Constitution. The *Charter* ‘is important because it sets the standard for government actions and limits how far governments can impinge on the lives of individuals through laws and policies’.<sup>11</sup> If a person believes he / she has been affected by a law or policy which has violated his / her Charter rights, the person has the ability to go to court and challenge the law or policy. This presence of entrenched human rights legislation enables ‘deeper consideration of the implications of laws for human rights before enactment, as well as meaningful judicial intervention later on’,<sup>12</sup> including in relation to anti-terror laws.

Unlike the UK and Canada, Australia does not have human rights legislation protecting its citizen from human rights abuses. Therefore, the independent monitoring of Australia’s relevant legislation, particularly its anti-terror laws, is essential.

## CONCLUSION

Australia needs a body with the ability to engage in independent, holistic, and ongoing review. It is essential to provide a more integrated and ongoing approach to monitor anti-terror laws in Australia, and ensure its compliance with Australia’s human rights obligations. Protection of individual’s rights and adherence to the basic principles of the rule of law is essential in light of counter-terrorism law reform, and this can only be achieved with an independent monitor.

As such, the ALA strongly believes that repealing the Act weakens Australia’s human rights protections, and should be abandoned in full.

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### REFERENCES

<sup>1</sup> Australian Lawyers Alliance (2012) <[www.lawyersalliance.com.au](http://www.lawyersalliance.com.au)>

<sup>2</sup><http://www.ag.gov.au/NationalSecurity/CounterterrorismLaw/Documents/Government%20response%20to%20the%20review%20of%20security%20and%20counter-terrorism%20legislation.pdf>



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<sup>3</sup> 'Watch dog' of Australia's counter-terrorism laws – The coming of the National Security Legislation Monitor (Andrew Lynch and Nicola McGarrity)

<sup>4</sup> [http://www.aph.gov.au/~media/wopapub/senate/committee/legcon\\_ctte/completed\\_inquiries/2008\\_10/terrorism/report/c01\\_pdf.ashx](http://www.aph.gov.au/~media/wopapub/senate/committee/legcon_ctte/completed_inquiries/2008_10/terrorism/report/c01_pdf.ashx)

<sup>5</sup> <http://www.theguardian.com/world/2014/mar/19/abbott-plans-scrap-independent-monitor-terror-laws>

<sup>6</sup> <http://www.humanrightsactionplan.org.au/nhrap/focus-area/counter-terrorism>

<sup>7</sup> 'Watch dog' of Australia's counter-terrorism laws – The coming of the National Security Legislation Monitor (Andrew Lynch and Nicola McGarrity)

<sup>8</sup> The United Kingdom's Anti-Terrorism Laws: Lessons for Australia (Clive Walker)

<sup>9</sup> Fixing the Deficiencies in Parliamentary Review of Anti-Terrorism Law: Lessons from the United Kingdom and Australia (Craig Forcese) (2008) 14(6) *IRPP Choices* 1.

<sup>10</sup> 'Watch dog' of Australia's counter-terrorism laws – The coming of the National Security Legislation Monitor (Andrew Lynch and Nicola McGarrity)

<sup>11</sup> <http://bccla.org/privacy-handbook/main-menu/privacy1contents/privacy1-4/>

<sup>12</sup> 'Watch dog' of Australia's counter-terrorism laws – The coming of the National Security Legislation Monitor (Andrew Lynch and Nicola McGarrity)