



President

Professor Gillian Triggs

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Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
Canberra ACT 2600

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

Dear Secretary,

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

Thank you for the opportunity to make a submission to this inquiry.

The Independent National Security Legislation Monitor (the Monitor) carried out extremely valuable work during the three years of his appointment from 21 April 2011 in reviewing the operation, effectiveness and implications of Australia's counter-terrorism and national security legislation (I refer to this generally as 'national security legislation' below).

Important work remains to be done. Further, the need for the Monitor has increased as a result of the significant amount of national security legislation that has recently been passed and the national security legislation that is currently before Parliament.

The Monitor must have regard to Australia's human rights obligations when performing his or her statutory functions.¹ In light of this requirement, the Australian Human Rights Commission makes the following comments about the changes proposed in the Independent National Security Legislation Monitor (Improved Oversight and Resourcing) Bill 2014 (Cth) (Bill).

With some exceptions, the Commission supports the changes proposed in the Bill. In this letter, I deal with the proposed changes in the order set out in the general outline at paragraph 15 of the Explanatory Memorandum.

¹ *Independent National Security Legislation Monitor Act 2010* (Cth), s 8(a)(i).

Review of proposed legislation

The Commission supports the amendments designed to ensure that the Monitor can review proposed as well as existing national security legislation.

The Monitor has and acquires significant expertise in relation to national security legislation. It is appropriate that this expertise can be accessed when changes to national security legislation are proposed. Further, the Monitor is in a unique position to be able to comment on whether proposed changes to national security legislation are consistent with the Monitor's previous recommendations.

The Commission notes that the first Monitor made a related recommendation for an additional amendment to the INSLM Act. He recommended that there should be an express power for the Monitor to report on a matter or matters within the statutory mandate but more urgently or particularly than by the annual report.² This would make explicit the power of the Monitor to make submissions, for example to this Committee or to the Parliamentary Joint Committee on Intelligence and Security, in relation to proposed national security legislation. The Commission supports such an additional amendment to the INSLM Act.

Amendment of objects clause

The Bill proposes an amendment to the objects of the INSLM Act set out in s 3 to provide that it is an object of the Act to ensure that Australia's national security legislation 'is, or would be, proportionate to any threats of terrorism and threats to national security'.

While the Commission does not have any objection to this amendment, it is unclear whether it is necessary, particularly in light of the functions of the Monitor. It is already an object of the Act to appoint a Monitor to assist Ministers in ensuring that national security legislation is consistent with Australia's human rights obligations and contains appropriate safeguards for protecting the rights of individuals. These objects require issues of proportionality to be considered.

The Monitor already has the function in s 6(1)(b)(ii) of considering whether existing legislation 'remains proportionate to any threat of terrorism or threat to national security'. Amendments to this section proposed in the Bill, and supported by the Commission, would extend this function to proposed legislation.

As the first Monitor noted in his first annual report, the functions of the Monitor and the object of the Act may be paraphrased as the review of the effectiveness and appropriateness of the national security legislation. In describing the second of these, the Monitor said:

As to whether the CT Laws are appropriate, the question concerns, first, their consistency with Australia's international obligations including human rights obligations, counter-terrorism obligations and international security obligations.

² Independent National Security Legislation Monitor, *Annual Report* (28 March 2014), p 2. At http://www.dpmc.gov.au/sites/default/files/publications/INSLM_Annual_Report_20140328.pdf (viewed 12 January 2015).

Second, it concerns the safeguards contained in them for protecting the rights of individuals. Third, it concerns their proportionality to any threat of terrorism or threat to national security or both.³

This is the way in which each of the Monitor's annual reports has proceeded to review the appropriateness of existing national security legislation.

In light of the proposed amendments to the Monitor's powers in s 6, and in light of the way in which the first Monitor carried out his statutory functions based on the objects and powers in the INSLM Act, it is unclear whether any amendment to the objects of the Act in s 3 is required.

Reference by the Senate Legal and Constitutional Affairs Committee

The Commission supports the proposal that the Senate Legal and Constitutional Affairs Committee be able to refer matters to the Monitor for inquiry that are relevant to the performance of the functions of the Committee.

Reference by the Australian Human Rights Commission

The Commission does not support the proposal that the Australian Human Rights Commission be able to refer matters to the Monitor for inquiry. In those circumstances, proposed s 6(1)(e) of the INSLM Act would then require the Monitor to report on such a reference.

The INSLM Act already contains provisions which allow the Monitor to consult with, among other people, the President of the Commission and the Human Rights Commissioner (s 10). Further, the Monitor has the function of conducting reviews on his or her own initiative (s 6). The Commission considers that these provisions are sufficient for it to provide input to the Monitor about human rights issues that arise in relation to national security legislation.

The Commission does not consider that it would be appropriate for it to direct the Monitor to conduct particular inquiries. The power to make a reference to the Monitor is one that is more suitable to be exercised by the Prime Minister or the Joint Parliamentary Committee on Intelligence and Security (as is currently provided for), rather than another Commonwealth agency, given that it will involve decisions about how the limited resources of the Monitor are used.

Nature of the Monitor's position

The Commission supports the proposal that the position of the Monitor be a full time position and that the Monitor be supported by appropriate staff.

In his first report, the Monitor noted that the bulk of reading and the breadth of consultation required in order to fulfil the statutory function was very large.⁴

³ Independent National Security Legislation Monitor, *Annual Report* (16 December 2011), p 4. At https://www.dpmc.gov.au/sites/default/files/files/INSLM_Annual_Report_20111216.pdf (viewed 12 January 2015).

Submissions to this Committee in relation to the Independent National Security Legislation Monitor Repeal Bill 2014 (Cth), including from the Law Council of Australia and the Gilbert + Tobin Centre of Public Law, described in some detail the work still required to be done by the Monitor.⁵ It appears that the Monitor would be better placed to efficiently carry out the necessary statutory functions if the position were full time and appropriately resourced.

Responding to reports

The Commission supports the proposal that the Prime Minister make a statement to the Parliament setting out the action that the Government proposes to take in relation to a report of the Monitor that is tabled in Parliament.

The proposal adopts the recommendation made by the Law Council of Australia in its submission to this Committee in relation to the Independent National Security Legislation Monitor Repeal Bill 2014 (Cth).⁶

The Monitor noted in his fourth and final annual report in March 2014 that there had been no response from the Government to either the second or third annual reports.⁷ A statutory requirement for a response on behalf of the Government within a reasonable period of time would assist in focussing attention on the recommendations made by the Monitor.

Other recommendations by the Monitor for amendments to the INSLM Act

The Commission notes that the first Monitor made other recommendations for amendment to the INSLM Act.

Section 12(1) of the INSLM Act provides that the Monitor may be appointed for a period of up to three years, and s 12(2) provides that the Monitor is eligible for reappointment once.

⁴ Independent National Security Legislation Monitor, *Annual Report* (16 December 2011), p 2. At https://www.dpmc.gov.au/sites/default/files/files/INSLM_Annual_Report_20111216.pdf (viewed 12 January 2015).

⁵ Law Council of Australia, *Submission to the Senate Legal and Constitutional Affairs Legislation Committee on the Independent National Security Legislation Monitor Repeal Bill 2014* (12 May 2014), pp 13-16. At: <http://www.aph.gov.au/DocumentStore.ashx?id=1daa64de-620a-4159-ae95-4d7e76567377&subId=252613> (viewed 12 January 2015). Gilbert + Tobin Centre of Public Law, *Submission to the Senate Legal and Constitutional Affairs Legislation Committee on the Independent National Security Legislation Monitor Repeal Bill 2014* (29 April 2014), pp 5-7. At <http://www.aph.gov.au/DocumentStore.ashx?id=2aee0726-612c-49ca-9a11-e7a3e87e5aa2&subId=251957> (viewed 12 January 2015).

⁶ Law Council of Australia, *Submission to the Senate Legal and Constitutional Affairs Legislation Committee on the Independent National Security Legislation Monitor Repeal Bill 2014* (12 May 2014), p 4. At: <http://www.aph.gov.au/DocumentStore.ashx?id=1daa64de-620a-4159-ae95-4d7e76567377&subId=252613> (viewed 12 January 2015).

⁷ Independent National Security Legislation Monitor, *Annual Report* (28 March 2014), p 2. At http://www.dpmc.gov.au/sites/default/files/publications/INSLM_Annual_Report_20140328.pdf (viewed 12 January 2015).

In his last annual report, the Monitor recommended that s 12(2) be repealed and in its place a provision be inserted that prohibits reappointment of the Monitor.⁸ The rationale given was that ‘there should be no hope of preferment from the Executive’ which could impact on the work of the Monitor.

The Monitor also recommended that the period of appointment be enlarged to four or possibly five years.

The Commission does not express any view about the desirability of these additional provisions but raises them for the consideration of the Committee in the context of the present Bill.

Yours sincerely,

Gillian Triggs
President

⁸ Independent National Security Legislation Monitor, *Annual Report* (28 March 2014), pp 2-3. At http://www.dpmc.gov.au/sites/default/files/publications/INSLM_Annual_Report_20140328.pdf (viewed 12 January 2015).