

Independent National Security Legislation Monitor Repeal Bill 2014

Portfolio: Prime Minister

Introduced: House of Representatives, 19 March 2014

Summary of committee concerns

1.8 The committee seeks further information on the types of mechanisms and measures that the government considers will provide continued coverage of the Independent National Security Legislation Monitor's mandate of ensuring that Australia's counter-terrorism and national security legislation are compatible with human rights.

1.9 The committee also seeks information about the stage at which the government's consideration of the recommendations made by the Monitor during his period of appointment has reached, in particular those recommendations relating to the human rights concerns identified by the Monitor.

Overview

1.10 This bill seeks to repeal the *Independent National Security Legislation Monitor Act 2010* (the INSLM Act) and accordingly to abolish the Office of the Independent National Security Legislation Monitor.

Compatibility with human rights

Statement of compatibility

1.11 The bill is accompanied by a statement of compatibility which states that the bill does not engage any human rights. The statement states that '[t]he Monitor's role is not mandated by the relevant international human rights obligations subject to scrutiny under the *Human Rights (Parliamentary Scrutiny) Act 2011*'. Accordingly, '[t]he bill is compatible with human rights as it does not raise any human rights issues'.

Committee view on compatibility

1.12 The INSLM Act was introduced in 2010 for the purpose of establishing a Monitor to review the operation, effectiveness and implications of counter-terrorism and national security legislation¹ and to report his or her comments, findings and recommendations to the Prime Minister, and in turn Parliament, on an annual basis.²

1.13 In doing so, the Monitor must, among other things, assist Ministers to ensure that Australia's counter-terrorism and national security legislation is consistent with Australia's international obligations, including human rights obligations.³ According to the explanatory memorandum which accompanied the 2010 bill, these include, for example, Australia's obligations under the International Covenant on Civil and Political Rights (ICCPR) and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.⁴

1.14 In particular, the Monitor's functions require consideration of whether counter-terrorism and national security legislation:

- contains appropriate safeguards for protecting the rights of individuals;
- remains proportionate to any threat of terrorism or threat to national security or both; and
- remains necessary.⁵

1.15 To date, the Monitor has provided three annual reports for the government's consideration. According to the explanatory memorandum accompanying this bill, a fourth and final report from the Monitor is expected in April 2014.

1 See the definition of 'counter-terrorism and national security legislation' in section 4 of the *Independent National Security Legislation Monitor Act 2010* (INSLM Act).

2 The institution was modelled on the United Kingdom's Office of the Independent Reviewer of Terrorism Laws, which has a history dating back to the 1970s and was placed on a statutory basis in 2005: David Anderson QC, *The Terrorism Acts in 2012, Report of the Independent Reviewer on the Operation of the Terrorism Act 2000 and Part 1 of the Terrorism Act 2006* (July 2013).

3 INSLM Act, section 3(c) and section 8.

4 Explanatory Memorandum to the 2010 bill, p 6.

5 INSLM Act, section 6(1)(b).

Effective oversight

1.16 The committee notes that Australia's counter-terrorism and national security laws contain a range of coercive and invasive powers, including, for example, Australian Security and Intelligence Organisation questioning warrants and questioning and detention warrants, control orders, and preventative detention orders.⁶ These laws have implications for a range of human rights, including: freedom from arbitrary detention;⁷ the right to a fair trial (and the minimum guaranteed protections therein);⁸ the right to privacy;⁹ freedom of movement;¹⁰ freedom of expression;¹¹ freedom of association;¹² protection of the family, including children's rights;¹³ and the right to equality and non-discrimination.¹⁴

1.17 These rights are not absolute and can be limited where the limitation seeks to achieve a legitimate objective, where there is a rational connection between the limitation and the objective, and where the limitation is proportionate to that objective.

1.18 The committee considers that a key safeguard in ensuring that the limitations placed on human rights by Australia's counter-terrorism and national security legislation are reasonable, necessary and proportionate to achieving the legitimate objective of protecting Australia's national security is independent oversight of such laws, including a body with the mandate of ensuring that such laws remain so.

6 The UN Human Rights Committee has previously raised concerns about the compatibility of Australia's counter-terrorism and national security legislation with the International Covenant on Civil and Political Rights (ICCPR), see 'Concluding Observations of the Human Rights Committee: Australia', CCPR/C/AUS/CO/5, 2 April 2009, para 11 and 'List of issues prior to the submission of the sixth periodic report of Australia' (CCPR/C/AUS/6), adopted by the committee at its 106th session (15 October-2 November 2012)', CCPR/C/AUS/Q/6, 9 November 2012.

7 Article 9 of the ICCPR.

8 Article 14 of the ICCPR.

9 Article 17 of the ICCPR.

10 Article 12 of the ICCPR.

11 Article 19 of the ICCPR.

12 Article 22 of the ICCPR.

13 Articles 17 and 23 of the ICCPR; articles 3(1) and 37 of the Convention on the Rights of the Child.

14 Article 26 of the ICCPR.

1.19 This is supported by the UN Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, who has stated that an effective system of oversight must include at least one civilian organization that is independent of both the intelligence services and the executive.¹⁵

1.20 According to the statement of compatibility accompanying the bill:

Australia has a comprehensive range of standing and ad hoc oversight and accountability measures already in place. These measures include existing independent oversight bodies such as Parliamentary Committees, and executive powers to appoint ad hoc reviews. Comprehensive oversight of relevant counter-terrorism and national security legislation will remain despite this repeal.

1.21 The committee intends to write to the Prime Minister to seek clarification on the types of mechanisms and measures that the government considers will continue to ensure that Australia's counter-terrorism and national security legislation contains appropriate safeguards, remains proportionate to any threat of terrorism or threat to national security or both, and remains necessary, in the absence of the Monitor.

Monitor's recommendations past and future

1.22 As set out above, the Monitor has thus far released three reports, with a fourth report to be released in April 2014. The first report set out a list of issues for consideration over the three-year period for which the Monitor was appointed.¹⁶ The Monitor also set out the approach he intended to take to his mandate. In particular, the Monitor stated:

The ICCPR should be to the forefront of the INSLM's task in assessing the appropriateness of the CT Laws because it protects rights, freedoms and immunities considered to have universal value, because it pronounces that protection in specific terms, and because it recognizes and requires civilized balances where individual freedoms and social aims may be in tension.¹⁷

15 Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, Martin Scheinin, 'Compilation of good practices on legal and institutional frameworks and measures that ensure respect for human rights by intelligence agencies while countering terrorism, including on their oversight', A/HRC/14/46, 17 May 2010, pp 8-10.

16 Independent National Security Legislation Monitor Annual Report (16 December 2011): A consolidated list of issues for consideration is set out in Appendix 3.

17 Independent National Security Legislation Monitor Annual Report (16 December 2011), pp 18-24.

1.23 The Monitor's second report focussed on reviewing 'the extraordinary powers contained in Australia's CT Laws' and 'the definition of terrorism, which in the CT Laws comprises the statutory meaning of "terrorist act" stipulated in sec 100.1 of the *Criminal Code Act 1995* (Cth)'.¹⁸ The Monitor made 21 recommendations. In summary, the Monitor concluded:

- control orders in their present form are not effective, not appropriate and not necessary – but they may be effective, appropriate and necessary if limited to persons already convicted of terrorist offences whose dangerousness at the expiry of their sentences of imprisonment can be shown;
- preventive detention orders are not effective, not appropriate and not necessary and should be abolished;
- questioning warrants are sufficiently effective to be appropriate, and in a relevant sense necessary and could be made more readily available than the current legislation provides – rejecting the criticism that such warrants are an unjustified infringement of liberty;
- questioning and detention warrants are an unnecessary extension of questioning warrants and detention is appropriately comprehended within provisions relating to questioning warrants; and
- improvements to Australia's definition of terrorism are needed.¹⁹

1.24 The Monitor's third report covered the issues for consideration set out in the Monitor's first report but which were not considered in his second report. The Monitor made 30 recommendations, relating to:

- enhancing powers in the *Charter of the United Nations Act 1945*,²⁰
- streamlining the system of listing, designation and prescription of terrorist organisations with respect to existing terrorism financing offences in the Criminal Code;
- changes to the design of Criminal Code offences concerning associating with terrorist organisations; and
- changes to provisions relating to national security information under the *National Security Information (Criminal and Civil Proceedings) Act 2004*.²¹

18 Independent National Security Legislation Monitor Annual Report (20 December 2012), p 1.

19 Independent National Security Legislation Monitor Annual Report (20 December 2012), see a consolidated list of recommendations in Appendix A.

20 The committee has raised concerns about the human rights implications of powers under the *Charter of the United Nations Act 1945* and the *Autonomous Sanctions Act 2011*: see PJCHR, *Seventh Report of 2013*, June 2013, pp 47-49 and *Tenth Report of 2013*, June 2013, pp 13-16.

1.25 According to the explanatory memorandum accompanying the bill:

Together these four reports are expected to cover the extensive list of key issues in Australian national security laws that the Monitor indicated, in his first annual report, would be considered and reviewed during his term. ... The Government considers the best way forward is to work through the large number of recommendations made by the Monitor, and to continue engaging with the extensive range of existing independent oversight bodies, including the Inspector-General of Intelligence and Security, Parliamentary Committees, and the Parliament itself.

1.26 The committee intends to write to the Prime Minister to request that the Prime Minister provide the committee with information about the stage at which the government's consideration of the recommendations made by the Monitor has reached, particularly those recommendations which were made on the basis of concerns about the compatibility of existing measures with Australia's international human rights obligations.