

Independent National Security Legislation Monitor Repeal Bill 2014

Portfolio: Prime Minister

Introduced: House of Representatives, 19 March 2014

Purpose

2.38 The Independent National Security Legislation Monitor Repeal Bill 2014 (the bill) seeks to repeal the *Independent National Security Legislation Monitor Act 2010* (the INSLM Act) and accordingly abolish the Office of the Independent National Security Legislation Monitor (the monitor).

Background

2.39 The committee reported on the bill in its *Fifth Report of the 44th Parliament*.

Committee view on compatibility

Multiple rights

2.40 The committee notes that counter-terrorism and national security legislation potentially engages a range of human rights, including:

- the right to life;¹
- the prohibition on torture, cruel and unusual punishment;²
- the right to a fair trial and fair hearing rights;³
- the right freedom of association;⁴ and
- the right to privacy.⁵

Effective oversight of counter-terrorism and national security legislation

2.41 The committee sought clarification regarding the types of mechanisms and measures that will continue to ensure that, in the absence of the monitor, 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.

1 International Covenant on Civil and Political Rights (ICCPR), article 4.

2 ICCPR, article 4.

3 ICCPR, article 14.

4 ICCPR, article 21.

5 ICCPR, article 17.

Parliamentary Secretary's response

Australia's national security legislation is subject to oversight by multiple independent and Parliamentary scrutiny mechanisms, which are robust and extensive. This is so despite the limited exercise of the powers contained in such legislation, which is consistent with the Parliament's intention that they are extraordinary measures that are to be reserved for emergencies. The Government considers that, in combination, these mechanisms cover the field in terms of the grounds of independent review, including in the scrutiny of human rights compatibility.

Statutory Oversight Mechanisms

The statutory oversight office of the Inspector-General of Intelligence and Security (IGIS) is invested with broad powers to inquire (on the IGIS's own motion or on a reference from the Prime Minister) into the powers, functions and broader practices of all intelligence and security agencies. This includes powers to examine and make recommendations to the Government about matters concerning: the legal compliance of the acts or practices of an agency (including compliance with human rights obligations on the reference of the Australian Human Rights Commission); an agency's compliance with Ministerial directions; the propriety of particular activities of an agency; and the effectiveness, appropriateness, legality and propriety of an agency's procedures. The Australian Commissioner for Law Enforcement Integrity also has statutory mandates to investigate the actions of law enforcement agencies with responsibilities under counter-terrorism legislation.

Parliamentary Scrutiny

These independent statutory offices are additional to the integral role of the Parliament in the scrutiny of proposed legislation and its broader powers of inquiry. Various Parliamentary committees play a valuable role in scrutinising and reviewing legislation. This Committee has a valuable role in scrutinising the compatibility of any proposed counter-terrorism legislation with human rights requirements.

The Parliamentary Joint Committee on Intelligence and Security (PJCIS) can review matters in relation to Australian intelligence agencies on reference from the Parliament or the responsible Minister and makes recommendations on the listing of individual terrorist organisations under the *Criminal Code Act 1995*. Several comprehensive reviews have been undertaken by the PJCIS, including its 2006 inquiries into the package of counter-terrorism legislation enacted in 2002, and an inquiry into the process for the listing of terrorist organisations completed in 2007. In addition, the PJCIS has a statutory mandate to review the operation, effectiveness and implications of the Australian Security Intelligence Organisation's questioning and detention warrants regime and questioning powers by 22 January 2016.

The Parliamentary Joint Committee on Law Enforcement also monitors and reviews the performance by the Australian Federal Police.

All major pieces of counter-terrorism legislation introduced since 2002 have benefited from considerable Parliamentary scrutiny, including in debate and via committee inquiries. As a number of counter-terrorism provisions will sunset in 2015 and 2016, any proposed renewal would provide a further opportunity for the Parliament to consider the necessity, effectiveness and appropriateness of these powers in contemporary circumstances.

International Engagement and Obligations

Australia engages actively with the United Nations (UN) and other international standard-setting bodies in the scrutiny of our compliance with international obligations, including human rights obligations. This includes engagement in periodic treaty reporting mechanisms, such as the sixth periodic report on Australia under the *International Covenant on Civil and Political Rights* which is currently in progress. Other significant areas include Australia's engagement with the UN Human Rights Committee complaints resolution framework and the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism.

Ad Hoc Reviews

These standing mechanisms are additional to the Government's ability to appoint executive reviews to undertake inquiries. This power has been exercised by successive Governments to establish comprehensive reviews of provisions, such as the Security Legislation Review Committee in 2006, the Independent Review of the Intelligence Community in 2011, and the Council of Australian Governments' (COAG) Review of Counter-Terrorism Legislation in 2012 (2012 COAG Review); as well as inquiries into specific exercises of power, such as the Clarke Inquiry into the case of Dr Haneef in 2008. While such reviews are convened at a particular point in time, they have, in practice, been examined in subsequent reviews. The 2012 COAG Review, for instance, referred extensively to the 2006 reports of the Security Legislation Review Committee and the PJCIS. The annual reports by the current Independent National Security Legislation Monitor, Mr Bret Walker SC, have also made references to the findings, recommendations and reasoning of previous ad hoc reviews.

Since the enactment of the first tranche of counter-terrorism specific legislation in 2002, the Government has consistently supported the need for independent oversight of the extraordinary powers conferred. This bottom line has not changed. We remain firmly in support of the principle that any extraordinary powers require appropriate independent oversight. Such oversight is critical to ensuring that the laws are operating in the manner intended, and to promoting public trust and confidence in their administration.

The decision to repeal the *Independent National Security Legislation Monitor Act 2010* was made after careful consideration of the role and function of extant oversight mechanisms. The Government considers that the best way forward is to work through the large number of recommendations made by Mr Walker and other recent independent reviews, and to continue engaging with the extensive range of existing oversight bodies. The Government is confident that despite the repeal Bill, there is, and will remain, no shortage of oversight bodies to conduct

inquiries and investigations and provide independent advice to the Government and the Parliament of the day on counter-terrorism and national security legislation.⁶

Committee response

2.42 The committee thanks the Parliamentary Secretary to the Prime Minister for his detailed response and has concluded its interest in this matter.

2.43 However, the committee notes that, while there are a number of existing review mechanisms and bodies which allow for oversight of Australia's counter-terrorism and national security legislation (as outlined by the Parliamentary Secretary), these review mechanisms and bodies provide oversight of performance and operational matters relating to government agencies and national security. There is no review mechanism or body, other than the monitor, with a specific statutory mandate for ongoing review of counter-terrorism legislation, having regard to Australia's obligations under international human rights agreements.

2.44 The committee notes that the INSLM Act was introduced in 2010 to establish a monitor to review the operation, effectiveness and implications of Australia's counter-terrorism and national security legislation. Part of that role is to assist ministers to ensure that Australia's counter-terrorism and national security legislation is consistent with Australia's international obligations, including human rights obligations.

2.45 The monitor was introduced after reports of the Security Legislation Review Committee (June 2006) and the Parliamentary Joint Committee on Intelligence and Security (PJCIS) (December 2006) recommended that the government appoint an independent reviewer of Australia's counter-terrorism legislation.⁷ In its report, the PJCIS noted that the current system was 'fragmented', with only a limited 'capacity

6 See Appendix 2, Letter from the Hon Josh Frydenberg MP, Parliamentary Secretary to the Prime Minister, to Dean Smith, 10 April 2014, [pp 1-3].

7 See Security Legislation Review Committee, *Report of the Security Legislation Review Committee*, June 2006 and Parliamentary Joint Committee on Intelligence and Security (PJCIS), *Review of Security and Counter Terrorism Legislation*, December 2006.

for independent, ongoing and comprehensive examination of how terrorism laws are operating'.⁸

2.46 In the committee's view, in light of the specific character and function of the monitor (notably its independence and mandate to consider human rights obligations), the committee considers that other, existing review mechanisms cannot replicate the monitor's role in the event that it is abolished.

2.47 In relation to the range of ICCPR rights potentially engaged by counter-terrorism and national security legislation, the committee notes that such legislation is inherently limiting of human rights. The monitor's continuing oversight of such legislation is an important safeguard to ensure that any such limitations are, and continue to be, reasonable and proportionate.

2.48 The committee remains of the view 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 continuing review of the operation (and human rights implications) of such laws.

2.49 The committee notes that the UN Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism has stated that an effective system of oversight must include at least one civilian organisation that is independent of both the intelligence services and the executive.⁹

2.50 In light of the considerations outlined above, the committee is unable to conclude that the bill is compatible with human rights.

Government consideration of monitor's recommendations

2.51 The committee sought further information regarding 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.

8 PJCIS, *Review of Security and Counter Terrorism Legislation*, December 2006, p. 19.

9 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.

Parliamentary Secretary's response

The task of responding to the recommendations made by Mr Walker over the three-year term of his appointment, together with related recommendations from other independent legislative reviews, is an extensive and complex body of work. Mr Walker's first annual report did not contain any recommendations, and his second and third annual reports made 21 and 30 recommendations respectively. The Attorney-General's Department is leading the development of the Government's response to Mr Walker's second and third annual reports, ensuring a coordinated response to overlapping recommendations of the 2012 COAG Review. In total, the Monitor (in his second and third reports) and the 2012 COAG Review made 98 recommendations, which are under careful consideration. This includes close consultation with states and territories under the auspices of COAG. The Government intends to respond to each report once this significant process of consideration and consultation is complete.

As most recommendations raise complex legal, policy and operational issues, and many overlap and in several instances conflict, it is essential that each recommendation and its supporting reasoning and evidence base is analysed thoroughly. Work is well advanced on responses to the 68 recommendations contained in Mr Walker's second annual report and the COAG Review, which were tabled in Parliament by the previous Government on 14 May 2013. These responses will address recommendations on provisions relating to control orders, preventative detention orders, police powers, ASIO's questioning and detention warrants regime and questioning powers, and definition of a terrorist act and the terrorism offences in the *Criminal Code Act 1995*.

Mr Walker provided his fourth annual report to the Prime Minister on 28 March 2014. This report contained a further 31 recommendations and will be tabled in accordance with section 29(5) of the *Independent National Security Legislation Monitor Act 2010*. The Government will also consider this report carefully and respond in due course. The Government is committed to working through the comprehensive package of independent review recommendations provided over the previous three years, and to continue to engage constructively with the wide range of standing oversight, accountability and scrutiny bodies exercising responsibilities in relation to counter-terrorism legislation, including this Committee.¹⁰

10 See Appendix 2, Letter from the Hon Josh Frydenberg MP, Parliamentary Secretary to the Prime Minister, to Dean Smith, 10 April 2014, [p. 4].

Committee response

2.52 The committee thanks the Parliamentary Secretary for his response.

2.53 However, the committee notes the relevance of the monitor's recommendations to the human rights compatibility of Australia's counter-terrorism and national security legislation. The committee will further consider the human rights compatibility of the repeal of the INSLM Act in light of the government's response to the recommendations of the monitor, once released.