# Chapter 2

## Key issues

2.1 Submitters to the inquiry generally expressed a view that the Independent National Security Legislation Monitor (Monitor) fulfils an important function in providing independent scrutiny of the ongoing operation and relevance of Australia's national security and counter-terrorism laws. For example, the Muslim Legal Network (NSW) stated:

> As counter terrorism and national security legislation is and will continue to react and respond to international events and conflicts, the need for continual review and scrutiny of such legislation due to its nature is a necessary safeguard against the undue violation of human rights in Australia. Furthermore, as the [Monitor] has immense information gathering powers and is privy to classified material, the position also assists in providing public confidence that the laws are necessary, effective and proportionate to any national security concerns.[1]

2.2 While many submitters were supportive of the intent of the Bill to strengthen the role of the Monitor, opinions were divided in relation to the specific measures proposed by the Bill.

### Power to review proposed as well as existing legislation

2.3 Submitters expressed mixed views about the proposal to enable the Monitor to review proposed as well as existing legislation. The Law Council of Australia (Law Council) argued that the Monitor should be allowed to initiate advice to government on proposed counter-terrorism and national security legislation:

> Doing so would be of great assistance to law enforcement and security agencies, the Government, the Parliament and the public. It would enable stakeholders to obtain independent advice and high level expertise to help ensure that proposed laws are more likely to operate in an effective and accountable manner, consistent with human rights and counter-terrorism and international security obligations.[2]

2.4 The Human Rights Law Centre also supported this proposed amendment:

> At present, the [Monitor] is only empowered to review laws once they have been enacted. This is a missed opportunity for Parliament to access the [Monitor's] expert, independent advice during the development of legislation. As the independent, ongoing, and expert review body charged by the Australian Government with reviewing counter terrorism laws, the [Monitor] can make a valuable contribution which is likely to improve

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1 *Submission 9*, p. 5.

2 *Submission 2*, p. 2. The Law Council also suggested that a change in the wording of the clauses implementing these provisions be made to refer to whether proposed counter-terrorism and national security legislation 'is likely to be' (rather than 'would be') effective.

> proposed legislation and reduce the need for subsequent changes and further consideration by Parliament.[3]

2.5 The Australian Human Rights Commission (AHRC) expressed the view that the Monitor's expertise should be utilised when changes to national security legislation are proposed, and noted that 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'.[4]

2.6 The Public Law and Policy Research Unit, University of Adelaide, argued that the existing mechanisms of parliamentary oversight would be complemented by the Monitor's proposed involvement in this process:

> [C]ommittees 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, 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.
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> … 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.[5]

2.7 Conversely, the Gilbert + Tobin Centre for Public Law disagreed that the Monitor's role should be expanded to include scrutiny of proposed legislation. It noted that the establishment of the role of the Monitor in Australia was partly modelled on the United Kingdom's Office of the Independent Reviewer of Terrorism Laws, and that expanding the Monitor's role to provide pre-enactment scrutiny of legislation would 'add a function to the office that is neither possessed by its United Kingdom antecedent nor was envisioned by any of the major reviews which recommended its creation in Australia'.[6] The Gilbert + Tobin Centre argued further:

> Empowering the Monitor to assess anti-terrorism bills would risk distorting the political debate and parliamentary scrutiny of such measures. In this context the Monitor's views would necessarily be of a more speculative (albeit, still highly-informed) nature than his existing reporting function which is based on observation, including access to highly classified material and discussion with police and intelligence services staff, of the law's operation. Yet inevitably the Monitor's views on any draft legislation would occupy a privileged place in debate about the proposed measures

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3 *Submission 7*, p. 4.

4 *Submission 4*, p. 2. See also: Civil Liberties Councils across Australia, *Submission 10*, p. 4; Media, Entertainment and Arts Alliance, *Submission 5*, p. 6; The Law Society of New South Wales, *Submission 6*, p. 1; Muslim Legal Network (NSW), *Submission 9*, p. 6.

5 *Submission 1*, pp 2 and 3.

6 *Submission 3*, p. 2.

> despite the fact that the challenge of safeguarding the Australian community and preserving essential freedoms is a fine balance and often turns on questions of degree and differing perspectives.[7]

2.8 The Gilbert + Tobin Centre contended that enabling the Monitor to assess bills before Parliament would 'have the unfortunate effect of the Monitor being drawn into the political fray and thus endangering the perception of his or her independence'.[8] It also argued that commenting on bills under consideration could risk prejudicing future post-enactment scrutiny of these bills in the event they became law.[9]

2.9 Ms Teneille Elliott, who worked as the Advisor to the former Monitor Mr Brett Walker SC from 2011 to 2014, agreed with Gilbert + Tobin's analysis and noted additionally that practical considerations were also relevant:

> The [Monitor's] statutory functions should not be expanded to include pre-enactment review of counter-terrorism and national security legislation. Given the scope of the existing functions of the [Monitor], it would be impractical for the [Monitor] to conduct reviews of existing as well as proposed legislation. It is difficult to see how the [Monitor] would have the capacity to conduct his or her annual reviews, reviews into matters referred by the Prime Minister and parliamentary committees, as well as conduct pre-enactment review.[10]

2.10 The Attorney-General's Department (department) argued that existing parliamentary oversight of proposed laws was already adequate, and that the Monitor's independence and objectivity could be called into question if it were to comment on proposed legislation:

> The role of scrutinising proposed legislation is already performed by parliamentary committees such as this Committee, the Parliamentary Joint Committee on Intelligence and Security (PJCIS), the Senate's Standing Committee for the Scrutiny of Bills…and the Parliamentary Joint Committee on Human Rights.
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> Additionally, requiring the [Monitor] to review and comment on proposed legislative measures risks jeopardising the independence and the objectivity of the [Monitor] when called on to review the operation and effectiveness of national security laws which the [Monitor] has assisted to develop.[11]

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7 *Submission 3*, p. 2. See also: Ms Teneille Elliott, *Submission 12*, p. 8.

8 *Submission 3*, p. 3. See also: Castan Centre for Human Rights Law, *Submission 8*, [p. 3].

9 *Submission 3*, p. 3.

10 *Submission 12*, p. 8.

11 *Submission 11*, p. 2.

## Referrals from Senate committees and the AHRC

2.11 Submitters commented in some detail on the proposed amendments that would allow the Senate Legal and Constitutional Affairs Committees and the AHRC to refer matters to the Monitor.

### *Referrals from the Senate Legal and Constitutional Affairs Committees*

2.12 Several submitters expressed support for the proposal to allow references to the Monitor by the Senate Legal and Constitutional Affairs Committees. For example, the Civil Liberties Councils across Australia stated that 'these proposed amendments widen the independent character of the Monitor by broadening the base to which it can provide expert advice'.[12]

2.13 The Castan Centre for Human Rights Law expressed partial support for the proposal to allow referrals by the Legal and Constitutional Affairs committees:

> [T]he Castan Centre does not support the proposal that the [Monitor] provide advice to a Committee on Legal and Constitutional Affairs pertaining to the likely operation and effect of proposed legislation. However, if a Committee on Legal and Constitutional Affairs, in order to support its own functions, wished to receive information on the operation and effect of existing national security legislation, then it would be appropriate for it to refer such a matter to the [Monitor] for reporting to the Committee.[13]

2.14 Ms Elliott noted, however, that there is currently no legal impediment that would prevent the [Monitor] from providing a briefing to parliamentary committees, or appearing before parliamentary committees at hearings into proposed legislation, and that the former Monitor, Mr Walker SC, had contact with the PJCIS and appeared at an Estimates hearing of the Senate Finance and Public Administration Legislation Committee.[14]

2.15 Ms Elliott stated further:

> As a matter of practicality, the idea of multiple parliamentary committees referring matters to the [Monitor] has the potential to significantly impact on the [Monitor's] ability to carry out his or her statutory mandate, and the requirement to provide annual reports on the carrying out of those duties. If the [Monitor] received several referrals from different parliamentary committees at the same time it would be impractical for the [Monitor] to carry out all of these, in addition to any referrals from the Prime Minister and the [Monitor's] statutory obligations for annual reviews and reporting.[15]

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12 *Submission 10*, p. 5. See also: Law Council of Australia, *Submission 2*, p. 3; Human Rights Law Centre, *Submission 7*, pp 4-5; Muslim Legal Network (NSW), *Submission 9*, p. 6; Australian Human Rights Commission, *Submission 4*, p. 3.

13 *Submission 8*, [p. 3].

14 *Submission 12*, p. 10.

15 *Submission 12*, p. 11.

2.16 The Gilbert + Tobin Centre opposed the idea of granting the committees referral powers, as it did not support the referral of proposed legislation under the consideration of parliament to the Monitor.[16]

2.17 The department argued that extending referral powers to the Legal and Constitutional Affairs Committees was not warranted:

> It is appropriate that the PJCIS and the Prime Minister remain able to refer matters to the [Monitor] having regard to the national security responsibilities vested in those roles. Expansion of referral powers to non-national security bodies may not be appropriate. Further, expansion of the bodies from which referrals may be received may pose an unreasonable impost on the [Monitor's] resources.[17]

***Referrals from the Australian Human Rights Commission***

2.18 The Civil Liberties Councils across Australia supported the amendment to give the AHRC powers to refer matters to the Monitor, stating that enhancing communications between the AHRC and the Monitor 'will undoubtedly enable the Monitor to better assess the human rights impact of proposed and existing counter-terrorism or national security laws on human rights'.[18]

2.19 The Muslim Legal Network (NSW) supported the proposal on the basis that it would enable community concerns about the practical effects of national security laws to be heard:

> [This proposed amendment] will allow minority groups to make complaints to the AHRC in relation to the practical implications of these laws. It will then allow the AHRC to further investigate these complaints and forward to the [Monitor] only when appropriate. This will streamline the concerns that ordinary Australians may have in relation to the practical implications of these laws…expanding the power of referral to the AHRC allows minority groups to bring attention to the practical implications of these laws with the [Monitor].[19]

2.20 Conversely, the Law Council of Australia did not agree that the AHRC should be given the power to refer matters to the Monitor, stating that 'it may not be appropriate for a statutory authority to require the [Monitor] to conduct inquiries, and this may lessen the independence of the [Monitor]'.[20]

2.21 Ms Elliott also opposed the idea of granting referral powers to the AHRC or other third parties:

> It is unclear as to how the independence of the [Monitor] could be enhanced through increasing the control of third parties over the [Monitor's] review

16 *Submission 3*, p. 4.

17 *Submission 11*, pp 2-3.

18 *Submission 10*, p. 4. See also: The Law Society of New South Wales, *Submission 6*, p. 1.

19 *Submission 9*, pp 5-6.

20 *Submission 2*, p. 3.

> functions, including his or her work plan and work load. Rather, such third party control is more likely to erode the independence of the [Monitor] by prescribing the subject matter and timeframe of how the [Monitor] conducts his or her work and limiting the [Monitor's] influence over his or her own work agenda.[21]

2.22 The AHRC was also unsupportive of the proposal that it be able to refer matters to the Monitor for inquiry:

> 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.
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> 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 [PJCIS] (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.[22]

2.23 The department agreed that an efficient and effective dialogue between the Monitor and the AHRC is already facilitated under the existing framework of the INSLM Act, without needing to give the AHRC referral powers:

> Section 3 of the Act already requires the [Monitor] to assist Ministers in ensuring Australia's national security laws are consistent with Australia's international obligations including human rights considerations. The [Monitor] may seek information from the AHRC should it wish further consideration of human rights matters.[23]

## Staffing and operational arrangements

### *Full-time appointment of the position of Monitor*

2.24 The AHRC expressed support for the proposal that the position of Monitor be full time 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...It appears that the Monitor would be better placed to efficiently carry

21 *Submission 12*, p. 9.

22 *Submission 4*, p. 3. See also: Gilbert + Tobin Centre for Public Law, *Submission 3*, pp 4-5; Castan Centre for Human Rights Law, *Submission 8*, [p. 3].

23 *Submission 11*, p. 3.

> out the necessary statutory functions if the position were full time and appropriately resourced.[24]

2.25 The Law Council argued that an ability to appoint a full-time Monitor should be optional, rather than mandatory:

> The Law Council supports amending the INSLM Act to permit the [Monitor] to be appointed on a full-time or a part-time basis. Flexibility in making appointments may encourage well-qualified individuals to offer their services. Such matters should be able to be discussed between nominees, the Prime Minister and the Opposition Leader. Accordingly, the Law Council does not support Schedule 1, Item 14 of the Bill because it does not support this requirement for flexibility.[25]

2.26 The Gilbert + Tobin Centre expressed the view that the role of the Monitor is best served by a part-time appointment, or multiple part-time appointments:

> Section 11(1) of the INSLM provides that the Monitor is to be appointed on a part-time basis. In debates about the creation of the office, it was accepted that this constituted a guarantee of its independence. The Monitor is not reliant on the position for income and is thus not beholden to the government…
>
> [I]f workload remains a concern, then rather than appointing one full-time Monitor, we would advocate revisiting the idea of a panel of three part-time Monitors…In 2008, while acknowledging that a single appointment 'offers administrative simplicity and possibly financial advantages', the Senate Standing Committee on Legal and Constitutional Affairs ultimately recommended a panel of part-time reviewers be appointed. In doing so it cited not just the issue of workload, but also 'the opportunity to stagger new appointments, therefore promoting continuity over time' and reducing 'the risk of perceived lack of independence' that might come with a lone reviewer.[26]

2.27 The Public Law and Policy Research Unit, University of Adelaide, agreed that a part-time appointment was more appropriate:

> The workload of the [Monitor] 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

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24 *Submission 4*, pp 3-4. See also: Civil Liberties Councils across Australia, *Submission 10*, p. 5; Human Rights Law Centre, *Submission 7*, p.4.

25 *Submission 2*, p. 3. See also: Castan Centre for Human Rights Law, *Submission 8*, [p. 2].

26 *Submission 3*, pp 5-6.

> would accept the appointment to the role if it is changed to a full-time position.[27]

2.28 The department concurred with the view that due to the variability of the workload, the Monitor's position should be part-time and flexible, and agreed that one of the potential consequences of changing the position to full-time would be that the pool of candidates available to fill the position would become more limited.[28]

*Ability to hire staff and delegate responsibilities*

2.29 Some submitters also commented on the proposed new ability of the Monitor to hire staff. Ms Elliot expressed support for the establishment of the Office of the Monitor as a statutory agency with the ability to hire its own staff:

> Important benefits from the proposed amendments would include providing the [Monitor] with control over financial matters (enabling independence in the expenditure of funds in the fulfilling of his or her statutory functions). The proposed amendments would also provide the [Monitor] with the ability to determine the appointment of his or her own staff, rather than being provided with staff from the Department of the Prime Minister and Cabinet…Staff of independent oversight bodies are generally not employed by a department or agency which that body oversights. The [Monitor] should be entitled to satisfy him or herself that the person appointed has the requisite qualifications and experience, and to ensure there is no conflict of interest or perceived conflict of interest between the duties the person is required to perform on behalf of the [Monitor] and any other positions they may hold.[29]

2.30 The Gilbert + Tobin Centre disagreed with the specific proposal (under proposed new section 20A of the Bill) that the Monitor be enabled to employ individuals for the purposes of assisting with specific inquiries of the Monitor:

> [W]e are not persuaded of the…desirability of enabling the Monitor to 'appoint an expert to assist with a particular inquiry'. Even noting the presence of a similar power held by the Inspector-General of Intelligence and Security, this seems to run counter to the purposes of the Monitor as an independent watchdog of the anti-terrorism laws, their operation, effectiveness and impact. Those functions seem ones which should be able to be fulfilled by an appropriate appointee without the need for supplementation.[30]

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27 *Submission 1*, p. 5. See also: Ms Teneille Elliott, *Submission 12*, p. 7.

28 *Submission 11*, p. 3.

29 *Submission 12*, p. 7.

30 *Submission 3*, p. 6. See also: Castan Centre for Human Rights Law, *Submission 8*, [p. 2].

### *Requirement for the position of Monitor to be filled within three months*

2.31 Submitters were generally supportive of the proposed requirement for the position of Monitor to be left vacant for no longer than three months.[31] The Law Council stated that 'it is valuable for there to be an incumbent in the office of the [Monitor] when counter-terrorism proposals are progressed'.[32]

2.32 The Public Law and Policy Research Unit, University of Adelaide stated:

> 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.[33]

2.33 It noted, however, that if the proposed amendment was passed and the government chose to ignore the new requirement to appoint a Monitor 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'.[34]

2.34 In relation to this proposed amendment, the department stated that 'prescribing a maximum vacancy period could raise practical issues and limit the flexibility required of the role'.[35]

## Tabling of reports and government responses

2.35 The majority of submissions expressed support for the proposed requirement for a formal government response to the Monitor's reports to be tabled in Parliament within six months.[36] For example, the AHRC stated:

> 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 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. A statutory requirement for a response on behalf of the Government within a reasonable period of time would

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31 See, for example: Gilbert + Tobin Centre for Public Law, *Submission 3*, p. 6; Castan Centre for Human Rights Law, *Submission 8*, [p. 2].

32 *Submission 2*, p. 3.

33 *Submission 1*, p. 4.

34 *Submission 1*, p. 4.

35 *Submission 11*, p. 3.

36 See, for example: Civil Liberties Councils across Australia, *Submission 10*, p. 5; Castan Centre for Human Rights Law, *Submission 8*, [p. 3]; Muslim Legal Network (NSW), *Submission 9*, p. 7.

> assist in focussing attention on the recommendations made by the Monitor.[37]

2.36 The Gilbert + Tobin Centre welcomed these proposed amendments, stating that the requirement of a government response would 'enhance the Monitor's utility as an ongoing mechanism to ensure Australia has the anti-terrorism laws that it needs and which are both working effectively and with the least possible interference with fundamental freedoms'.[38] It cautioned, however:

> The type of response provided by the government should ideally be one which respects the purpose and function of independent scrutiny. It must not become an easy box-ticking exercise which the government can fulfil simply by publishing vague assertions about 'supporting' the Monitor's recommendations in principle or keeping the Monitor's recommendations 'under review'.[39]

2.37 Ms Elliott expressed strong support for a legislated statutory time limit for government responses to reports of the Monitor. She suggested, however, that rather than the six month time period proposed by the Bill, the requirement should be modelled on the existing guidelines issued by the Department of the Prime Minister and Cabinet for responding to parliamentary committee reports, which set a general limit of three months from the time a committee report is presented to Parliament.[40]

2.38 The department did not support a statutory time limit for government responses to reports of the Monitor:

> It is important for the government to be able to prioritise its legislative agenda, particularly in the context of a changing security environment. Having regard to the complexity of the issues which may be raised within each INSLM report, it may not be appropriate or practicable to prescribe a six monthly reporting timeframe. The changing security environment, including intervening events, may require focus on alternative security issues. A six month deadline would be inconsistent with the flexibility required to respond to emerging challenges.
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> The Department notes all of the [Monitor's] recommendations have been considered by government and those considered to be the most pressing gaps in Australia's counter terrorism legal framework have been addressed through legislative change.
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> The government has adopted many of the [Monitor's] recommendations to date, and continues to consider and review the remaining… recommendations.[41]

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37 *Submission 4*, p. 4. See also: Law Council of Australia, *Submission 2*, p. 4.

38 *Submission 3*, p. 7.

39 *Submission 3*, p. 7.

40 *Submission 12*, p. 3.

41 *Submission 11*, p. 4.

## Committee view

2.39 The committee agrees with submissions to the inquiry that, in the rapidly changing security environment Australia now faces, the Independent National Security Legislation Monitor plays an important role in ensuring that the Commonwealth's counter terrorism and national security laws remain up-to-date and effective in dealing with emerging threats, without disproportionately impacting our freedoms and civil liberties.

2.40 The committee considers, however, that the INSLM Act in its current form already provides a sound legal framework that allows the Monitor to fulfil his or her functions. In the view of the committee, the measures proposed in this Bill will not materially increase the effectiveness of the role of Monitor, and in some cases will detract from the Monitor's ability to independently and objectively examine Australia's national security laws.

2.41 In relation to the proposal that the Monitor should be enabled to review proposed legislation, the committee agrees with the view put forward by several submitters that this could potentially distort the political debate and parliamentary scrutiny of such measures, and would risk undermining the Monitor's perceived independence and impartiality. The committee considers that the position of Monitor should continue to function as a unique post-enactment review mechanism of security laws, separate to the system of parliamentary scrutiny involved in assessing proposed legislation.

2.42 The committee does not support the proposals to allow referrals to the Monitor from the Senate Legal and Constitutional Affairs Committees and the AHRC. The committee considers that the ability of the Prime Minister and the PJCIS to refer matters to the Monitor, as well as the Monitor's ability to initiate own-motion inquiries, constitute sufficient referral powers to enable the Monitor to fulfil its statutory functions. The committee also notes that the AHRC itself is not supportive of the proposal to allow it to refer matters to the Monitor.

2.43 On issues of staffing, the committee is of the view that a flexible, part-time appointment is most appropriate for the Monitor at the current time. The committee does not consider that a sufficient case has been made to justify changing the role to a full-time position or supplement it through the appointment of additional staff.

2.44 The committee notes that while the position of Monitor was vacant for several months after the cessation of the initial appointee's term, the subsequent appointment of the Hon Roger Gyles QC has ensured that the operation of the suite of security-related laws passed in 2014 will be the subject of ongoing review in coming years. The committee agrees with the department's view that creating a statutory maximum vacancy period of three months could create practical issues and limit the flexibility required in recruiting a qualified individual to the position of Monitor.

2.45 Finally, the committee agrees with the department's evidence that it may not be appropriate or practicable to prescribe a six month reporting timeframe for the government to provide an official response to reports of the Monitor. The committee notes that the government has formally responded to many recommendations made by

the Monitor, with the additional recommendations made by the Monitor remaining under active consideration by the government.

**Recommendation 1**

**2.46 The committee recommends that the Senate not pass the Bill.**

**Senator the Hon Ian Macdonald**
**Chair**