Dissenting Report of the Australian Greens

1.1 The enactment of the Independent National Security Legislation Monitor (Improved Oversight and Resourcing) Bill 2014 (the Bill) is critical to ensuring that the position of Independent National Security Legislation Monitor (the Monitor) is able to effectively fulfil its mandate as an independent source of advice on Australia's extensive and ever-growing counter-terrorism and national security laws. For these reasons, the Australian Greens recommend that the Bill be passed.

1.2 The Majority Report contains a useful summary of the history of the appointment of the Monitor and a description of the Monitor's current role, as well as an accurate overview of this Bill.

1.3 While some of the key issues raised by submission makers are acknowledged in the Majority Report, further relevant issues require consideration and are outlined below.

1.4 It is disappointing that the Majority Report did not take the opportunity to recommend changes to the existing legal framework for the Monitor, particularly changes that received overwhelming support from submission makers to this inquiry and are necessary for the effective functioning of this critical oversight role.

General Support for the Bill

1.5 As briefly noted in the Majority Report, strong support was expressed by submission makers for improvements to the existing Monitor regime, particularly at this time of unprecedented expansion of Australia's national security legislation. As Ms Teneille Elliot, advisor to the former Monitor Mr Bret Walker SC, submitted:

> With the recent reforms to the national security legislative framework and use of never before used counter-terrorism powers, the role of the INSLM is arguably more important than ever before. The 2014 legislative reforms to the counter-terrorism and national security legislation represent the most extensive reforms in this policy area in over a decade.
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> …
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> The 2014 reforms have increased the need for the INSLM to assess Australia's counter-terrorism laws for consistency with international obligations and impact on individual rights. The increased powers given to agencies through these reforms has also increased the need for the INSLM to perform the important watchdog task of investigating whether the provisions have been used for matters unrelated to terrorism or national security.[1]

1.6 In the last year alone, the government has introduced four significant pieces of legislation which have implications for national security:

- the Counter-Terrorism Legislation Amendment Bill (No. 1) 2014;

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1 Ms Teneille Elliott, *Submission 12*, pp 1-2.

- the National Security Legislation Amendment Bill (No. 1) 2014;
- the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014; and
- the Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014.

1.7 Further controversial changes to national security laws relating to citizenship have been flagged for introduction in coming sitting weeks.

1.8 The need for timely, independent and expert scrutiny of these laws—both to determine whether they are necessary, effective and proportionate, and to test their impact on the human rights of ordinary Australians—was emphasised by all non-government submission makers to this inquiry. For example, the Muslim Legal Network submitted that:

> Since July 2014, there have been significant changes to counter terrorism legislation in Australia. Throughout this period, the Muslim Legal Network (NSW) has expressed extreme concern at the haste and rate that these laws, which carry significant implications for human rights in Australia, have been passed. These include lowering the threshold required to obtain various warrants, expanding the scope of control orders and criminalising the mere travel of Australian citizens to certain areas. These laws are of particular concern to the Australian Muslim community as they had had a disproportionate effect and impact on that community.[2]

1.9 In its submission, the Human Rights Law Centre (the HRLC) stated:

> The serious human rights risks posed by the powers granted to police and other security and intelligence agencies under counter terrorism laws require comprehensive and dedicated oversight and accountability provided by an ongoing, fully informed, expert and independent reviewer.[3]

1.10 The Media, Entertainment & Arts Alliance submitted that it:

> …is concerned that counter-terrorism and national security legislation introduced and passed by the Australian Parliament, particularly but not exclusively during 2014, as well as proposed legislation, contain extraordinary assaults on press freedom, freedom of expression, the right to privacy and the freedom of access to information.
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> Many of these laws have been rushed through Parliament with haste, without sufficient time spent on detailed discussion and debate or allowance for widespread public consultation over the considerable changes that affect every Australian.[4]

1.11 It is in this context that this Bill was introduced. Its passage into law is the only way to preserve and enhance the role of the Monitor and to make sure that the

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2 Muslim Legal Network (NSW), *Submission 9*, p. 3.

3 Human Rights Law Centre, *Submission 7*, p. 1.

4 Media, Entertainment & Arts Alliance, *Submission 5*, p. 3.

Australian community will never again be left without access to independent, expert advice about extraordinary national security and counter-terrorism laws that place at risk fundamental individual rights and freedoms.

1.12 Widespread and deep respect for the position of Monitor, and in particular for the work of the first Monitor Mr Bret Walker SC, has been reflected in the submissions made to this inquiry, as well as in submissions made to past inquiries by this Committee in response to the Abbott Government's misguided attempt to abolish the position in March 2014.[5]

1.13 The ongoing need for a Monitor has been emphasised in the submissions to this inquiry, which have also drawn attention to the fact that the position of Monitor was left vacant precisely at the time that the Abbott Government pushed its intrusive and extraordinary counterterrorism laws through Parliament. For example, the Australian Human Rights Commission submitted that:

> 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…
>
> 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.[6]

1.14 The Law Council of Australia submitted that:

> The Law Council endorses many of the Bill's objectives which highlight the importance of the role of the Independent National Security Legislation Monitor (INSLM) which continues to be a necessary and effective form of scrutiny of Australia's national security and counter terrorism legislation.[7]

1.15 Many submission makers also expressed deep disappointment at the lack of comprehensive and timely responses, by successive Commonwealth governments, to the reports of the first Monitor. For example, the Human Rights Law Centre submitted that:

> …the role of the INSLM is underutilised and undermined by the Government's failure to act on the INSLM's previous recommendations. The HRLC urges the Committee to recommend that the Government implement the recommendations of the former INSLM in the reviews published in his series of annual reports as soon as possible.[8]

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5 Independent National Security Legislation Monitor Repeal Bill 2014.

6 Australian Human Rights Commission, *Submission 4*, p. 1.

7 Law Council of Australia, *Submission 2*, p. 1.

8 Human Rights Law Centre, *Submission 7*, p. 3.

1.16 This consensus among human rights bodies, legal experts and certain community organisations as to the value of the position of Monitor and the need for the position to be filled and adequately resourced to undertake its rapidly growing review task led the Australian Greens to introduce this Bill, which provides practical mechanisms to enhance and preserve the position of Monitor and its critical review functions.

1.17 Many submission makers to this inquiry expressed their full support for the objectives of the Bill and its provisions. For example, the MEAA submitted that it:

> …believes that the Bill, if enacted, will help ensure Australia's national security regime is appropriate and proportionate to the needs of the Australian community and that Australia's human rights obligations, including those relating to freedom of expression, the right to privacy and freedom to access information, are met and observed.
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> …
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> MEAA believes that the amendments outlined in the Bill will allow for the concerns of the MEAA and others in community, to be raised about the erosion of human rights, particularly freedom of expression, the right to privacy and freedom to access information.[9]

1.18 The Public Law and Policy Research Unit of Adelaide University also expressed strong support for the Bill noting that the Monitor is uniquely placed to provide the public and the Parliament with independent and expert advice about national security laws, and offers distinct benefits when compared to existing parliamentary scrutiny Committees such as the Senate's Legal and Constitutional Affairs Committee, the Parliamentary Joint Committee on Intelligence and Security, the Senate's Standing Committee for the Scrutiny of Bills, and the Parliamentary Joint Committee on Human Rights (PJCHR):

> …In all the 2014 reports tabled by the above parliamentary committees regarding proposed national security legislation, much reliance was placed on the views of the INSLM who is equipped with a broad scope of inquiry and access to relevant information. This points to the need to expand the INSLM's remit to include scrutiny of proposed laws so as to strengthen the nature of parliamentary scrutiny performed by these parliamentary committees. 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.[10]

Particular Support for Extended Powers to Review Proposed Laws

1.19 One of the key amendments proposed in this Bill is designed to ensure that the Monitor is able to provide the Parliament and the public with an expert, independent

9 Media, Entertainment & Arts Alliance, *Submission 5*, pp 6-7.

10 Public Law and Policy Research Unit, University of Adelaide, *Submission 1*, p. 3.

assessment of any proposed additions or changes to counter-terrorism or national security laws before they are enacted into legislation.

1.20 As the Majority Report noted a number of submission makers expressed particular support for this aspect of the Bill, including the AHRC,[11] the HRLC[12] and the Law Council of Australia,[13] and the Muslim Legal Network agreed, noting that:

> As the INSLM has immense information gathering powers and is privy to classified material, the position will benefit the public in assessing whether any proposed laws are necessary, effective and proportionate to any national security concerns.[14]

1.21 The Public Law and Policy Unit of Adelaide University explained the benefits of this extended power in more detail, submitting that:

> There is a logical connection between the INSLM's current role of monitoring existing legislation, and an expanded role of reviewing proposed legislation. Engaging the INSLM at this earlier stage of the legislative process enables the INSLM to shape security legislation as well as reviewing its effectiveness. The review function can only be enacted by the INSLM's engagement earlier in the legislative process.
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> The expansion of the INLSM's review function would enable it to advise Parliament about how proposed reforms would interact with existing national security laws. For example, in the 2014 reforms, a number of changes were implemented to the control order regime to broaden the regime's reach and lower the threshold to apply for control orders. The 2012 Report of the INSLM had recommended the repeal of the control order regime. Parliament would have been greatly assisted by an INSLM review of the proposed changes against the current national security threat, particularly in light of the recommendations made in the 2012 Report.
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> Providing the INSLM with the function of reviewing proposed legislation would also be of great assistance to the government. National security legislation is highly sensitive and is often at the margins of what is constitutionally permitted. The INSLM is in a strong position to offer both practical advice on the most effective operation of security laws, and also to assess whether proposed laws are within constitutional bounds.[15]

1.22 By specifically empowering the Monitor to inquire into and report on proposed as well as existing counter-terrorism laws, the Bill will also assist in addressing a number of the concerns raised by the PJCHR relating to the speed at which counter-terrorism reforms have proceeded through Parliament. For example, the PJCHR has observed that:

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11 Australian Human Rights Commission, *Submission 4*, p. 2.

12 Human Rights Law Centre, *Submission 7*, p. 4.

13 Law Council of Australia, *Submission 2*, p. 2.

14 Muslim Legal Network (NSW), *Submission 9*, p. 6.

15 Public Law and Policy Research Unit, University of Adelaide, *Submission 1*, pp 3-4.

> [t]he apparent urgency with which the national security legislation is being passed through the Parliament is inimical to legislative scrutiny processes, through which the committee's assessments and dialogue with legislation proponents is intended to inform the deliberations of senators and members of the Parliament in relation to specific legislative proposals. The committee is concerned that the capacity of legislative scrutiny to contribute to achieving the fine balance between the preservation of traditional human rights and freedoms and the maintenance of national security is limited where the passage of such legislation is expedited.[16]

Particular Support for Expanding Source of References

1.23 Currently, only the Prime Minister and the Parliamentary Joint Committee on Intelligence and Security can refer matters to the Monitor for review and report. This limits the independent character of the Monitor, and can leave the Parliament without access to independent, expert advice on proposed and existing counter terrorism and national security laws.

1.24 This Bill aims to ensure that the two Committees on Legal and Constitutional Affairs—who are regularly involved in scrutinising proposed and existing counter terrorism laws—are empowered to refer relevant matters to the Monitor for review and reform.

1.25 In the last year, for example, these Committees considered at least six separate Bills that sought to reform or add to Australia's counter-terrorism and national security legislation. The vast majority of these Bills were considered while the position of Monitor remained vacant and without the benefit of a formal government response to the past recommendations made by the Monitor.

1.26 This amendment will enable these Committees—that comprise of membership from a more representative cross section of the Parliament—with the opportunity to refer matters to the Monitor for review and inquiry.

1.27 The Bill also enables the Australian Human Rights Commissioner to refer matters to the Monitor for inquiry. This aspect of the Bill received particular support from some submission makers including the Muslim Legal Network that submitted:

> Expanding these [referral] rights to the AHRC will allow minority groups to make complaints to the AHRC in relation to the practical implication of these laws. It will then allow the AHRC to further investigate these complaints and forward to the INSLM only when appropriate. This will streamline the concerns that ordinary Australians may have in relation to the practical implications of these laws by limiting the power of referral to the AHRC.[17]

16 Parliamentary Joint Committee on Human Rights, *Fourteenth Report of the 44th Parliament*, 28 October 2014, pp 5-6.

17 Muslim Legal Network (NSW), *Submission 9*, p. 6.

Particular Support for Ensuring Position of Monitor is Not Left Vacant

1.28 Under the current Act, the Monitor is appointed for a period not exceeding three years. The first Monitor, Mr Bret Walker was appointed on 21 April 2011 and this term of office expired on 20 April 2014. It was not until 7 December 2014 that the Prime Minister announced that the Hon Roger Gyles AO would take up the position of Acting Monitor. As a result of this unjustified delay, the office remained vacant for approximately 7 months—a time period during which many very significant changes to Australia's counter-terrorism laws were introduced.

1.29 The deep disappointment generated by this cynical and disrespectful approach to the position of Monitor by the Abbott Government was reflected in the submission of the Gilbert + Tobin Centre for Public Law:

> The long silence as to the successor to Mr Bret Walker SC as Monitor after his term concluded on 20 April was deeply unsatisfactory, especially after the government's decision earlier in the year to abolish the office all together (which is subsequently abandoned) and the later prominence of terrorism and national security issues, including fresh legislative response in the national spotlight by September.[18]

1.30 The Bill seeks to prevent this scenario arising in the future by requiring the Prime Minister to take the appropriate steps towards appointing a permanent Monitor within three months of the position becoming vacant. This time frame provides adequate scope for expressions of interest to be sought and considered, while ensuring that the position is not left vacant for a prolonged period of time.

Particular Support for Requiring Timely Government Response to Monitor's Reports

1.31 Under the current Act, the Monitor is required to provide an Annual Report to the Prime Minister which must be tabled in Parliament. However, there is no statutory requirement for the government to respond to the Monitor's report, or the findings and recommendations made therein.

1.32 As a result, it has been possible for successive Commonwealth governments to ignore or fail to comprehensively respond to the first Monitor's four Annual Reports, effectively undermining the practical value of the independence and expertise the Monitor brings to bear to his or her critical review work. As the first Monitor observed in his 2014 Report:

> Where there is no apparent response to recommendations that would increase powers and authority to counter terrorism, some scepticism may start to take root about the political imperative to have the most effective and appropriate counter-terrorism laws. That would be, in the opinion of the INSLM, a regrettable atmosphere in which future and continued assessment and improvement of Australia's CT laws are undertaken.[19]

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18 Gilbert + Tobin Centre of Public Law, *Submission 3*, p. 6.

19 Mr Bret Walker SC, *National Security Legislation Monitor Annual Report 2014* p. 2.

1.33 This Bill aims to remedy this unsatisfactory situation by inserting a new provision into the Act which would require the Prime Minister, within 6 months of the Annual Report being presented to a House of the Parliament, to make a statement to the Parliament setting out the action that the government intends to take in relation to the report.

1.34 A number of submission makers supported this amendment. For example, in its submission, the AHRC noted that:

> 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).
>
> 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 assist in focussing attention on the recommendations made by the Monitor.[20]

Particular support for Establishment of the Office of the Monitor as a Listed Entity

1.35 Particular support for the establishment of the Office of the INSLM as a listed entity for the purposes of finance law and as a Statutory Agency was provided by Ms Elliot, advisor to the former INSLM. Ms Elliot described the benefits of this approach as including: 'providing the INSLM with control over financial matters (enabling independent in the expenditure of funds in the fulfilling of his or her statutory function)' and providing the INSLM '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'.[21] Ms Elliot expressed the view that 'both of these are necessary precursors to at least the perception that the INSLM is fulfilling his or her role in a way that is truly independent (emphasis in the original)'.[22]

Addressing Issues Raised in Submissions

1.36 The Australian Greens are grateful for the thoughtful submissions provided by human rights experts, legal representative bodies, media and entertainment advocacy bodies, community organisations and the Attorney-General's Department.

1.37 As noted above, all of the non-government submissions to this inquiry expressed strong support for the objects of the Bill and the need to preserve and enhance the role of the Monitor.

1.38 Some of those submissions suggested that certain aspects of the Bill could be improved, providing thoughtful alternatives that are worthy of careful consideration.

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20 Australian Human Rights Commission, *Submission 4*, p. 4.

21 Ms Teneille Elliott, *Submission 12*, p. 7.

22 Ms Teneille Elliott, *Submission 12*, p. 7.

Others suggested additional amendments that could be made to the Act to further enhance the role of the Monitor.

Pre-legislative Scrutiny

1.39 The Gilbert + Tobin Centre for Public Law provided a thoughtful submission that included a discussion of the merits of empowering the Monitor to review proposed as well as existing national security laws. This discussion included consideration of the role of the UK Independent Reviewer of Terrorism Laws and the history of the establishment of the position of Monitor in Australia. The Centre concluded that:

> Participating in pre-legislative scrutiny of proposed bills, might not only jeopardise the Monitor's independence, but might also risk prejudicing future post-enactment scrutiny.[23]

1.40 This view was shared by the Castan Centre on Human Rights Law,[24] and Ms Elliot,[25] however, as noted above, many other submission makers specifically endorsed or supported this aspect of the Bill.

1.41 The Australian Greens acknowledge that the proposed extension of the Monitor's role may have a significant impact on the public visibility and work load of the Monitor, which in turn may lead to greater public and parliamentary debate of the Monitor's views on proposed and existing national security laws. It is impossible to rule out the potential for more robust public debate to include accusations of partisanship or other bias, however the Australian Greens do not consider that this risk justifies restricting the Monitor's role to one of post-legislative scrutiny only.

1.42 As the submissions quoted above demonstrate, pre-legislative scrutiny by the Monitor has much to offer the public and the Parliament—both in terms of assisting in understanding whether any proposed changes or additions to national security laws are needed and will be effective, and in terms of ensuring that they are proportionate, having regard to Australia's human rights obligations.

1.43 In addition, there are many other bodies established under statute that have functions that include pre and post legislative scrutiny. The independence of these bodies, and the level of respect for their post-legislative scrutiny role, does not appear to have been compromised by the ability for them to provide pre-legislative review.

1.44 For example, pursuant to subsection 11(3) of the *Australian Human Rights Commission Act 1984* (Cth) it is a function of the Australian Human Rights Commission to examine both enacted laws and proposed laws (when requested to do so by the Minister) for the purpose of ascertaining whether the laws or proposed law 'may be, are, or would be, inconsistent with or contrary to any human right, and to report to the Minister the results of any such examination'. This function does not appear to have detracted from the Commission's post-legislative scrutiny functions or

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23 Gilbert + Tobin Centre of Public Law, *Submission 3*, p. 3.

24 Castan Centre for Human Rights Law, *Submission 8*, p. 3.

25 Ms Teneille Elliott, *Submission 12*, p. 8.

its complaints or inquiry functions that may relate directly to the proposed laws with respect to which the Commission has previously expressed a view.

1.45 Similarly, the Sex Discrimination Commissioner,[26] the Age Discrimination Commissioner[27] and the Disability Discrimination Commissioner[28] are all empowered to examine existing laws and (at the request of the Minister) proposed laws for the purpose of ascertaining whether these laws are consistent with the objects of their respective Acts, and to report to the Minister on the results of such examinations. These Commissioners are simultaneously empowered to, of their own initiative or when requested by the Minister, report to the Minister as to the laws that should be made by the Parliament, or action that should be taken by the Commonwealth, on matters relating to discrimination on the requisite grounds.

1.46 The Information Commissioner is also given powers under section 28A of the *Privacy Act 1988* (Cth) to examine proposed laws that might result in interferences with the privacy of individuals, or which may otherwise have any adverse effects on the privacy of individuals, and under section 31, to provide the Minister with reports on those proposed laws. This role does not appear to have detracted from the Information Commissioner's guidance and complaints roles—both of which directly involve the application of privacy laws or privacy principles in respect of which the Commissioner may have previously expressed a view.

1.47 It is also noted that the Australian Law Reform Commission's functions include pre and post legislative review. For example, under section 21 of the *Australian Law Reform Commission Act 1996* (Cth), the ALRC can review and report on proposals for consolidating or unifying laws, as well as reviewing and reporting on existing consolidated or unified laws.

1.48 The Australian Greens acknowledge that the United Kingdom's Independent Reviewer of Terrorism Laws does not have a clear legislative mandate to review *proposed* laws and is grateful for the details provided in relation to the UK Reviewer's role by the Gilbert + Tobin Centre. However, it is also apparent that both the current and former UK Reviewers have been outspoken in their public commentary on proposed laws and have on occasion directly assisted Parliament in understanding the content of the proposed laws and suggesting improvements. For example, earlier this year, the UK Reviewer appeared before the UK Parliamentary Committee on Human Rights to give evidence and provide suggestions for improvements in respect of the proposed 'temporary exclusion orders' contained in the *Counter Terrorism and Security Bill 2014* (UK).[29]

1.49 Indeed, a quick perusal of the current UK Reviewer's official website suggests that Mr David Anderson QC considers it well within his mandate to provide public

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26 *Sex Discrimination Act 1984* (Cth) s 48.

27 *Age Discrimination Act 2004* (Cth) s 53.

28 *Disability Discrimination Act 1992* (Cth) s 67.

29 A description of this appearance is available at https://terrorismlegislationreviewer.independent.gov.uk/the-judicial-oversight-of-teos/

commentary on proposed counter-terrorism laws and to ensure that his views are taken into account during parliamentary consideration of those proposed laws. This is confirmed by an article authored by Mr Anderson QC in July 2014, where he said:

> Of course, the influence of the Independent Reviewer cannot compare with that of Parliament or of the courts—and nor should it. But the Reviewer may, independently of any influence that he may exert in his own right, be able to contribute to the work of both. Thus:
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> • Opinions reached on the basis of the Independent Reviewer's interviews and researches, crucially including access to classified material, can influence the conclusions of parliamentary committees and the content of parliamentary debates—though less so in the case of the more politically charged debates, in which the Reviewer's reports, though often given prominence, tend to be selectively brandished rather than used as a source of insight.
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> • The Independent Reviewer's ability to look at the operation of anti-terrorism laws in a non-contentious atmosphere, and without restricting himself to such cases as may happen to be brought and such facts as the parties to those cases may have chosen to place in evidence, can similarly be of assistance to the courts in forming or confirming their own conclusions.[30]

1.50 In the same article, Mr Anderson QC went on to explain how he has assisted in the development of new counter-terrorism laws, prior to their enactment into law:

> There are areas, often technical and out of the public eye, in which a Reviewer can speak directly to Government and Government will simply do as it is advised. In that category belong the 12 recommendations that I made during my first term of office in relation to the procedures for operating the Terrorist Asset-Freezing etc. Act 2010, each of which has been promptly accepted and implemented by the Treasury.
>
> Direct influence may also be exerted privately and so undisclosably, for example through comments on a draft Code of Practice, discussions with intelligence chiefs or conversations with a Minister about the likely practical consequences of a clause being contemplated for inclusion in a Government Bill. Nor is such influence confined to Government; opposition spokespersons for example may quiz the Independent Reviewer in order to help inform their own policy positions, particularly on legal or operational issues with which they have little familiarity.[31]

1.51 These comments align with the observations quoted above from submission makers supporting the expanded role of the Australian Monitor to provide advice in respect of proposed, as well as existing counter terrorism laws. These comments—along with the case study examples outlined in Mr Anderson QC's article—also

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30 Mr David Anderson QC, 'The Independent Review of Terrorism Laws', (2014) *Public Law* 403. A copy of this article is available at https://terrorismlegislationreviewer.independent.gov.uk/what-does-a-terror-watchdog-do/

31 Mr David Anderson QC, 'The Independent Review of Terrorism Laws', (2014) *Public Law* 403.

support the amendments proposed in this Bill that would empower the Senate Committee on Legal and Constitutional Affairs to refer matters to the Monitor for inquiry.

Referral Powers for the AHRC

1.52 A number of submission makers expressed the view that the amendment proposed in the Bill that would empower the AHRC to refer a matter to the Monitor for inquiry is unnecessary, in light of existing provisions that facilitate a dialogue between these two bodies.[32]

1.53 The Australian Greens respect the views of the Commission in this matter. The amendments proposed in the Bill are designed to facilitate an efficient and effective dialogue between Australia's independent expert authority on human rights, the AHRC, and the person appointed to review Australia's counter-terrorism and national security laws for, among other things, compliance with Australia's international human rights obligations. This dialogue is crucial given that the AHRC is uniquely placed to identify whether and to what extent these laws are engaging with or infringing upon human rights, and therefore would serve as an efficient and independent source of referrals to the Monitor. For example, through its work with Arab and Muslim Australians, the AHRC is familiar with concerns that counter-terrorism legislation can have a disproportionate impact on the rights of members of particular communities. This information could form the basis of a referral to the Monitor, who in turn, possesses unique information gathering powers that allow him or her to speak with the agencies responsible for implementing these laws and to comprehensively review the practical impact of counter terrorism laws on individual rights.

Full Time Appointment

1.54 The need to ensure that the position of Monitor is sufficiently resourced and supported by adequate staff was strongly supported by submission makers to this inquiry. The rapidly growing workload of the Monitor was noted by a number of submission makers, including the AHRC:

> 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.
>
> 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. 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.[33]

32 Australian Human Rights Commission, *Submission 4*, p. 3.

33 Australian Human Rights Commission, *Submission 4*, p. 4.

1.55 A number of submission makers expressed the view that rather than amending the existing Act to require the position of Monitor to be full time, a degree of flexibility should be retained so that a part time or full time appointment could be made. This flexibility, it was argued, would ensure that '[t]he Monitor is not reliant on the position for income and is thus not beholden to the government'.[34] The Law Council of Australia and the Castan Centre also expressed support for a proposal raised by the Gilbert + Tobin Centre that 'provision be made for multiple part-time appointments where the workload of the INSLM warrants them'.[35]

Government Response to INSLM Report

1.56 As noted above, the vast majority of submission makers strongly supported amending the INSLM Act to ensure the timely response by the government to the INSLM's recommendations. For example Ms Elliot, advisor to the former INSLM, noted that:

> [t]he need for an express legislative requirement on the Government to respond to INSLM reports is shown by actual experience…There is simply no reasonable excuse for Government consideration of recommendations made as early as 2012 by the former INSLM to be ongoing, without any kind of formal response in the interim.[36]

1.57 Ms Elliot further submitted that:

> The intended purpose of the laws reviewed by the INSLM include the prevention, detention and prosecution of terrorism and the protection of Australians and Australia's national security. In addition there is a high potential for the laws to have a negative impact on individual rights. These purposes are too important and the potential impact on individual's rights too high for the Government to ignore the INSLM's recommendations in some cases for years while agencies continue to apply provisions described by the former INSLM as "not effective, not appropriate and not necessary".[37]

1.58 However, Ms Elliot, expressed concern that the six month time period proposed in this Bill was too long, 'especially given the length of time that will already have elapsed from when the INSLM provides the Prime Minister with the report and the (up to) 15 sittings days after the report is presented before the tabling of the report'.[38] Ms Elliot also considered the requirement proposed in the Bill that the government response take the form of a 'statement to the Parliament setting out the action that the Government proposes to take in relation to the report' to be too narrow a requirement. Ms Elliot submitted that this requirement would 'only require the Government to respond to those recommendations that it proposes to take action in

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34 Gilbert + Tobin Centre of Public Law, *Submission 3*, p. 5.

35 Castan Centre for Human Rights Law, *Submission 8*, p. 2.

36 Ms Teneille Elliott, *Submission 12*, p. 5.

37 Ms Teneille Elliott, *Submission 12*, p. 5.

38 Ms Teneille Elliott, *Submission 12*, p. 3.

response to, meaning that the recommendations with which the Government does not agree will be immune from the requirement for a Government response'.[39]

1.59 Ms Elliot suggested an alternative approach whereby the requirement for Government responses to INSLM reports is modelled on existing guidelines for responding to parliamentary committee reports, namely the *Guidelines for the Presentations of Document's to the Parliament*, issued by the Department of Prime Minister and Cabinet. These Guidelines include requirements for a timely response, for consultation on the proposed Government response, and for all recommendations to be addressed with reasons for non-acceptance of specific recommendations given.[40] Ms Elliot submitted that the timeframe of up to three months allowed under the Guidelines was appropriate for a Government response to an INSLM report, noting that the Guidelines also provided sufficient flexibility to deal with situations where a Government response cannot be provided within this timeframe.[41]

Additional Amendments to the Independent National Security Legislation Monitor Act

1.60 In addition to expressing support for most or all of the amendments proposed in this Bill, a number of submission makers suggested that further improvements could be made to the Act to enhance and preserve the role of the Monitor. These include the improvements recommended by the first Monitor Mr Bret Walker SC, including that:

- Section 12(2) be repealed and in its place a provision be inserted that prohibits reappointment of the Monitor. 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 period of appointment be enlarged to four or possibly five years.

1.61 The AHRC and Ms Elliot also supported an additional amendment to the INSLM Act recommended by the first Monitor:

> [t]hat 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. 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 national security legislation.[42]

1.62 The Australian Greens urge the Committee to have regard to this suggested improvement, ideally as an addition to the amendments proposed in this Bill, but at the very least as a modest alternative step forward to improve the effectiveness of the Monitor and enhance his critical scrutiny role.

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39 Ms Teneille Elliott, *Submission 12*, p. 3.

40 Ms Teneille Elliott, *Submission 12*, p. 4.

41 Ms Teneille Elliott, *Submission 12*, p. 4.

42 Australian Human Rights Commission, *Submission 4*, p. 2.

1.63 Ms Elliot submitted that consideration should also be given to exploring the option of security-cleared parliamentary committees in Australia, modelled on the United States system where members of appropriate congressional committees are security cleared. Ms Elliot submitted that security cleared parliamentary committees in the Australian Parliament would enable the INSLM to provide classified reports, briefings and submissions to such committees and enhance the capability of those committees to carry out their important parliamentary oversight functions.

Conclusion

1.64 Recent moves by this government to rush through drastic and draconian changes to national security laws that weaken the very rights and freedoms that sustain our democracy demonstrate the necessity for legislative changes that will strengthen the role of the Monitor.

1.65 This Bill responds to the critical need—already keenly felt within the Parliament and the community—for careful, independent scrutiny of Australia's counter-terrorism and national security laws.

1.66 As currently drafted, the main purpose of the *Independent National Security Legislation Monitor Act* is to ensure that Australia's counter-terrorism and national security laws operate in an effective and accountable manner, are consistent with Australia's international obligations, including human rights, counter-terrorism and international security obligations, and to help to maintain public confidence in those laws.

1.67 Recent uncertainty around the position of the Monitor has put this legislative aim at risk of being undermined. This Bill aims to ensure the legislative aim of the *Independent National Security Legislation Monitor Act* is realised. If enacted, this Bill will help give the Australian community confidence that there is someone keeping a close eye on Australia's national security laws to check that they are operating effectively and accountably, and in a manner consistent with Australia's international obligations, including human rights obligations.

Recommendation 1

1.68 That the Bill be passed.

Senator Penny Wright
Australian Greens