The Senate

# Legal and Constitutional Affairs Legislation Committee

## Independent National Security Legislation Monitor (Improved Oversight and Resourcing) Bill 2014

June 2015

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# Introduction and background

## Referral and conduct of the inquiry

1.1 On 4 December 2014, the Senate referred the Independent National Security Legislation Monitor (Improved Oversight and Resourcing) Bill 2014 (Bill) to the Senate Legal and Constitutional Affairs Legislation Committee (committee) for inquiry and report by 5 March 2015.[1] On 3 March 2015, the Senate granted an extension of time to report until 17 June 2015.[2] The Bill is a private senator's bill, introduced into the Senate by Senator Penny Wright on 3 December 2014.[3]

1.2 The committee advertised the inquiry on its website. The committee also wrote to over 60 individuals and organisations, inviting written submissions.

1.3 The committee received 12 submissions to the inquiry. These submissions are listed at Appendix 1, and are available on the committee's website at www.aph.gov.au/senate_legalcon.

## Background

### *Role of the Independent National Security Legislation Monitor*

1.4 The position of Independent National Security Legislation Monitor (Monitor) is established under the *Independent National Security Legislation Monitor Act 2010* (INSLM Act).

1.5 Section 3 of the INSLM Act states that the object of the Act is to appoint a Monitor who will assist Ministers in ensuring that Australia's counter-terrorism and national security legislation:

(a) is effective in deterring and preventing terrorism and terrorism-related activity which threatens Australia's security;

(b) is effective in responding to terrorism and terrorism-related activity;

(c) is consistent with Australia's international obligations, including:

(i) human rights obligations;

(ii) counter-terrorism obligations;

(iii) international security obligations; and

(d) contains appropriate safeguards for protecting the rights of individuals.

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1 *Journals of the Senate*, 4 December 2014, pp 1984-1985.

2 *Journals of the Senate*, 3 March 2015, p. 2223.

3 *Journals of the Senate*, 3 December 2014, p. 1967.

1.6 Under the INSLM Act, the Monitor is appointed on a part-time basis for a period not exceeding three years, and is eligible for re-appointment to the position once only.[4]

1.7 The Monitor is empowered to review matters on his or her own initiative relating to the operation, effectiveness and implications of any Commonwealth laws relating to Australia's counter-terrorism and national security legislation (own-motion referral powers). This can include whether such legislation: contains appropriate safeguards for protecting the rights of individuals; remains proportionate to any threat of terrorism or threat to national security; and remains necessary. The Monitor may also assess whether Australia's counter-terrorism or national security legislation is being used for matters unrelated to terrorism and national security.[5]

1.8 In addition to own-motion referral powers, the Monitor may also be referred particular matters for inquiry by the Prime Minister or by the Parliamentary Joint Committee on Intelligence and Security.[6]

1.9 Section 9 of the INSLM Act provides that, when performing functions relating to Australia's counter-terrorism and national security legislation in a particular financial year, the Monitor must give particular emphasis to provisions of that legislation that have been considered, applied or purportedly applied by government agencies during the current financial year or the immediately preceding financial year.

1.10 Under section 29 of the INSLM Act, the Monitor must provide an annual report to the Prime Minister, outlining the activities undertaken by the Monitor in the previous financial year. The Prime Minister must then table the annual report in the parliament. If the Monitor's annual report contains sensitive national security information, a declassified version of the report must also be presented to the Prime Minister, with the declassified report being the version to be tabled in Parliament and made publicly available.

### *History of the position of Independent National Security Legislation Monitor*

1.11 The office of the Independent National Security Legislation Monitor was established in 2010, following several years of discussion surrounding the need for such a position in the context of changes to national security legislation made between 2001 and 2006.

1.12 During 2005 and 2006, a Security Legislation Review Committee (SLRC), established by the then government and chaired by the Hon Simon Sheller AO QC, conducted a one-off public review of a number of Commonwealth counter-terrorism laws. The first recommendation of its report, published in June 2006, was that the government should establish a continuing review mechanism for counter terrorism

4 *Independent National Security Legislation Monitor Act 2010* (INSLM Act), sections 11-12.

5 INLSM Act, section 6.

6 INSLM Act, sections 7-7A.

legislation, either through the appointment of an independent reviewer or through a further report of the SLRC.[7]

1.13 A report of the Parliamentary Joint Committee on Intelligence and Security (PJCIS) in 2006 recommended that an independent reviewer be appointed to provide comprehensive and ongoing oversight of Australia's anti-terrorism laws.[8] The PJCIS reiterated its view that an independent reviewer should be established in a further report in September 2007.[9] In November 2008, the Hon John Clarke QC recommended in his report on the case of Dr Mohamed Haneef that consideration be given to the appointment of an independent reviewer of Commonwealth counter-terrorism laws.[10]

1.14 Also in 2008, the Senate Standing Committee on Legal and Constitutional Affairs inquired into and reported on a private senators' bill co-sponsored by Senators Troeth and Humphries, which sought to establish an independent reviewer of terrorism laws. The committee recommended that the Bill be supported in principle, and that several amendments be made before the Bill's passage.[11] The private senators' bill was passed by the Senate on 13 November 2008, incorporating amendments recommended by the committee's report.[12] This Bill was then introduced into the House of Representatives, where it lapsed at the end of the 42nd Parliament in 2010.

*Decision to establish the INSLM*

1.15 On 23 December 2008, the then Attorney-General, the Hon Robert McClelland MP, announced the decision to establish the position of the National Security Legislation Monitor as an independent statutory office within the Prime Minister's portfolio, to review the practical operation of counter-terrorism legislation on an annual basis.[13]

1.16 The legislation implementing this decision, the National Security Legislation Monitor Bill 2009, was introduced into Parliament in June 2009, before being passed

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7 Security Legislation Review Committee, *Report of the Security Legislation Review Committee*, June 2006, p. 6.

8 Parliamentary Joint Committee on Intelligence and Security, *Review of Security and Counter Terrorism Legislation*, December 2006, p. vii.

9 Parliamentary Joint Committee on Intelligence and Security, *Inquiry into the proscription of 'terrorist organisations' under the Australian Criminal Code*, September 2007, p. 52.

10 The Hon John Clarke QC, *Report of the Inquiry into the Case of Dr Mohamed Haneef*, Volume 1, November 2008, pp 255-56.

11 Senate Standing Committee on Legal and Constitutional Affairs, *Independent Reviewer of Terrorism Laws Bill 2008 [No. 2]*, October 2008, p. ix.

12 *Journals of the Senate*, 13 November 2008, pp 1209-1213.

13 The Hon Robert McClelland MP, Attorney-General, 'Comprehensive Response to National Security Legislation Reviews', *Press Release*, 23 December 2008, p. 2.

in its final form in March 2010.[14] Several amendments were made during the bill's consideration by the Parliament, arising from recommendations by the Senate Finance and Public Administration Legislation Committee.[15]

1.17 The then Attorney-General stated in relation to the legislation establishing the office of the Monitor:

> The government's aims in establishing the monitor are, firstly, to ensure that the laws which Australia has enacted or enhanced since 11 September 2001 to specifically address the threat of terrorism or security related concerns operate in an effective and accountable manner and, secondly, that these laws are consistent with Australia's international obligations, including our human rights, counterterrorism and international security obligations… This bill puts in place a mechanism for the regular review of Australia's counterterrorism and national security legislation and will provide for greater public confidence in the operation of those laws.[16]

1.18 The Hon Bret Walker SC was selected as the first appointee to the role of Monitor on 21 April 2011, and served as Monitor until the completion of his three year term on 20 April 2014.[17]

*Reports made by the Monitor since 2011*

1.19 During his tenure, Mr Walker SC provided four annual reports to the Prime Minister, all of which were subsequently tabled in Parliament.[18] Issues canvassed by the Monitor in these reports included:

- the use of control orders and preventative detention orders in the *Criminal Code Act 1995*;[19]
- the legislative definition of 'terrorism' in Australia and in other jurisdictions;[20]

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14 Independent National Security Legislation Monitor Bill 2010, *Bills Homepage*, http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=s712 (accessed 19 January 2015).

15 Senate Finance and Public Administration Legislation Committee, *National Security Legislation Monitor Bill 2009*, September 2009.

16 The Hon Robert McClelland MP, Attorney-General, *House of Representatives Hansard*, 17 March 2010, p. 2846.

17 Department of Prime Minister and Cabinet, *Independent National Security Legislation Monitor*, https://www.dpmc.gov.au/pmc/about-pmc/core-priorities/national-security-and-international-policy/independent-national-security-legislation-monitor (accessed 19 January 2015).

18 The Monitor's four annual reports were provided to the Prime Minister on: 16 December 2011; 20 December 2012; 8 November 2013; and 28 March 2014. See: Department of Prime Minister and Cabinet, *Independent National Security Legislation Monitor*, https://www.dpmc.gov.au/pmc/about-pmc/core-priorities/national-security-and-international-policy/independent-national-security-legislation-monitor (accessed 19 January 2015).

19 Mr Bret Walker SC, *Independent National Security Legislation Monitor Declassified Annual Report*, 20 December 2012, Chapters II-III (pp 6-67).

- Australia's international obligations and legislation relating to terrorism financing;[21] and
- the legislative framework dealing with Australians and armed conflicts overseas, including rules relating to foreign evidence and citizenship issues.[22]

*Recent government decisions in relation to the office of the Monitor*

1.20 In March 2014 the government introduced a Bill to abolish the office of the Monitor, the Independent National Security Legislation Monitor Repeal Bill 2014, as one of its 'cutting red tape' initiatives. In his second reading speech to the repeal bill, the then Parliamentary Secretary to the Prime Minister, the Hon Josh Frydenburg MP, stated:

> The government remains firmly in support of independent oversight of counter-terrorism and national security legislation, however, multiple independent oversight mechanisms already exist which perform this role. These include the Inspector-General of Intelligence and Security, the Australian Commission for Law Enforcement Integrity, the joint parliamentary committees on law enforcement and intelligence and security, and the parliament itself. The executive also has powers to appoint ad hoc reviews.
>
> …[The] four reports [made by Mr Walker SC] 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 end of the monitor's term brings to an end this thorough review… 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.[23]

1.21 The Attorney-General, the Hon George Brandis QC, then announced on 16 July 2014 that the government had reversed its decision to abolish the position of the Monitor. This decision came at the same time as the Attorney-General announced a new national security bill would be introduced as the 'first tranche' of a series of reforms to Australia's national security legislation:

> …the Government has decided not to proceed with the Budget measure to abolish the Office of the [Monitor]. That was an economy measure. It's not something we particularly wanted to do. It's something that because of the Budget emergency and in the search for Budget savings within every portfolio we thought was something that we might have to do. But given

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20 Mr Bret Walker SC, *Independent National Security Legislation Monitor Declassified Annual Report*, 20 December 2012, Chapter VI (pp 108-124).

21 Mr Bret Walker SC, *Independent National Security Legislation Monitor Annual Report*, 7 November 2013.

22 Mr Bret Walker SC, *Independent National Security Legislation Monitor Annual Report*, 28 March 2014, Chapters III-V (pp 8-58).

23 The Hon Josh Frydenburg MP, *House of Representatives Hansard*, 19 March 2014, p. 2391.

> that there is extensive new legislation being introduced by the Government…it was a good idea to retain the Office of the [Monitor].[24]

*Recent changes to national security laws and amendments to the INSLM Act*

1.22 The government introduced several pieces of legislation during 2014 which substantially altered the Commonwealth's legislative framework for dealing with terrorism and related matters. The relevant Bills passed by the Parliament were:

- the National Security Legislation Amendment Bill No. 1 2014;
- the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (Foreign Fighters Bill); and
- the Counter-Terrorism Legislation Amendment Bill (No. 1) 2014.

1.23 As these Bills amended existing Acts already within the scope of the Monitor's oversight remit, the changes will now form part of the body of legislation overseen by the Monitor. Additionally, the Foreign Fighters Bill, which passed both Houses on 30 October 2014, included amendments to the INSLM Act which provides that the Monitor must complete a review of specified aspects of the new counter-terrorism laws by 7 September 2017.[25]

*New appointment to the position of Monitor in December 2014*

1.24 With Mr Bret Walker SC having ended his tenure as Monitor on 20 April 2014, the position remained vacant until the Prime Minister announced on 7 December 2014 that the Hon Roger Gyles QC would be appointed to the role. The Prime Minister stated that Mr Gyles would commence the role 'immediately on an acting basis, pending consideration of a permanent appointment by the Governor-General as soon as practicable', and that Mr Gyles' first task as Monitor would be to review any impact on journalists of the section 35P provisions in the Government's first tranche of national security legislation, the *National Security Legislation Amendment Act No. 1 2014*.[26]

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24 The Hon George Brandis QC, Attorney-General, 'Press conference with Mr David Irvine AO, Director-General of Security', *Interview Transcript*, 16 July 2014, http://www.attorneygeneral.gov.au/transcripts/Pages/2014/ThirdQuarter2014/16July2014-PressconferencewithMrDavidIrvineAODirectorGeneralofSecurity.aspx (accessed 21 January 2015).

25 Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014, Schedule 1, Part 1, Item 131A. The review will cover: the control order regime and preventative detention regime in the *Criminal Code Act 1995* (Criminal Code); the new 'declared areas' offence introduced into the Criminal Code by the Foreign Fighters Bill; terrorism stop, search and seizure powers in the *Crimes Act 1914*; and detention and questioning powers in the ASIO Act.

26 The Hon Tony Abbott MP, Prime Minister, 'Appointment of Independent National Security Legislation Monitor', *Press Release*, 7 December 2014, https://www.pm.gov.au/media/2014-12-07/appointment-independent-national-security-legislation-monitor (accessed 21 January 2015).

## Overview of the Bill

1.25 The Explanatory Memorandum (EM) to the Bill states that the Bill aims 'to preserve and enhance the role of the Monitor' by making amendments that would:

- ensure that the Monitor can review *proposed* as well as existing national security legislation;
- make it clear in the objects clause of the [INSLM Act] that the Monitor is required to consider whether Australia's national security legislation is a *proportionate* response to the national security threat faced;
- enable the Senate Committees on Legal and Constitutional Affairs to refer matters to the Monitor for inquiry;
- enable the Australian Human Rights Commissioner to refer matters to the Monitor for inquiry;
- ensure that the position of Monitor is a full time position, cannot be left vacant and is supported by appropriate staff; and
- ensure that all reports of the Monitor are tabled in Parliament and that the Government is required to respond to the recommendations of the Monitor within six months of tabling.[27]

1.26 The EM stated further:

> By preserving and enhancing the role of the Monitor, the Bill aims to give the Australian community confidence that Australia's counter-terrorism and national security laws are operating effectively and accountably, and in a manner consistent with Australia's international obligations, including human rights obligations.[28]

## Key provisions of the Bill

1.27 The Bill contains one schedule dealing with amendments to the INSLM Act and the *Australian Human Rights Commission Act 1986* (AHRC Act).[29] The proposed amendments to the INSLM Act are contained in Part 1 of Schedule 1 of the Bill, while the proposed amendments to the AHRC Act are contained in Part 2 of Schedule 1.

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27 Explanatory Memorandum (EM) to the Independent National Security Legislation Monitor (Improved Oversight and Resourcing) Bill 2014, pp 3-4 (italics in original).

28 Explanatory Memorandum (EM) to the Independent National Security Legislation Monitor (Improved Oversight and Resourcing) Bill 2014, p. 1.

29 The EM to the Bill incorrectly states that amendments to the INSLM Act and AHRC Act are contained in separate schedules; the Bill itself deals with amendments to the INSLM Act in Part 1 of Schedule 1 and amendments to the AHRC Act in Part 2 of Schedule 1.

### *Changes to the objects of the INSLM Act and the role of the Monitor*

*Ability to review proposed as well as existing legislation*

1.28 The INSLM Act currently provides that the Monitor's role is to examine existing Commonwealth counter-terrorism and national security legislation.[30]

1.29 Items 1, 2 and 4 of the Bill would amend section 3 of the INSLM Act to provide that the object of the Act is to appoint a Monitor who will assist Ministers in relation to counter-terrorism and national security legislation 'and proposed counter-terrorism and national security legislation'. Items 7-9 of Schedule 1 of the Bill would amend section 6 of the INSLM Act (which details the functions of the Monitor) to allow the Monitor to review proposed legislation as well as existing legislation.

*Reflecting role of the Monitor in the objects clause*

1.30 Item 3 of Schedule 1 would insert a new paragraph (ba) into section 3 of the INSLM Act, to provide that it is part of the objects of the Act that the Monitor assist in ensuring that national security and counter-terrorism legislation (and proposed legislation) 'is, or would be, proportionate to any threats of terrorism and threats to national security'. The EM explains:

> Subparagraph 6(1)(b) (ii) of the Act currently provides that the Monitor can, by his or her own initiative, inquire into whether any national security legislation "remains proportionate to any threat of terrorism or threat to national security, or both".
>
> However, unlike other functions listed in section 6, this function is not currently reflected in the objects clause of the Act.
>
> …Ensuring that such laws are proportionate is critical to an assessment of whether Australia is complying with its international human rights obligations, and also requires the Monitor to consider whether there are any other less rights-restrictive means for achieving the same legislative ends sought by the particular law. This process can lead to sound recommendations for how the proposed or existing laws could be improved or amended.[31]

*Enabling the Senate Legal and Constitutional Affairs Committees to refer matters to the Monitor*

1.31 The Bill seeks to expand the number of bodies that can refer matters to the Monitor. Item 12 of Schedule 1 of the Bill would insert new section 7B into the INSLM Act, to enable both the Senate Legal and Constitutional Affairs Legislation Committee and the Senate Legal and Constitutional Affairs References Committee (committees) to refer matters to the Monitor. Proposed new subsection 7B(1) provides

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30 The particular laws falling within the remit of the Monitor are detailed in section 4 of the INSLM Act; however, under subparagraph 6(1)(a)(ii) the Monitor may also review any other law of the Commonwealth to the extent that it relates to Australia's counter-terrorism and national security legislation.

31 EM, p. 11.

that either of the committees may refer a matter to the Monitor of which it becomes aware in the course of performing its functions, and considers should be referred to the Monitor.

1.32 In relation to these proposed changes, the EM states:

> 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.
>
> This amendment will 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.
>
> 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.
>
> 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.[32]

*Enabling the Australian Human Rights Commission to refer matters to the Monitor*

1.33 Amendments to the INSLM Act and the AHRC Act in the Bill seek to enable the AHRC to refer matters to the Monitor.

1.34 Item 24 of Schedule 1 of the Bill seeks to augment section 11 of the AHRC Act by making it a function of the AHRC to refer matters relating to Australia's counter-terrorism and national security legislation (or proposed legislation) to the Monitor, if the Commission considers it would be appropriate to do so.

1.35 Item 10 of Schedule 1 of the Bill seeks to amend subsection 6(1) of the INSLM Act to make it a function of the Monitor to report on any matter referred to it by the AHRC.

1.36 The EM states:

> The [AHRC] is uniquely placed to identify whether and to what extent [counter-terrorism and national security] 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

32 EM, pp 14-15.

> 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.[33]

1.37 The EM also notes that these proposed changes are consistent with the AHRC's existing power to refer matters to the Inspector General of Intelligence and Security.[34]

***Changes to operational and staffing arrangements for the Monitor***

1.38 The Bill would introduce several changes to the operational and staffing arrangements in place for the Monitor.

*Appointment of a Monitor after a vacancy*

1.39 Item 15 of Schedule 1 would insert proposed new subsection 11(2A), which provides that if the office of Monitor is vacant, a recommendation must be made to the Governor-General to fill the position within three calendar months of it becoming vacant.

1.40 The EM notes that (at the time of the Bill being introduced on 3 December 2014) the position of Monitor had been vacant since April 2014:

> As many legal and other experts have submitted to parliamentary committees, it is deeply regrettable that the office of Monitor should remain vacant at a time of the most significant legislative reform in this area for almost a decade.
>
> This Item aims 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.[35]

*Full-time basis of the appointment as Monitor*

1.41 Item 14 of Schedule 1 would amend subsection 11(1) of the INSLM Act, which deals with the appointment of the Monitor, by changing the existing requirement that the appointment be made on a part-time basis, to instead require that the appointment be made on a full-time basis. The EM states:

> The former Monitor, Mr Bret Walker SC, performed the role of Monitor on a part time basis…and produced four high quality and detailed reports.

33 EM, p. 14.

34 EM, p. 21.

35 EM, p. 16.

> However, it has since become apparent that the prolific pace of legislative reform to counter-terrorism and national security laws demands a full-time Monitor with adequate support staff.
>
> For example, the scope of the Monitor's functions have recently been significantly expanded by the *Counter Terrorism Legislation (Foreign Fighters) Amendment Act 2014* which amended the Act by introducing a new subsection 6(1A) that requires the Monitor to review the sun-setting counter-terrorism provisions in the ASIO Act, the Criminal Code and the Crimes Act…by 7 September 2017.
>
> …The changes proposed in this Bill, including expanding the function of the Monitor to review proposed counter-terrorism and national security laws and respond to references from the Committees on Legal and Constitutional Affairs and the [AHRC], will also increase the work load of the Monitor and require that the position be appointed on a full time basis.[36]

*Appointment of staff to assist the Monitor*

1.42 Item 17 of Schedule 1 would insert proposed new Division 3 of Part 2 of the INSLM Act, to enable the appointment of staff to the Monitor. Under these provisions, the Monitor can employ staff for the purposes of a particular inquiry if the Monitor is satisfied that it is necessary to employ a person in relation to the particular inquiry and the person has expertise appropriate to the inquiry. Under proposed new section 20B, the Monitor may delegate any or all of his or her functions or powers to staff members employed for the purposes of particular inquiries. The EM states:

> This proposed new Division is necessary to support the expanded and full time role of the Monitor, and in recognition of the changes to the Monitor's functions as described above. These changes also enable the Monitor to appoint an expert to assist with a particular inquiry. Similar powers are currently available to the Inspector General of Intelligence and Security... without adequate staffing and access to subject-specific experts, there is a risk that the Monitor will not continue to be able to produce high quality, evidence based expert reports and recommendations or to respond to the pace to legislative change in this area.[37]

***Tabling requirements and government responses to reports of the Monitor***

1.43 Items 19-20 of Schedule 1 would introduce a new requirement into the INSLM Act that, within six months of a report of the Monitor being tabled in Parliament, the Prime Minister must make a statement to the Parliament setting out the action that the government proposed to take in relation to the report. The EM states that these amendments 'are necessary to ensure that the Government provides a timely and public response to any findings or recommendations made by the Monitor'.[38]

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36 EM, pp 15-16.

37 EM, pp 17-18.

38 EM, p. 18.

1.44 Item 21 of Schedule 1 would insert proposed new section 30A, providing for reporting requirements in situations where a reference is given to the Monitor by one of the Senate Legal and Constitutional Affairs Committees. These provisions largely mirror existing provisions that deal with the other reports of the Monitor, the primary difference being that reports are given in the first instance to the relevant committee chair (rather than the Prime Minister, who is the current recipient of all reports of the Monitor).

1.45 Under proposed new subsection 30A(6), the committee chair must cause a copy of a report received from the Monitor to be presented to each House of Parliament within 15 sitting days after the report has been received. Under proposed new subsection 30A(7), the Prime Minister would be required to provide a response to the Parliament in relation to any such report within six months of it being presented to the Parliament.

# 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.
>
> … 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.
>
> 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.
>
> 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.
>
> 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.
>
> 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**

# Additional Comments by Labor Senators

1.1 Labor strongly supports the Independent National Security Legislation Monitor.

***The importance of the Monitor***

1.2 As is noted in Chapter 1 of the Committee's Report, the office was created by the previous Labor Government in 2010, which appointed eminent barrister Mr Bret Walker SC the inaugural holder of the office in 2011.

1.3 In March 2014, the newly-elected Coalition Government announced that they would abolish the office as part of their initiatives to 'cut red tape'. Speaking to the repeal Bill, the then Parliamentary Secretary to the Prime Minister the Hon Josh Frydenberg MP claimed that, having delivered several annual reports, the work of the Monitor was complete.

1.4 This was a deeply misguided decision by the government, and Labor staunchly opposed it.

1.5 The stated reasons for the Monitor's abolition were nonsensical.

1.6 The Monitor is not in any sense "red tape". The function of the office is to provide a uniquely independent review of our evolving national security laws, which contain a range of provisions that impact the rights of Australian citizens and impose significant obligations on Australian companies. The regular review of those national security laws to ensure that they are still appropriate, effective and proportionate to the risks we face is the opposite of "red tape".

1.7 Further, the Monitor was intended as a permanent office—unlike the various ad hoc reviews of national security law and policy which have been commissioned. Its review function is, by design, ongoing. For the government to declare that the Monitor's work was complete showed either an unfortunate lack of understanding of the ongoing role the Monitor fulfils, or worse, a disdain for it.

1.8 In the face of vociferous opposition and certain defeat for the repeal measures in the Senate, the government backed away from its ill-considered plan to abolish the Monitor on 16 July 2014. However, the government left the office vacant between the expiry of Mr Walker's term in April 2014 and the appointment of the Hon Roger Gyles AO QC in December 2014.

1.9 The worth of the Monitor has since been thoroughly vindicated. Since July 2014, with Labor's support, the Government has passed three very substantial pieces of national security legislation. In each case, the legislation proposed by the government was subject to rigorous scrutiny by the opposition, resulting in substantial amendments to ensure a range of improvements including further safeguards and accountability measures.

1.10 A fourth piece of national security legislation, dealing with the removal of citizenship, is foreshadowed. The term of the current Parliament has seen the most significant revision of our national security laws since the period immediately after the September 11 attacks.

1.11 The input of the Monitor has been of invaluable assistance to the Parliament throughout this period of legislative change.

1.12 Mr Walker's reports provided much of the impetus for the measures contained in the *Counter‑Terrorism Legislation Amendment (Foreign Fighters) Act 2014*. He provided very considered advice on the revocation of citizenship, a topic soon to be dealt with by the Parliament.

1.13 The Monitor will continue to play an important role. Immediately after he was appointed, the new Monitor Mr Gyles was directed by the Prime Minister, at Labor's insistence, to inquire into the impact on journalists of the contentious s 35P of the *ASIO Act*, added to the Act in the Government's first national security Bill. The Monitor has held public hearings and is due to report back on this important matter in June.

1.14 Beyond that current inquiry, the Monitor will have the substantial task of reviewing Australia's newly-revised national security laws, including any changes to our citizenship laws that the government may introduce.

### *Senator Wright's Bill*

1.15 Senator Wright's Bill proposes a range of amendments to the *Independent National Security Legislation Monitor Act 2010* and to the *Australian Human Rights Commission Act 1986*.

1.16 In her second reading speech, Senator Wright said that the Bill was 'introduced with the aim of preserving and enhancing the crucial role' of the INSLM. Senator Wright spoke of 'the need to have a robust conversation about our national security laws'.

1.17 Labor supports these goals. However, we are not convinced that the specific measures proposed in this Bill are either appropriate or timely.

1.18 We note that neither the current Monitor nor the previous office-holder Mr Walker provided a submission to this Committee inquiry. Labor is hesitant to proceed with any reforms to the office of the Monitor without their input.

1.19 Some of the Bill's measures seem reasonable. Labor is certainly concerned, for instance, about adequate staffing of the Monitor, and we are keen to ensure that the office cannot be left vacant, as it was by the Government for many months in 2014. This was a view shared by a number of submitters.[1] The Law Council of Australia (LCA) noted that 'it is valuable for there to be an incumbent in the office of the INSLM when counter-terrorism proposals are progressed'.[2] The Gilbert + Tobin Centre of Public Law stated that:

> The long silence as to the successor to Mr Bret Walker SC as Monitor after his term concluded on 20 April 2014 was deeply unsatisfactory, especially

1 Law Council of Australia, *Submission 2*, p. 3; Gilbert + Tobin Centre of Public Law, *Submission 3*, p. 6; Human Rights Law Centre, *Submission 7*, p. 4.

2 Law Council of Australia, *Submission 2*, p. 3.

> after the government's decision earlier in the year to abolish the office altogether (which it subsequently abandoned) and the later prominence of terrorism and national security issues, including fresh legislative responses, in the national spotlight by September.[3]

1.20 Other measures, though well-intentioned, are problematic. Labor is concerned, for example, that making the Monitor a full-time position will make it more difficult to attract expert applicants. We are not convinced that it is appropriate for the Monitor to report on Bills presently before the Parliament.

1.21 We also do not believe it necessary to further complicate and potentially increase the Monitor's reporting obligations by allowing the Australian Human Rights Commission and the Senate Legal and Constitutional Affairs Committee to refer matters to the Monitor. We note the evidence provided by the LCA, who submitted that 'it may not be appropriate for a statutory authority to require the INSLM to conduct inquiries, and this may lessen the independence of the INSLM'.[4] We also refer to evidence provided by the Gilbert + Tobin Centre of Public Law, who noted that it 'might have the unintended effect of concentrating scrutiny of national security laws in the office of the Monitor and limiting public debate on human rights'.[5] Labor members of this Committee believe that the Parliamentary Joint Committee on Intelligence and Security is the appropriate committee to issue references to the Monitor. We also note that the Human Rights Commission itself, in its submission, does not support the proposal that it have power to refer matters to the Monitor.

1.22 Further, the Bill is premature. The Monitor presently has a heavy work program to deal with. It would be more timely for the institutional arrangements of the office to be reconsidered once the current set of references have been dealt with, and when the Monitor is in a position to advise on how those institutional arrangements could be improved.

**Senator Jacinta Collins**
**Deputy Chair**

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

4 Law Council of Australia, *Submission 2*, p. 3.

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

# 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.
>
> …
>
> 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.
>
> 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.
>
> …
>
> 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.
>
> 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.
>
> 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:
>
> • 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.
>
> • 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**

# Appendix 1

## Public submissions

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|---|---|
| 1 | Public Law and Policy Research Unit, University of Adelaide |
| 2 | Law Council of Australia |
| 3 | Gilbert + Tobin Centre of Public Law |
| 4 | Australian Human Rights Commission |
| 5 | Media, Entertainment & Arts Alliance |
| 6 | The Law Society of New South Wales |
| 7 | Human Rights Law Centre |
| 8 | Castan Centre for Human Rights Law |
| 9 | Muslim Legal Network (NSW) |
| 10 | Councils for Civil Liberties Across Australia |
| 11 | Attorney-General's Department |
| 12 | Ms Teneille Elliott |