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National Security Legislation Monitor Bill 2009

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Law and Bills Digest Section

Contents

National Security Legislation Monitor Bill 2009

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House: Senate

Portfolio: Cabinet Secretary

Commencement: The day after Royal Assent.

Links: The relevant links to the Bill, Explanatory Memorandum and second reading speech can be accessed via BillsNet, which is at http://www.aph.gov.au/bills/. When Bills have been passed they can be found at ComLaw, which is at http://www.comlaw.gov.au/.

Purpose

The purpose, or object, of the Bill is to appoint a National Security Legislation Monitor (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; and

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

(c) is consistent with Australia's international obligations, including human rights obligations; and

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

Background

The Australian anti-terrorism laws introduced since late 2001 have been criticised for being 'framed so broadly that they catch innocent people and tie up resources that could be much better used chasing real terrorists'.[1] There have been calls by politicians, media commentators and academics for a thorough review of the suite of legislation that includes

1. M. Steketee, 'Real terror can be found in the legislation', *The Australian*, 1 May 2008, p. 14. viewed 23 October 2008, http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressclp%2F8YAQ6%22

allowing law enforcement officials to detain a person for questioning without charging them with an offence for 48 hours. These laws also allow a Federal court to issue control orders which can limit a person's movement when that person has not been found guilty of a criminal offence.[2] Legislation allowing extended periods of detainment without charge and restricting a person's movements through a control order is excessive to internationally recognised human rights such as freedom of movement but are considered by the Australian Legislature to be necessary to limit a person's freedom in certain circumstances.[3] These are not the only controversial aspects of the anti-terrorism laws but they are the aspects that have received the most media attention, particularly since the cases of David Hicks, Jack Thomas and Dr Mohammed Haneef.[4]

The anti-terrorism laws have been criticised for impinging on Australians' civil liberties, specifically by failing to protect an individual's freedom of movement, privacy and reputation, rights in criminal proceedings (including during the investigation stage) and the right to a fair hearing.[5] More explicitly, the United Nations Human Rights Committee, in its April 2009 review of Australia's compliance with the International Covenant on Civil and Political Rights (ICCPR), expressed concern that 'some provisions of the *Anti-Terrorism Act (No 2) 2005* and other counter-terrorism measures adopted by the State party appear to be incompatible with the [ICCPR], including with non-derogable provisions'.[6] The Committee was particularly concerned at:

(a) the vagueness of the definition of terrorist act;

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2. After 48 hours, a person can be transferred to a State or Territory Periodic Detention Order for a period of 14 days. For a thorough synopsis of control orders in Australia and the United Kingdom, see the Parliamentary Library's publication, available here.

3. See, for example, ACT Chief Justice Terence Higgins' comments in 'Top judge fears anti-terrorism laws threaten human rights', *The Canberra Times*, 14 October 2005, viewed 21 October 2008, http://www.abc.net.au/news/newsitems/200510/s1482666.htm

4. The case of Dr Mohammed Haneef, an Indian born doctor living in Australia, began in 2007 when alleged terrorists attempted to bomb parts of London and Glasgow. Dr Haneef was connected to the attempt through the involvement of his second cousin in the Glasgow car bombing. The subsequent handling of the investigation by Australia's law enforcement officials and Minister for Immigration lead to an independent inquiry of the circumstances, the laws and the conduct of the persons involved. That inquiry, conducted by the Hon. John Clarke, reported on 21 November 2008 and the report can be found at http://www.haneefcaseinquiry.gov.au/

5. See for example, G. Barns, 'Anti-terror laws make a Federal Bill of Rights more necessary', 21September 2005, viewed 24 July 2009, http://www.onlineopinion.com.au/view.asp?article=25

6. United Nations Human Rights Committee, Concluding Observations on Australia [Compliance with ICCPR], April 2009, viewed 15 July 2009,http://www.hrlrc.org.au/content/topics/civil-and-political-rights/human-rights-committee-concluding-observations/#comments

(b) the reversal of the burden of proof in certain cases contrary to the right to be presumed innocent;

(c) the fact that 'exceptional circumstances', to rebut the presumption of bail relating to terrorism offences, are not defined in the *Crimes Act*, and

(d) the expanded powers of the Australian Security Intelligence Organisation (ASIO), including so far unused powers to detain without access to a lawyer and in conditions of secrecy for up to seven-day renewable periods.

The United Nations Human Rights Committee recommended that 'The State party should ensure that its counter-terrorism legislation and practices are in full conformity with the Covenant'.[7] It is a challenge for any Government to balance the need for an effective national security regime with the need to ensure reasonable protection of an individual's rights and liberties. The Australian community also need reassurance that the Government will scrutinise these laws 'following concerns that police and security agencies have failed to apply them properly'.[8] In this light, a number of terrorism reviews have occurred and calls for a review of all the terrorism legislation have been made over recent years.

Preliminary resources

This Bills Digest assumes some general understanding of the concepts and Australian laws relating to terrorism. For more explanation and details of those concepts and laws, see the resource guide on Terrorism Law, prepared by the Parliamentary Library.[9]

7. Human Rights Law Resource Centre and Public Interest Law Clearing House, Joint submission to the Finance and Public Administration Legislation Committee, Inquiry into the National Security Legislation Monitor Bill 2009, July 2009, p. 7, viewed 27 July 2009, http://www.aph.gov.au/Senate/committee/fapa_ctte/national_security_leg/submissions/sublist.htm

8. Maley, P. 'Failures prompt regular reviews of terrorism laws', *The Weekend Australian*, 20 September 2008, p. 4, viewed 22 April 2009, http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressclp%2F6MLR6%22

9. Australia, Parliamentary Library, *Terrorism Law*, Canberra, 2009, viewed 11 August 2009, http://www.aph.gov.au/library/intguide/law/terrorism.htm

Background

Sheller Review (2005)

In October 2005, a one-off review looking at the operation, effectiveness and implications of amendments in six terrorism-related Acts passed in 2002 and 2003 was conducted. This review is known as the Sheller Review.[10] The Sheller Review did, at the time, consider that an Independent Reviewer of terrorism legislation could be part of the office of the Inspector-General of Intelligence and Security or the Commonwealth Ombudsman's office.[11] This option to have an existing office take on the role was favoured by a number of groups who made submissions to the 2008 Senate Committee Inquiry into the Independent Reviewer of Terrorism Laws Bill 2008.[12] The Howard Government did not implement the 20 recommendations from the Sheller Review.[13]

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10. Note that the Security Legislation Review Committee was not a Parliamentary Committee. It was established pursuant to section 4(1) of *the Security Legislation Amendment (Terrorism) Act 2002*, as amended by the *Criminal Code Amendment (Terrorism) Act 2003*. The former Attorney-General, the Hon Philip Ruddock MP, tabled the Security Legislation Review Committee's report (the Sheller Review) in the House of Representatives on 15 June 2006. That Review is available at:

    http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(03995EABC73F94816C2AF4AA2645824B)~SLRC+Report-+Version+for+15+June+2006[1].pdf/$file/SLRC+Report-+Version+for+15+June+2006[1].pdf

11. *Op. cit*, see p. 203 of the Report.

12. See for example, Attorney-General's Department, Submission to the Senate Legal and Constitutional Affairs, *Inquiry into the Independent Reviewer of Terrorism Laws Bill 2008 [No. 2]*, 15 September 2008, http://www.aph.gov.au/Senate/committee/legcon_ctte/terrorism/submissions/sublist.htm viewed 16 July 2009 and Commonwealth Ombudsman, Submission to the Senate Legal and Constitutional Affairs, *Inquiry into the Independent Reviewer of Terrorism Laws Bill 2008 [No. 2]*, 12 September 2008, http://www.aph.gov.au/Senate/committee/legcon_ctte/terrorism/submissions/sublist.htm viewed 16 July 2009.

13. No formal response to the Sheller Inquiry was provided by the Howard Government. However, the Attorney-General did indicate in Question Time on 19 June 2006 that the government formed a preliminary view on several key issues raised in the report and was not in agreement with the Sheller Inquiry. The Attorney-General emphasized that the report noted that there had been no excessive or improper use of Australia's counter-terrorism laws, http://parlinfo.aph.gov.au/parlInfo/download/chamber/hansardr/2006-06-19/toc_pdf/4798-2.pdf;fileType=application%2Fpdf The Rudd Government has responded to the recommendations and the response can be found here: http://www.ag.gov.au/www/agd/agd.nsf/Page/Publications_AustralianGovernmentresponsetoPJCISReviewofSecurityandCounter-TerrorismLegislation-December2008 viewed 3 March 2009.

Joint Committee on Intelligence and Security (2006)

In 2006, the Parliamentary Joint Committee on Intelligence and Security (the 2006 Joint Committee Inquiry) reviewed a selection of terrorism legislation, as required by paragraph 29(1)(ba) of the *Intelligence Services Act 2001 (Cth)*. This provision required the Joint Committee to review the operation, effectiveness and implications of the *Security Legislation Amendment (Terrorism) Act 2002; Border Security Legislation Amendment Act 2002; Criminal Code Amendment (Suppression of Terrorist Bombings) Act 2002* and the *Suppression of the Financing of Terrorism Act 2002*. These Acts were originally passed subject to an agreement that a review of the operation, effectiveness and implications of the new laws would be conducted after three years.[14] During the Joint Committee hearing in August 2006, the Assistant Secretary of the Security Law Branch of the Attorney-General's Department indicated that further reviews of all the terrorism legislations were not planned.[15]

The proposal to appoint an Independent Reviewer of Terrorism Laws, with a similar role and function to the Reviewer in the United Kingdom, was endorsed by the Parliamentary Joint Committee on Intelligence and Security in its report of December 2006. In its support of the idea, the Joint Committee noted that:

> to date post enactment review has been sporadic and fragmented with a focus on specific pieces of legislation rather than the terrorism law regime as a whole. This has limited the opportunity for comprehensive evaluation and highlights the need for an integrated approach to ensure ongoing monitoring and refinement of the law where necessary.[16]

Private Members' Bill – Independent Reviewer of Terrorism Laws Bill 2008

In March 2008, Liberal MP Petro Georgiou introduced into the House of Representatives a Bill that established an 'Independent Reviewer of Terrorism Laws' that would have the

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14. Parliamentary Joint Committee on Intelligence and Security, *Review of Security and Counter Terrorism Legislation*, Parliament House Canberra, December 2006, para 1.2. http://www.aph.gov.au/house/committee/pjcis/s http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressclp%2FFQAR6%22curityleg/report.htm, accessed 28 October 2008.

15. G. McDonald, 'Review of Security and Counter Terrorism Legislation', *Transcripts of Evidence*, August 2006, p. 10 http://www.aph.gov.au/house/committee/pjcis/securityleg/hearings/OfficialHansard1Aug.pdf viewed 3 March 2009.

16. Parliamentary Joint Committee on Intelligence and Security**,** *Review of Security and Counter Terrorism Legislation*, December 2006, Paragraph 2.62, p. 17. http://www.aph.gov.au/house/committee/pjcis/securityleg/report/chapter2.pdf viewed 3 March 2009.

capacity to review Commonwealth terrorism laws. The Government gagged debate on the Bill in the House of Representatives and it could not proceed.[17]

Consequently, in June 2008, Liberal Senators' Gary Humphries and Judith Troeth introduced an identical Bill into the Senate. The Private Member's Bill encouraged debate and revived public interest in the need for a review of terrorism laws. So too did the Clarke Inquiry into the so-called 'Haneef affair' where Dr Mohammed Haneef was detained and questioned without charge for 12 days. Mr Georgiou said at the time that 'the anti-terrorism laws need the public's confidence. This proposal [to have an Independent Reviewer] sends the right message and would engender confidence'.[18]

Senate Legal and Constitutional Committee (2008)

The Senate Legal and Constitutional Committee (the 2008 Senate Committee Inquiry) inquired into the Senators' Bill and reported on 14 October 2008. In brief, the Committee supported the Bill in-principle and made 5 recommendations about possible amendments to the Bill.[19] The Committee was chaired by Senator Trish Crossin, ALP Senator for the Northern Territory. A range of amendments were made and the Bill was passed in the Senate on 13 November 2008. The Bill is now on the Notice Paper in the House of Representatives but given the introduction of this Bill, is likely to be removed without debate in the future.[20] The current Bill has adopted the following recommendations from the 2008 inquiry:

- that the Bill be amended to comprehensively describe the role and function of the Independent Reviewer, and enumerate the criteria by which legislation should be reviewed (**adopted**)
- That the Bill be amended to detail the legal status of the Independent Reviewer; the legislation intended to fall under its purview; remuneration of the Independent Reviewer ; resourcing of the Independent Reviewer and the immunity or otherwise of the Independent Reviewer from civil liberty **(partially adopted)**
- That the Bill be amended so that, in addition to reporting to Parliament on inquiries undertaken by the Independent Reviewer in respect of terrorism legislation, an Annual

17. House of Representatives, *Hansard*, 19 March 2008, p. 2199, http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansardr%2F2008-03-19%2F0002%22 , accessed 18 September 2008.
18. M. Grattan, 'Anti-terror bill wins backing', *The Age*, 19 August 2008, p. 2 http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressclp%2FFQAR6%22 viewed 27 July 2009.
19. The recommendations can be found in the Committee's Report here: http://www.aph.gov.au/Senate/committee/legcon_ctte/terrorism/report/b01.htm
20. House of Representatives, *Notice Paper*, No. 106, 11 August 2009, Item 34. http://www.aph.gov.au/house/info/notpaper/rnp106.pdf viewed 11 August 2009.

Report on the activities of the Independent Reviewer is tabled in Parliament (**adopted**).

The Bill has not been changed to allow the role of the Monitor to be carried out by a panel of three experts as per Recommendation 4 of the Report.

Basis of policy commitment

This Bill implements the decision announced by the Government on 23 December 2008, to establish the position of the National Security Legislation Monitor.[21] Further, the second reading speech has noted that

> the establishment of an independent reviewer of terrorism laws is consistent with the recommendations made by the Security Legislation Review Committee in June 2006 and the Parliamentary Joint Committee on Intelligence and Security in December 2006 and September 2007. Most recently, the inquiry by the Hon. John Clarke QC into the case of Dr Mohammed Haneef also supported the establishment of an independent review mechanism.[22]

However, an analysis of the Bill raises a number of concerns about how loosely the recommendations of these Committees and Inquiry have been followed. Of most significance is the suggestion that the Monitor is truly 'independent' in the way that the Committees and the Hon. John Clarke QC recommended. There is no mention of the word 'independent' in either the title or, more importantly, the text of the Bill. Whilst the Monitor will have significant operational independence, their legislated mandate is for example narrower in some significant respects than the United Kingdom's Independent Reviewer of Terrorism Laws. For example, the Independent Reviewer in the United Kingdom is required to report on 'the implications for the operation of the Prevention of Terrorism Act *of any proposal* made by the Secretary of State for the amendment of the law relating to terrorism [emphasis added]'[23]. It is not proposed that the new Monitor have this reporting requirement. These issues and others are considered in detail further in this Digest.

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21. R. McClelland, *Media Release*, 23 December 2008, http://www.attorneygeneral.gov.au/www/ministers/RobertMc.nsf/Page/MediaReleases_2008_FourthQuarter_23December2008ComprehensiveResponseToNationalSecurityLegislationReviews accessed 23 December 2008.

22. P Wong, 'Second Reading Speech: National Security Legislation Monitor Bill 2009', Senate, *Debates*, 25 June 2009, pp. 4260-4262, viewed 25 July 2009, http://parlinfo.aph.gov.au/parlInfo/genpdf/chamber/hansards/2009-06-25/0076/hansard_frag.pdf;fileType=application%2Fpdf

23. Sydney Centre for International Law, Submission to Senate Standing Committee on Finance and Public Administration, 19 July 2009, p. 4, http://www.aph.gov.au/Senate/committee/fapa_ctte/national_security_leg/submissions/sublist.htm viewed 29 July 2009.

Committee consideration

The Bill has been referred to the Senate Finance and Public Administration Committee (Current Senate Inquiry) for inquiry and report by 7 September 2009. [24]The Committee will assess the extent to which the recommendations of the 2008 Senate Committee Inquiry into Independent Reviewer of Terrorism Laws Bill 2008 [No.2][25] were taken on board, and the scope of the Monitor's mandate. The inquiry is therefore not required to make recommendations on the substantive issues and drafting of the Bill. At the time of publication, the Committee had received 14 submissions to its Inquiry and issues raised in those submissions will be considered in this Digest.

Position of significant interest groups/press commentary

The Bill itself has not attracted significant commentary or press coverage. However, the need and arrangements for an independent review mechanism has been the subject of academic discussion for a number of years.[26]

Most commentary is supportive of the review mechanism in-principle however there are some groups who have strongly disagreed with the manner in which the Monitor is proposed to work. For example, the Sydney Centre for International Law has said that:

> establishing a one-off monitor of terrorism laws would be institutionally inefficient (by unnecessarily creating new and potentially costly structures where more experienced structures already exist and can deliver economies), inadequate (because the position would likely be part-time and thus stretched) and risky (since the success of the monitor would stand or fall on an individual personality, rather than embedding the review function in a better resourced, professional, long-standing law reform body

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24. Details of the inquiry are at: http://www.aph.gov.au/Senate/committee/fapa_ctte/national_security_leg/index.htm

25. The report from that inquiry can be found at: http://www.aph.gov.au/Senate/committee/legcon_ctte/terrorism/report/index.htm

26. See for example, G. Williams 'Securing our safety', *The Canberra Times*, 21 June 2008, p. 2 http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressclp%2FLFSQ6%22; M. Steketee 'Real terror can be found in the legislation', *The Australian*, 1 May 2008, p. 14, http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressclp%2F8YAQ6%22 ; J. Uhr, 'Terra Infirma? Paliament's Uncertain Role in the 'War on Terror'' *University of New South Wales Law Journal*, vol 27, 2004 pp. 339-353. C.Walker, 'The United Kingdom's Anti-Terrorism Laws: Lessons for Australia' in A. Lynch, E. Macdonald and G.Williams *Law and Liberty in the War on Terror* (2007) 189; C.Forcese, 'Fixing the Deficiencies in Parliamentary Review of Anti-terrorism Law: Lessons from the United Kingdom and Australia' (2008) 14(6) *IRPP Choices*, 14.

> which is not dependent on an individual). Whereas the ALRC [Australian Law Reform Commission] can deliver systematic, considered views based on consultative processes, there is a risk of an independent reviewer providing idiosyncratic individual opinions, regardless of whether the person is a barrister, academic or former judge or public servant.[27]

Financial implications

The Explanatory Memorandum states that funding of $1.36 million over four years was provided in the 2009-10 Budget to fund the establishment of the Office of the National Security Legislation Monitor. Portfolio responsibility for the Monitor will be with the Department of Prime Minister and Cabinet as the coordinating Department for national security and counter-terrorism policy.[28]

Key issues

There are five key issues that will be explored in this Bills Digest:

1. The functions of the Monitor and how they fit into the national security legislative framework.

2. The similarities and differences of the Monitor with the United Kingdom's independent reviewer of terrorism legislation.

3. Determining and prioritising certain aspects of the terrorism laws for review.

4. The Monitor's mandate to review legislation from a human rights perspective and how this might work in practice, with or without a national charter of human rights.

5. The need to clarify the independence of the Monitor by expressly allowing him or her to self-initiate reviews.

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27. Sydney Centre for International Law, Submission to Senate Standing Committee on Finance and Public Administration, 19 July 2009, p. 1, http://www.aph.gov.au/Senate/committee/fapa_ctte/national_security_leg/submissions/sublist.htm viewed 29 July 2009.

28. Note that the Bill states that the portfolio responsible for the Bill is "Cabinet Secretary" and the Bill was introduced in the Senate. The Cabinet Secretary is Senator the Hon Joe Ludwig however Senator the Hon Penny Wong made the second reading speech in the Chamber for this Bill.

The national security legislative framework and the proposed functions of the Monitor

Many of the submissions to the 2008 Senate Committee Inquiry noted the need for greater clarification of the role and function of the Independent Reviewer. Indeed, the second recommendation from the Committee was that the Bill be amended to comprehensively describe the role and function of the Independent Reviewer, and enumerate the criteria by which legislation should be reviewed.[29] This is not simply fixed by listing criteria in isolation of the existing administrative and political landscape. There needs to be thorough consideration of what is already regularly reviewed, what is reviewable by existing agencies such as the Commonwealth Ombudsman or Parliamentary Committees and what legislation can reasonably be expected to be regularly reviewed.

This Bill has addressed the Senate Committee's concerns by listing the legislation and enumerating the criteria which the Monitor must consider. The Bill is also consistent with the recommendations from previous reviews to put in place a Monitor or similar review mechanism. The Government has further indicated that it will establish a Parliamentary Joint Committee on Law Enforcement to extend parliamentary oversight to include the Australian Federal Police.[30] Explicitly, the proposed National Security Legislation Amendment Bill 2009 and the Parliamentary Joint Committee on Law Enforcement Bill 2009 are further measures intended to 'implement the Government's response to various reviews of national security legislation, taking into account the outcomes of public consultation'.[31] The Government has not suggested whether the Monitor will be able to review, or take references from, the proposed Parliamentary Joint Committee on Law Enforcement. If the Monitor had this capacity, it could improve the effectiveness and independence of the Monitor. Further, the functions of the Monitor as they are currently drafted will not allow the appointed person to review the provisions of any bills before Parliament.

United Kingdom model

A number of submissions to the 2008 Senate Committee Inquiry, in particular submissions from the Gilbert & Tobin Centre for Public Law and the Law Council of Australia, mount a strong argument in favour of adopting a model similar to that of the Independent Reviewer in the Untied Kingdom:

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29. The recommendations can be found in the Committee's Report here: http://www.aph.gov.au/Senate/committee/legcon_ctte/terrorism/report/b01.htm

30. R. McClelland, *Media Release*, 23 December 2008, http://www.attorneygeneral.gov.au/www/ministers/RobertMc.nsf/Page/MediaReleases_2008_FourthQuarter_23December2008ComprehensiveResponseToNationalSecurityLegislationReviews accessed 10 August 2009.

31. See the 'Legislation proposed for introduction in the Spring sittings' at http://www.pmc.gov.au/parliamentary/index.cfm viewed 4 August 2009.

> The current Independent Reviewer [in the UK] is Lord Carlile of Berriew QC. His reports have proved to be a valuable contribution to the debates on terrorism law in the UK and have provided the public, the Government and the Parliament with valuable information, insights and suggestions for reform.[32]

Without delving too much into the history of the establishment of the Independent Reviewer in the United Kingdom, it is interesting to note that the debate in Australia is following a similar line. Take for example, the words of Lord Denning in the House of Lords debates on the Prevention of Terrorism Bill in 1984:

> The whole object of this amendment, as I understand it, is to have a commission. I had, at one time, a good deal to with inquiry into security matters. I should have thought a commission was extremely good … [T]hey should have suitable Privy Counsellors who will be able to inquire, not into actual details of individual cases but into how the Secretary of State is exercising his powers in this regard. That can only be done if they are monitored and a report is made to Parliament from time to time so that we can see that these exceptional powers have been well exercised.[33]

While the Government has drawn parallels between the United Kingdom Reviewer and the proposed Monitor, the functions are a little different. In particular, the Law Council has explicitly noted that:

> the functions of the National Security Legislation Monitor as outlined in clause 6 of the National Security Legislation Monitor Bill differ from those attributed to the UK Independent Reviewer of Terrorism Laws in an important respect. Unlike the UK Independent Reviewer, the National Security Legislation Monitor has no specific role in respect of the issuing of control orders.
>
> One of the tasks of the UK Independent Reviewer is to 'replicate exactly the position of the Home Secretary at the initiation of a control order. The UK Independent Reviewer is given the same information as that provided to the Home Secretary, and draws a conclusion as to whether a control order should have been issued in each case. To date, Lord Carlile has reached the conclusion that in each case, a control order should have been made. However he has, on occasion, disagreed with the conditions imposed by control orders.[34]

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32. Law Council of Australia, Submission to the *Inquiry into the Independent Reviewer of Terrorism Laws Bill 2008 [No.2]*, 15 September 2008, p. 9. http://www.aph.gov.au/Senate/committee/legcon_ctte/terrorism/submissions/sublist.htm, accessed September 2008

33. Lord Denning, Debate on the Prevention of Terrorism (Temporary Provisions) Bill 1984, *Hansard* (UK), 8 March 1984, p. 400.

34. Law Council of Australia, Submission to the Senate Committee of Finance and Public Administration Legislation, 'Inquiry into the National Security Legislation Monitor Bill 2009', July 2009, p. 13

Another model that the Parliament could consider in this regard is the Public Interest Monitor in Queensland (PIM). The PIM considers whether law enforcement authorities' use of search warrants and *Criminal Code (Cth)* control orders is appropriate. It is inconsistent that these can presently only be reviewed (in this manner) in Queensland.[35] Whatever the final parameters of the Monitor look like, an Australian monitor 'should have independence of mind, political independence and 'a willingness to think out of the box and look in a conceptual way at counter-terrorism law and policy', according to Lord Carlile'[36].

Determining and prioritising certain aspects of the terrorism laws for review

In September 2005, the Council of Australian Governments (COAG) agreed to a review after five years of the operation of the new provisions that were introduced in 2005.[37] This review would therefore be scheduled to start in December 2010 and would cover the laws in the *Crimes Act 1914* and the *Criminal Code* allowing broader police powers, control orders, preventative detention orders, as well as the definition of terrorist organisation and terrorist financing provisions. Cooperation from the States and Territories is necessary for a strong national security regime and is also necessary from a constitutional law perspective where the Commonwealth relies on a referral of State and Territory power to enact comprehensive laws relating to terrorism.[38] However, the present COAG is not required, or even obliged to commence this review. Depending on how timely this Bill progresses, the Prime Minister might refer these laws as a matter of priority to the newly appointed Monitor for review. The Attorney-General has stated that the Government will refer to aspects of the legislation to the Monitor once the office is established. These will

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http://www.aph.gov.au/Senate/committee/fapa_ctte/national_security_leg/submissions/sublist.htm viewed 27 July 2009.

35. Note though that other jurisdictions do have mechanisms in place to review the conduct of law enforcement authorities during operations such as the Corruption and Crime Commission (WA) and the Office of Police Integrity (Vic).

36. A. Boxsell, 'Peer wants to watch those who watch us', *Australian Financial Review*, 19 June 2009 http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressclp%2FXBWT6%22 viewed 19 June 2009.

37. Council of Australian Governments' Special Meeting on Counter-Terrorism, *Communique*, 27 September 2005, http://www.coag.gov.au/coag_meeting_outcomes/2005-09-27/index.cfm#current accessed 2 October 2008.

38 *Australian Constitution*, section 51 (xxxvii). Due to constitutional constraints, the existing Commonwealth terrorism laws rely on the complementary laws of the States and Territories to operate as they were fully intended. While conferring with the States might be an extra step that delays Commonwealth legislative change, it is not an impediment and adds a further layer of scrutiny, cooperation, and effectiveness to the terrorism legislation.

be 'the offence of associating with a terrorist organisation, and strict liability aspects of other terrorism offences'.[39]

Alternatively, the Sydney Centre for International Law has recommended that:

> a specific provision should be made for mandatory review (within six months of the commencement of the Act) of detention powers under Division 2 of Part IC of the *Crimes Act 1914* (Cth) and Division 105 of the *Criminal Code Act 1995* (Cth). These Divisions of the Crimes Act and Criminal Code Act relating to the detention of person are potentially the most invasive of human rights. It is therefore important to *ensure* that they are assessed by the Monitor in a timely manner. The urgency of such an assessment means that it should be made the Monitor's first priority.[40]

The definition of Australia's counter-terrorism and national security legislation in the Bill appear broad because ability to consider laws that relate to specific sections, Parts or Divisions of existing terrorism-related provisions. However, it is a significant flaw that the definition does not include bills before Parliament relating to counter-terrorism or national security.

The Monitor's mandate to review legislation from a human rights perspective and how this might work in practice, with or without a national charter of human rights.

One of the most significant aspects of the Bill is that the Monitor's powers and functions expressly provide for consideration of appropriate safeguards for protecting the rights of individuals (**Proposed subsection 6(b)(i)**) as well as Australia's international obligations (**proposed section 8**). The broad drafting of these provisions is to be applauded on the one hand but may be problematic in practice. For example, if the Monitor is to look at how the terrorism laws are consistent with Article 19 (freedom of expression) of the ICCPR:

> …there is little doubt that the selected counter-terrorism provisions of the *Criminal Code* do limit free expression. The real question therefore is whether the extent to which they restrict expression and the manner in which the restriction apply fall within the boundaries of permissible restrictions. This is a problematic and complex area of international free expression law…[41]

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39. R. McClelland, *Media Release*, 23 December 2008, http://www.attorneygeneral.gov.au/www/ministers/RobertMc.nsf/Page/MediaReleases_2008_FourthQuarter_23December2008ComprehensiveResponseToNationalSecurityLegislationReviews accessed 10 August 2009.

40. Sydney Centre for International Law, Submission to Senate Standing Committee on Finance and Public Administration, 19 July 2009, p. 3, http://www.aph.gov.au/Senate/committee/fapa_ctte/national_security_leg/submissions/sublist.htm viewed 29 July 2009.

41. J. Irving, Security & Liberty: Australian's counter-terrorism laws and freedom of expression, 2009, p. 110.

Furthermore, submissions to both Senate the 2008 and current Inquiries were emphatic in the view that the appointment of the Monitor should not be seen as a substitute or alternative to the enactment of legislative safeguards to ensure individual rights are protected within Australian terrorism legislation.[42]

The Government-appointed National Human Rights Consultation is presently considering (amongst other things) the arguments for and against a charter of human rights for Australia and is due to report by 30 September 2009. If a charter of rights was adopted, it would be appropriate for the functions of the Monitor to be subsequently amended to make explicit reference to such a charter or at minimum, the rights that it will contain. If the Australian Government decides not to enact a charter of rights, it should certainly consider expanding the mandate of the Monitor to review proposed terrorism laws:

> The Monitor should be given power to review **proposed** amendments in regard to their '*operation, effectiveness and implications*', including consistency with the rights protected by the ICCPR. Similarly, the Independent Reviewer in the United Kingdom is required to report on '*the implications for the operation of the Prevention of Terrorism Act of **any proposal** made by the Secretary of State for the amendment of the law relating to terrorism'.* The Security Legislation Review Committee in its June 2006 report has also recommended that part of the Independent Reviewer's report should include comment on '*the implications for the operation and effectiveness of part 5.3 [of the Criminal Code] of any Government proposals for the amendment of terrorism laws'.*[43]

Indeed, Australia's 'lack of a charter of rights bolstered the need for a monitor to ensure anti-terrorism laws were applied to protect national security, while upholding civil liberties'.[44]

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42. See for example the submission from the Australian Lawyers for Human Rights to the Independent Reviewer of Terrorism Laws Bill 2008 http://www.aph.gov.au/Senate/committee/legcon_ctte/terrorism/submissions/sub18.pdf viewed 30 July 2009.

43. Sydney Centre for International Law, Submission to Senate Standing Committee on Finance and Public Administration, 19 July 2009, p. 4, http://www.aph.gov.au/Senate/committee/fapa_ctte/national_security_leg/submissions/sublist.htm viewed 29 July 2009.

44. Lord Carlile in A. Boxsell, 'Peer wants to watch those who watch us', *Australian Financial Review*, 19 June 2009 http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressclp%2FXBWT6%22 viewed 19 June 2009.

The need to clarify the independence of the Monitor by expressly allowing him or her to self-initiate reviews

The drafting of the Bill does not make it explicitly clear that the Monitor can initiate and report on his or her own inquiries. The Explanatory Memorandum states that section 6 of the Bill allows the Monitor to initiate a review but the Bill as currently drafted does not contain an express provision to this effect. If such an interpretation is not read into the Bill, the Monitor would have no function unless it received a reference from the Prime Minister. Moreover, the Prime Minster's reference powers are limited to matters relating to counter-terrorism or national security, not initiating legislative review of the legislation listed in **proposed section 6**. In support of this analysis, the Law Council further notes:

> even if the functions contained in clause 6 are interpreted in a manner broad enough to empower the National Security Legislation Monitor to initiate his or her own investigations, the only place the National Security Legislation Monitor could report on such investigations would be in his or her Annual Report, which may be prepared up to six months after the period of review.[45]

Similarly, Professor Clive Walker has argued that an independent reviewer of terrorism laws should not have to 'await the pleasure of the government as to the terms on which the debate takes place'.[46] The Law Council also noted these words from Professor Walker and it further questions the true independence of the proposed review mechanism.

The Human Rights Law Resource Centre (HRLRC) and the Public Interest Law Clearing House (PILCH) have also noted this apparent inconsistency between the Explanatory Memorandum which states 'clause 6 also provides that the Monitor will be able to initiate his or her own reviews' and in the absence of any such provision in the Bill. … PILCH and the HRLRC consider such a fundamental power should be explicitly provided for in clause 6.[47]

The submission from the Gilbert and Tobin Centre for Public Law also noted concern that there is no explicit mention in section 6 of the Monitor's power to conduct inquiries upon his or her own initiative (beyond the obligation to lodge an annual report in section 29).

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45. Law Council of Australia, Submission to the Senate Committee of Finance and Public Administration Legislation, 'Inquiry into the National Security Legislation Monitor Bill 2009', July 2009, p. 18 http://www.aph.gov.au/Senate/committee/fapa_ctte/national_security_leg/submissions/sublist.htm viewed 27 July 2009.

46. A. Lynch, *Law and Liberty in the War on Terror*, Federation Press, 2007, p. 189.

47. Human Rights Law Resource Centre and Public Interest Law Clearing House, Submission to the Senate Committee of Finance and Public Administration Legislation 'Inquiry into the National Security Legislation Monitor Bill 2009', July 2009, p. 12 http://www.aph.gov.au/Senate/committee/fapa_ctte/national_security_leg/submissions/sublist.htm viewed 27 July 2009.

'At times, the Independent Reviewer in the United Kingdom has produced reports on his own volition and the Monitor should certainly possess a similar capacity.[48] Arguably **proposed subsection 6(3)** could allow for the Monitor to self-initiate a review (by having the power to do all things necessary … in the connection with the performance of the Monitor's functions) but this is not clear.

The Law Council is 'disappointed that the term 'independent' does not feature in the title of the National Security Legislation Monitor Bill or in the title of the Monitor itself'.[49] The International Commission of Jurists also expressed disappointment that the intended impartiality and independence of the reviewer was not recognised in the title of the Monitor of the Bill:

> The International Commission of Jurists Australia submits that impartiality and independence would have been guaranteed further if the word 'independent' was included in both the title of the Bill and in the title of the Monitor as is the case in the United Kingdom.[50]

There is cause for concern about the Prime Minister being the only body or person with the ability to refer a matter to the Monitor. This seems at odd at least with the purpose of the appointment of a Monitor to primarily 'assist Ministers' (see **proposed section 3**). As the Law Council notes, this invests the Executive Government with considerable control over the activities of the National Security Legislation Monitor.[51] The Law Council therefore suggests a clause in the Bill that would allow the Parliamentary Joint Committee on Intelligence and Security to refer a matter relating to counter-terrorism or national

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48. Gilbert & Tobin Centre for Public Law, Submission to the Senate Committee of Finance and Public Administration Legislation, 'Inquiry into the National Security Legislation Monitor Bill 2009' p. 5 http://www.aph.gov.au/Senate/committee/fapa_ctte/national_security_leg/submissions/sub1.pdf viewed 27 July 2009.

49. Law Council of Australia, Submission to the Senate Committee of Finance and Public Administration Legislation, 'Inquiry into the National Security Legislation Monitor Bill 2009', July 2009, p. 3 http://www.aph.gov.au/Senate/committee/fapa_ctte/national_security_leg/submissions/sublist.htm viewed 27 July 2009.

50. International Commission of Jurists Australia, Submission to the Senate Committee of Finance and Public Administration Legislation, 'Inquiry into the National Security Legislation Monitor Bill 2009', pp. 2-3 http://www.aph.gov.au/Senate/committee/fapa_ctte/national_security_leg/submissions/sublist.htm

51. Law Council of Australia, Submission to the Senate Committee of Finance and Public Administration Legislation, 'Inquiry into the National Security Legislation Monitor Bill 2009', July 2009, p. 17 http://www.aph.gov.au/Senate/committee/fapa_ctte/national_security_leg/submissions/sublist.htm viewed 27 July 2009.

security to the Monitor and requiring the Monitor to report back to the Committee on that reference.[52] The International Commission of Jurists Australia has a similar but broader suggestion and that is to consider widening the referral process to include relevant government organisation and persons, particularly those persons with whom the Monitor will be able to liaise (as per section 10). They suggested that the Senate Committee consider the inclusion of State and Territory Attorneys General in the referral process. [53]

In its submission to the current Senate Inquiry, the Law Council of Australia has noted the following features require careful consideration:

- the absence of a specific reference to Australia's international human rights obligations in clause 6 outlining the functions of the National Security Legislation Monitor;
- the absence of a reference power for any body other than the Prime Minister;
- the absence of a specific requirement that the National Security Legislation Monitor exercise his or her coercive information gathering powers in accordance with the principles of natural justice and procedural fairness;
- the absence of detail in the National Security Legislation Monitor Bill regarding the structure and resources of the National Security Legislation Monitor; and
- the ability of the Executive Government to exercise control over the publication of the content of the National Security Legislation Monitor's reports.[54]

In the second reading speech, Senator Penny Wong stated that:

> In reviewing the legislation, the Monitor must have regard to Australia's international obligations, such as the International Convention [sic] on Civil and Political Rights

52. Note that this might also be appropriate for the proposed Parliamentary Joint Committee on Law Enforcement.

53. International Commission of Jurists Australia, Submission to the Senate Committee of Finance and Public Administration Legislation, 'Inquiry into the National Security Legislation Monitor Bill 2009', p. 3 http://www.aph.gov.au/Senate/committee/fapa_ctte/national_security_leg/submissions/sublist.htm

54. Law Council of Australia, Submission to the Senate Committee of Finance and Public Administration Legislation, 'Inquiry into the National Security Legislation Monitor Bill 2009', July 2009, p. 3 http://www.aph.gov.au/Senate/committee/fapa_ctte/national_security_leg/submissions/sublist.htm viewed 27 July 2009.

> and United Nations counter-terrorism instruments as well as the agreed national counter-terrorism arrangements between the Commonwealth, States and Territories.[55]

However, even if the Monitor does have regard to these obligations and instruments, it is important to note that the Bill does not place any obligation on the Government to implement the recommendations, if any, arising from a review. While such an obligation cannot be expected, an amendment to the Bill to place an obligation on the Prime Minister to respond within a specified time frame might be appropriate.

Main provisions

Proposed section 3 of the Bill outlines the object of the Bill. Once this Bill is enacted, a Monitor is to be appointed. The Monitor 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; and

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

(c) is consistent with Australia's international obligations, including human rights obligations; and

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

Proposed section 4 is a definitions section defining certain terms used in the Bill. Of particular note is the definition of 'counter-terrorism and national security legislation'. This term is intended to cover the following provisions:

(a) Division 3 of Part III of the *Australian Security Intelligence Organisation Act 1979* and any other provisions of that Act as far as it relates to that Division [deals with powers in relation to questioning warrants in relation to terrorism offences];

(b) Part 4 of the *Charter of the United Nations Act 1945* and any other provision of that Act as far as it relates to that Part [deals with Security Council decisions in relation to terrorism and asset listing];

(c) the following provisions of the *Crimes Act 1914*:

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55. P Wong, 'Second Reading Speech: National Security Legislation Monitor Bill 2009', Senate, *Debates*, 25 June 2009, pp. 4260-4262, viewed 25 July 2009, http://parlinfo.aph.gov.au/parlInfo/genpdf/chamber/hansards/2009-06-25/0076/hansard_frag.pdf;fileType=application%2Fpdf

(i) Division 3A of Part IAA and any other provision of that Act as far as it relates to that Division [contains powers to stop, question and search persons in relation to terrorist acts];

(ii) Sections 15AA and 19AG and any other provisions of that Act as far as it relates to those sections [relating to bail and non-parole periods];

(iii) Part IC, to the extent that the provision of that Part relate to the investigation of terrorism offences (within the meaning of that Act), and any other provision of that Act as far as it relates to that Part [deals with the investigation of Commonwealth offences];

(iv) Chapter 5 of the *Criminal Code* and any other provision of that Act as far as it relates to that Chapter [offences such as treason, sedition, espionage and terrorism];

(v) Part IIIAAA of the *Defence Act 1903* and any other provision of that Act as far as it relates to that Part [ordering the intervention of the Defence Force to protect persons from serious violence];

(vi) the *National Security Information (Criminal and Civil Proceedings) Act 2004* [relating to disclosure in court proceedings if prejudicial to national security].

Other terms that are defined in this section are *head, law enforcement or security agency, National Security Legislation Monitor, operationally sensitive information, responsible Minister, secrecy provision*.

Proposed section 6 is a significant provision. This is the section that purportedly allows the Monitor to self-initiate a review of *counter terrorism and national security legislation* (a defined term) as well as related legislation. It outlines that the National Security Legislation has the following functions (**proposed subsection 6(1)**):

(a) to review the operation, effectiveness and implications of:

(i) Australia's counter-terrorism and national security legislation; and

(ii) Any other law of the Commonwealth to the extent that it relates to Australia's counter-terrorism and national security legislation;

(b) to consider whether Australia's counter-terrorism and national security legislation:

(i) contains appropriate safeguards for protecting the rights of individuals; and

(ii) remains necessary;

Proposed subsection 6(2) is a provision that clarifies what is *not* a function of the Monitor. In particular, **proposed paragraph 6(2)(a)** states that it is not a function of the Monitor to review the priorities of, and use of resources by, agencies that have functions relating to, or are involved in the implementation of, Australia's counter-terrorism and national security legislation. Further, **proposed paragraph 6(2)(b)** prohibits the Monitor from considering any individual complaints about the activities of Commonwealth agencies that have functions relating to, or are involved in the implementation of, Australia's counter-terrorism and national security legislation. This is because individual complaints are dealt with through existing agencies such as the Commonwealth Ombudsman.

Proposed subsection 6(3) allows the Monitor the power to do all things necessary or convenient to be done for, or in connection with, the performance of the Monitor's functions. As indicated earlier, this could be interpreted as allowing the Monitor capacity to self-initiate reviews to fulfil his or her functions. A report on a self-initiated review could only be published as part of the annual report.

References to the Monitor are provided for in **proposed section 7**. Following **proposed section 6(c)** which provides that the Monitor is to report on a reference received from the Prime Minister, **proposed section 7** outlines the terms on which a reference may be made. The Prime Minister may refer a matter (at the Monitor's suggestion or on his or her own initiative) relating to counter-terrorism or national security to the Monitor. Significantly, this can be as broad or as narrow as the Prime Minister sees fit and the terms of a reference may be altered. The Explanatory Memorandum notes that this section is modelled on the provisions in the *Australian Law Reform Commission Act 1976*.

Proposed section 8 requires the Monitor to have regard to Australia's obligations under international agreements (as in force from time to time) (**proposed subsection 8(a))** and arrangements that are agreed from time to time between the Commonwealth, the States and the Territories to ensure a national approach to countering terrorism (**proposed subsection 8(b))**.

A further requirement of the Monitor is, under **proposed section 9**, to give preference to legislative provisions that have been applied, considered or purportedly applied by employees of agencies that have functions relating to, or are involved in the implementation of, that legislation. This applies to legislation during that financial year or the immediately preceding financial year.

Proposed paragraph 10(1)(a) will require the Monitor to have regard to the functions of the agencies that have functions relating to, or are involved in the implementation of the counter-terrorism and national security legislation. Further, **proposed paragraph 10(1)(b)** will also require the Monitor to have regard to functions relating to that legislation that are conferred on a person who holds any office or appointment under a law of the Commonwealth or of a State or Territory. This will minimise unnecessary reviews of other agencies' functions that are currently reviewed under different arrangements.

Consultation with other agencies is prescribed in **proposed section 10(2)** and will allow the Monitor to consult with the head of any relevant agency, the Ombudsman, the Inspector-General of Intelligence and Security or a similarly appointed person mentioned in **proposed paragraph 10(1)(b)**.

Division 2 contains provisions relating to the appointment of the National Security Legislation Monitor. The provisions are fairly standard for such an appointment and are not controversial, with some exceptions. **Proposed subsection 11(1)** notes that the position is a part-time appointment. **Proposed subsection 11(2)** also requires that the Prime Minister consult with the Leader of the Opposition before making a recommendation to the Governor-General for the appointment. The Governor-General must be of the opinion that the person is suitable for appointment because of the person's qualifications, training or experience (**proposed subsection 11(3)**).

Proposed section 12 outlines that the period of appointment must be specified in the instrument of appointment and must not exceed 3 years. The Monitor is only able to be reappointed once under **proposed subsection 12(2)**.

Proposed sections 13-20 set out processes relating to remuneration, leave, disclosure of interests, resignation and termination of appointment. These provisions are not controversial in themselves although there is insufficient detail as to the structure, public administration and resource arrangements of the Monitor.

Proposed subsection 13(1) requires the Monitor to be paid such remuneration as is determined by the Remuneration Tribunal. If there is no operative determination, the Monitor can be remunerated as prescribed by the regulations. Further, **proposed subsection 13(2)** requires that the Monitor be paid the allowances prescribed by the regulations.

The Monitor may be granted a leave of absence by the Prime Minister under **proposed section 14**, on specific terms and conditions determined by the Governor-General. **Proposed section 15** requires that the Monitor must not engage in any paid employment that conflicts, or may conflict, with the performance of his or her duties without the Prime Minister's written consent.

Proposed section 16 requires the Monitor to give written notice to the Prime Minister of all interests, pecuniary or otherwise, that the Monitor has or acquires and that conflict or could conflict with the proper performance of his or her functions.

Proposed section 18 addresses matters relating to resignation and **proposed section 19** outlines the conditions that must be met before the Governor-General can terminate the appointment of the Monitor. **Proposed subsection 19(1)** allows the Governor-General to terminate the appointment for misbehaviour or physical or mental incapacity. **Proposed subsection 19(2)** states that the Governor-General must terminate the appointment of the National Security Legislation Monitor:

(a) if the Monitor:
  (i) becomes bankrupt; or
  (ii) applies to take the benefit of any law for the relief of bankrupt or insolvent debtors; or
  (iii) compounds with his or her creditors; or
  (iv) makes an assignment of his or her remuneration for the benefit of his or her creditors; or
(b) if the Monitor fails, without reasonable excuse, to comply with section 16; or
(c) if the Monitor engages, except with the Prime Minister's written consent, in paid employment that conflicts or may conflict with the proper performance of the Monitor's duties; or
(d) if the Monitor is absent, except on leave of absence granted under section 14, for 7 consecutive days or for 14 days in any 12 months.

The appointment provisions also provide, in **proposed section 20**, for the appointment of an Monitor in the event of a vacancy or period of absence of less than 12 months.

Part 3 of the Bill contains provisions relating to the information gathering powers that the Monitor may use in the course of his or duties. This Part also contains offences relating to a person's failure to assist the Monitor in particular ways. These provisions are in **proposed section 25**.

Proposed section 21 allows the Monitor to hold a hearing for the purposes of performing his or her functions under the Act. The hearings must be held in public unless the Monitor directs that a hearing or part of a hearing be held in private. Hearings must also be private during any time which a person is giving evidence that discloses operationally sensitive information (a defined term). A person may, under **proposed section 22**, by written notice, be summoned to attend a hearing to give evidence or produce documents or things as specified.

The information-gathering powers given to the Monitor are similar to those given to Commonwealth intelligence and law enforcement agencies who are permitted to conduct examinations.

Proposed section 23 outlines that the Monitor may require a person to take an oath or make an affirmation. Failure to do so is an offence under **proposed subsection 25(2).** Further, the Monitor may issue a written notice to produce information, documents or things referred to in the notice (**proposed section 24**). Failure to do so is an offence under **proposed section 25(3)**.

Each offence in **proposed section 25** carries a maximum penalty of imprisonment for 6 months or 30 penalty units, or both. A penalty unit is $110.[56] **Proposed subsections 25(5)**

56. Section 4AA of the *Crimes Act 1914 (Cth)*.

and (6) provide for a person to use the defence of reasonable excuse for the offences. It is a reasonable excuse for a person to fail to answer a question, produce a document or thing or provide information, on the ground that to do so might tend to incriminate the person or expose the person to a penalty. Presumably, a Minister would also be able to claim public interest immunity against the production of documents.

Proposed section 26 clearly states that a person who is served with a notice under section 22 (summon to attend) or section 24 (notice to produce) does not commit an offence because they assist the Monitor in the following ways:

(a) answer a question at a hearing that the Monitor requires the person to answer; or

(b) provides information that the person is required to provide in accordance with the notice; or

(c) produces a document or thing that the person is required to produce in accordance with the notice.

The Explanatory Memorandum notes that this provision

> must be viewed in light of the Monitor's functions and the protection of operationally sensitive information in other provisions of the Act. This is designed to encourage people to assist the Monitor in the conduct of inquiries as fully as possible.[57]

The effectiveness of the Monitor is enhanced by **proposed section 27** which permits him or her to retain documents or things. The Monitor may take possession of, and make copies of, the document or thing, or take extracts from the document (**Proposed subsection 27(1)(a)**); and may retain possession of the document or thing for such period as is necessary for the performance of the Monitor's function under this Act (**proposed paragraph 27(1)(b)**). However, the Monitor must allow a person who would otherwise be entitled to possession of the document or thing, reasonable access to that document or thing (**proposed subsection 27(2)**).

If documents provided by an agency have a national security classification or contain operationally sensitive information, **proposed subsection 28(2)** requires the Monitor to make arrangements for the protection of those documents and ensure that they are returned as soon as possible to the agency after examination.

Proposed section 29 outline the requirements for the preparation and presentation of an annual report relating to the performance of the National Security Legislation Monitor's functions as set out in paragraphs 6(1)(a) and (b).

57. Explanatory Memorandum, National Security Legislation Monitor Bill 2009, p. 11.

Proposed subsection 29(2) requires that the annual report is given to the Prime Minister as soon as practicable after 30 June in each financial year and, in any event, by the following 31 December. **Proposed subsection 29(3)** indicates that the annual report must not contain, amongst other things, any operationally sensitive information or any information that would or might prejudice Australia's national security or the conduct of Australia's foreign relations or the performance by a law enforcement or security agency of its functions.

Proposed subsection 29(4) requires the Monitor to seek the advice of the responsible Ministers to determine if the annual report contains any operationally sensitive information or material that may be prejudicial to Australia's national security (amongst other things).

Proposed subsection 29(5) states that the Prime Minister must present an annual report to each House of the Parliament within 15 sitting days of that House after the day on which he or she receives the report. While this is a standard provision for tabling reports of this kind, it must be noted that due to the Parliamentary sitting schedule, there could still be a lengthy period of time between the Prime Minister formally receiving the report and the actual date of tabling.

However, before presenting an annual report to each House of the Parliament, the Prime Minister must be satisfied that the annual report does not contain information referred to in subsection 29(3) (**proposed subsection 29(6)**). If, because of subsection (3), the Monitor excludes information from an annual report, the Monitor must prepare and give to the Prime Minister a supplementary report that sets out that information (**proposed subsection 29(7)**).

Proposed subsection 29(8) explicitly states that section 34C of the *Acts Interpretation Act 1901* does not apply in relation to a report given to the Prime Minister under this section. Section 34C of that Act requires periodic reporting on activities and administration of a person (commission, authority, committee, organisation etc) or an Act. Section 34C(8) excludes the Australian Security Intelligence Organisation, the Australian Secret Intelligence Service or the Office of National Assessments from this requirement. Similarly then, the exclusion of the Monitor is appropriate.

Proposed section 30 outlines the reporting requirements for a reference by the Prime Minister under section 7. **Proposed subsection 30(1)** requires the Monitor to report to the Prime Minister on a reference. The Monitor may, before giving his or her report on a reference, give an interim report to the Prime Minister on the Monitor's work on the reference. The Prime Minister also may direct the Monitor to give an interim report to the Prime Minister on the Monitor's work on the reference. There is no obligation to table a report on a reference in the Parliament.

Part 5 of the Bill contains two standard miscellaneous provisions relating to immunity and regulations. **Proposed section 31** prohibits any action, suit or proceeding may be brought

against a person who is, or has been, the Monitor in relation to anything done, or omitted to be done, in good faith by the Monitor: (a) in the performance, or purported performance, of his or her functions; or (b) in the exercise, or purported exercise, or his or her powers. **Proposed section 32** allows for regulations to be made under the Act as necessary or convenient.

Concluding comments

This Bill is fulfilling a policy commitment made by the Australian Government in December 2008. While the concept and need for an independent reviewer of terrorism laws has widespread support with academics, media politicians, and indeed previous Committee reviews, the drafting of this Bill limits the independence and flexibility of the Monitor. A review mechanism of this kind needs to have a clearer function and purpose to ensure it is robust and effective. Furthermore, the explanatory memorandum and second reading speech are silent on how this Monitor will fit within existing and proposed review mechanisms. The Senate Committee Inquiry into this Bill should address these weaknesses to encourage a more vigorous review mechanism.

Members, Senators and Parliamentary staff can obtain further information from the Parliamentary Library on (02) 6277 2430.