The Senate

Finance and Public Administration Legislation Committee

National Security Legislation Monitor Bill 2009

September 2009

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Abbreviations

AGD	Attorney-General's Department
AHRC	Australian Human Rights Commission
AMCRAN	Australian Muslim Civil Rights Advocacy Network
The bill	National Security Legislation Monitor Bill 2009
Castan Centre	The Castan Centre for Human Rights Law
CLA	Civil Liberties Australia
The committee	Finance and Public Administration Legislation Committee
Gilbert + Tobin Centre	Gilbert + Tobin Centre of Public Law
HRLRC	Human Rights Law Research Centre
ICCPR	International Covenant on Civil and Political Rights
ICJA	International Commission of Jurists (Australia)
Law Council	The Law Council of Australia
Monitor	National Security Legislation Monitor
PIAC	Public Interest Advocacy Centre
PILCH	Public Interest Law Clearing House
PJCIS	Parliamentary Joint Committee on Intelligence and Security
PM&C	Department of the Prime Minister and Cabinet

Recommendations

Recommendation 1
2.7 The committee recommends that the Senate pass the bill subject to the following recommendations.

Recommendation 2
2.13 The Committee recommends that the title of the bill be amended to: 'Independent National Security Legislation Monitor Bill 2009'.

Recommendation 3
2.14 The Committee recommends that the bill be amended so that the Monitor be referred to as the 'Independent National Security Legislation Monitor'.

Recommendation 4
2.29 The committee recommends that the Government actively and regularly assess the adequacy of the resources and staff allocated to the Monitor's office.

Recommendation 5
2.56 The committee recommends that clause 6 of the bill be amended to state clearly that the National Security Legislation Monitor has the power to conduct inquiries on his/her own initiative on subjects which are within the functions of the Monitor.

Recommendation 6
2.70 The committee recommends that the bill be amended to enable the Parliamentary Joint Committee on Intelligence and Security to refer matters relating to Australia's counter-terrorism and national security legislation to the National Security Legislation Monitor for review and report.

Recommendation 7
2.88 The committee recommends that paragraph 6(1)(b) of the National Security Legislation Monitor Bill 2009 be amended to include reference to 'any other law of the Commonwealth, the States or the Territories to the extent that it relates to Australia's counter-terrorism and national security legislation'.

Recommendation 8
2.106 The committee recommends that the bill be amended to require the Monitor to assess whether counter-terrorism and national security legislation is being used as intended.

Recommendation 9

2.111 The committee recommends that the bill be amended to allow the Monitor when performing his or her functions, to consult with independent statutory agencies such as the Office of the Privacy Commissioner and the Australian Human Rights Commission, as the Monitor considers necessary.

Recommendation 10

2.130 The committee recommends that the bill be amended to require the Monitor to assess whether the legislation is consistent with Australia's international human rights obligations.

Recommendation 11

2.137 The committee recommends that the bill be amended to require the Monitor to assess whether the legislation being reviewed remains a proportionate response to the threat posed to national security.

Recommendation 12

2.152 The Committee recommends that the bill be amended to require the Monitor to prepare two versions of any report that requires reference to sensitive material. The first version would be an unedited version for the Prime Minister, and the second, an edited version with references to sensitive material excluded for tabling in both Houses of Parliament.

Recommendation 13

2.162 The committee recommends that, if its earlier recommendation to require the tabling of the Monitor's reports in both Houses of Parliament is adopted, then the government be required to table a response to the Monitor's reports in both Houses of Parliament, within six months of receipt of the report.

Chapter 1

Introduction

The inquiry

1.1 On 25 June 2009 the Senate, on the recommendation of the Selection of Bills Committee (Report No. 10 of 2009), referred the National Security Legislation Monitor Bill 2009 (the bill) to the Finance and Public Administration Legislation Committee (the committee) for inquiry and report by 7 September 2009.

1.2 The inquiry was advertised in *The Australian* and through the Internet. The committee invited submissions from the Australian Government and interested organisations and individuals.

1.3 The committee received 15 public submissions. A list of organisations that made public submissions to the inquiry, together with other information authorised for publication, is at Appendix 1.

1.4 The committee held a public hearing in Canberra on 14 August 2009. Appendix 2 lists the names and organisations of those who appeared. Submissions and the Hansard transcript of evidence may be accessed through the committee's website at www.aph.gov.au/senate/committee/fapa_ctte/index.htm.

The bill[1]

1.5 The bill establishes the statutory position of the National Security Legislation Monitor (the Monitor). The standing function of the Monitor will be to review the operation, effectiveness and implications of the counter-terrorism and national security legislation and report his or her comments, findings and recommendations to the Prime Minister. In addition, the Monitor must consider whether Australia's counter-terrorism and national security legislation contains appropriate safeguards for protecting individual rights, and whether the legislation remains necessary.

1.6 In reviewing the legislation, the Monitor must give particular emphasis to that legislation which has been used or considered in the previous financial year to ensure that the Monitor reviews the laws which have been used in a practical scenario. In conducting the review, the Monitor must have regard to Australia's international obligations as well as the agreed national counter-terrorism arrangements between the Commonwealth, states and territories.

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1 Much of this section is based on the Explanatory Memorandum, p. 1.

1.7 The Monitor will be able to initiate his or her own reviews. The Prime Minister may also refer matters relating to counter-terrorism or national security to the Monitor for report directly back to the Prime Minister.

1.8 The Monitor must also prepare, and give to the Prime Minister, an annual report on the performance of his or her statutory functions. An edited report will be tabled in each House of Parliament.

1.9 The bill provides the Monitor with the power to compel the giving of sworn testimony, to hold both public and private hearings and to summon a person and to compel the production of documents and things. These powers are supported by criminal offences for conduct in the nature of contempt.

1.10 The bill requires that before a recommendation on appointment is made to the Governor-General, the Prime Minister must consult with the Leader of the Opposition.

1.11 The Minister, in the second reading speech, noted that:

> The proposals in this Bill reflect the Government's commitment to ensure that Australia has strong counter-terrorism laws that protect the security of Australians, while preserving the values and freedoms that are part of the Australian way of life.[2]

Background

National security legislation

1.12 In its December 2006 report, the Parliamentary Joint Committee on Intelligence and Security (PJCIS) observed that:

> Since 2001, a series of terrorist events have served as a reminder of the risk and consequences of terrorist violence. Australia is not immune from these influences... [The PJCIS has] concluded that a special terrorism law regime is justifiable and forms an important, although not exclusive, tool in Australia's counter-terrorism strategy...
>
> It is clear that Australia now has a highly developed legal framework and stronger institutional capacities to deal with the threat of terrorism. The terrorism law regime is, essentially, a preventive model, which differs in many respects from our earlier legal traditions. Bearing in mind the significance of these changes and the importance of terrorism policy into the future, we have recommended the appointment of an Independent Reviewer to provide comprehensive and ongoing oversight. The Independent Reviewer, if adopted, will provide valuable reporting to the

2 Senator the Hon Penny Wong, Minister for Climate Change and Water, *Senate Hansard*, 25 June 2009, p. 4260.

> Parliament and help to maintain public confidence in Australia's specialist terrorism laws.[3]

1.13 The PJCIS also noted that since 2001 the Parliament has passed over thirty separate pieces of legislation dealing with terrorism and national security that extend the criminal law and expand the powers of intelligence and law enforcement agencies. This has coincided with the approval of very significant budget increases to fund new security measures. The PJCIS noted that the new terrorism law regime carries heavy penalties and introduces significant changes to the traditional criminal justice model.[4]

Calls for an independent reviewer

1.14 A number of inquiries into different aspects of terrorism and security legislation have recommended the establishment of an independent reviewer of national security legislation. The June 2006 report of the Security Legislation Review Committee, (the Sheller Committee, which was chaired by the Hon Simon Sheller AO QC), found that it was important that the ongoing operation of security legislation be closely monitored, and that Australian governments have an independent source of expert commentary on the legislation. The Sheller report discussed a number of models of future review including the appointment of an independent reviewer.[5]

1.15 In December 2006 the PJCIS noted that post enactment review of national security legislation had been sporadic and fragmented with a focus on specific pieces of legislation rather than the terrorism law regime as a whole. The PJCIS concluded that there was a need for an integrated approach to ensure ongoing monitoring and refinement of the law where necessary and recommended that the government appoint an Independent Reviewer of terrorism law in Australia. It was further recommended that the Independent Reviewer be free to set his or her own priorities, have access to all necessary information and that the Independent Reviewer report annually to the Parliament.[6]

1.16 In the 2007 report on its inquiry into the proscription of 'terrorist organisations' under the Australian Criminal Code, the PJCIS reiterated its view that an Independent Reviewer would provide a more integrated and ongoing approach to monitor the implementation of terrorism law in Australia.[7]

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

4 Parliamentary Joint Committee on Security and Intelligence, *Review of Security and Counter Terrorism Legislation*, December 2006, p. 21.

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

6 Parliamentary Joint Committee on Security and Intelligence, *Review of Security and Counter Terrorism Legislation*, December 2006, p. 22.

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

1.17 More recently, the Hon John Clarke QC, in his November 2008 report on the case of Dr Mohamed Haneef, recommended that consideration be given to the appointment of an independent reviewer of Commonwealth counter-terrorism laws. The Clarke report supported:

> ..the notion of ensuring that the system is balanced between the need to endeavour to prevent terrorism and the need to protect an individual's rights and liberties. An independent reviewer could play an important part in striking this necessary balance.[8]

1.18 In October 2008, the Senate Legal and Constitutional Affairs Committee reported on its inquiry into a private Senators' bill; the Independent Reviewer of Terrorism Laws Bill 2008 [No. 2]. The bill sought to establish an 'Independent Reviewer of Terrorism Laws' to ensure ongoing and integrated review of the operation, effectiveness and implications of laws in Australia relating to terrorism. In its report the committee gave in-principle support to the bill and recommended a range of amendments to the bill including that the role of Independent Reviewer be carried out by a panel of three people with relevant expertise, whose terms of service be staggered where possible; and that, in addition to reporting to Parliament on inquiries undertaken by the Independent Reviewer in respect of terrorism legislation, an Annual Report on the activities of the Independent Reviewer is tabled in Parliament.[9] The bill was passed in the Senate on 13 November 2008 and was introduced into the House of Representatives on 24 November 2008.

1.19 On 23 December 2008, the Attorney-General, the Hon Robert McClelland MP announced the establishment of the National Security Legislation Monitor:

> The Government will establish a National Security Legislation Monitor to review the practical operation of counter-terrorism legislation on an annual basis. The Monitor will be an independent statutory office within the Prime Minister's portfolio and will report to Parliament... The Government will progress this proposal as a priority.[10]

Proposed amendments to National Security Legislation

1.20 On 12 August 2009, the Attorney-General released a discussion paper on proposed legislative reforms to Australia's counter-terrorism and national security legislation.[11] Addressing the House of Representatives the Attorney-General stated:

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8 The Hon John Clarke, *Report of the Inquiry into the Case of Dr Mohamed Haneef, Volume One*, November 2008, pp 255–56.

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

10 The Hon Robert McClelland MP, Attorney-General for Australia, 'Comprehensive Response To National Security Legislation Reviews', Press Release, 23 December 2008.

11 The Hon Mr Robert McClelland MP, Attorney-General, *House of Representatives Hansard*, 12 August 2009, pp 73–74.

> The amendments proposed in this discussion paper seek to achieve an appropriate balance between the government's responsibility to protect Australia, its people and its interests and to instil confidence that our laws will be exercised in a just and accountable way.[12]

1.21 The Attorney-General noted that the release of the discussion paper was a separate process to the establishment of the Monitor, which will 'be independent and will consider whether legislation adequately protects public safety, without reducing cherished public freedoms.'[13]

12 The Hon Mr Robert McClelland MP, Attorney-General, *House of Representatives Hansard*, 12 August 2009, p. 73.

13 The Hon Mr Robert McClelland MP, Attorney-General, *House of Representatives Hansard*, 12 August 2009, p. 73.

Chapter 2

Key Issues

Overview of evidence

2.1 The committee received evidence from a variety of organisations that generally welcomed the establishment of the Monitor. The majority of evidence received included comments of support, which viewed the Monitor as an important office for improving the operation of terrorism and national security legislation. Typical of these was the following comment from the Gilbert + Tobin Centre of Public Law:

> We welcome the National Security Legislation Monitor Bill 2009 as an initiative to establish ongoing, holistic and independent review of Australia's anti-terrorism laws.[1]

2.2 Another example comes from the Federation of Community Legal Centres (Victoria):

> The Federation welcomes in principle the proposal to establish a National Security Legislation Monitor, a permanent mechanism for independent review of counter-terrorism and national security legislation. The counter-terrorism laws are extraordinary and it is imperative whilst they are in place that they are subject to regular, comprehensive and independent review.[2]

2.3 Some witnesses highlighted the increase in the amount of legislation concerning terrorism and national security as a key reason for supporting the establishment of the monitor. The International Commission of Jurists (Australia) (ICJA) stated that:

> At the outset the ICJA would first like to commend the Australian Government on creating such [an] office. The role of the Monitor is particularly important in light of the fact that over the past nine years there has been a proliferation of legislative activity concerning terrorism and national security.[3]

2.4 Notwithstanding the broad ranging support for the establishment of the Monitor, the committee heard evidence on a range of issues including the following items which are discussed below:

- the independence of the Monitor;
- the review referral mechanism;

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1 Gilbert + Tobin Centre of Public Law, *Submission 1*, p. 2.

2 Federation of Community Legal Centres (Victoria), *Submission 9*, p. 1.

3 International Commission of Jurists (Australia), *Submission 5*, p. 2.

- the matters to which the Monitor must have regard when reviewing legislation; and
- the Monitor's reporting requirements.

2.5 Only one submission opposed the establishment of the Monitor. The New South Wales Council for Civil Liberties stated that on balance '…the introduction of a National Security Legislation Monitor is not the best means of bringing the unsatisfactory legal situation that exists at present into a more satisfactory position.'[4]

2.6 At the outset the committee would like to endorse the widespread support for the bill. It also endorses the need to balance competing concerns which were highlighted in Senator Wong's second reading speech:

> The proposals in this Bill reflect the Government's commitment to ensure that Australia has strong counter-terrorism laws that protect the security of Australians, while preserving the values and freedoms that are part of the Australian way of life.[5]

Recommendation 1

2.7 The committee recommends that the Senate pass the bill subject to the following recommendations.

Independence of the monitor

2.8 A consistent theme that ran throughout the inquiry was the need to ensure the Monitor's independence. While being an issue in its own right, the question of the Monitor's independence also underlies many related issues that are discussed later in this report, for example the referral mechanism and reporting requirements. The committee sees the notion of independence as fundamentally important to the position of the National Security Legislation Monitor. It will be an aspect of the Monitor's character that will heavily influence the public perception and legitimacy of the position. As a consequence, the committee has used this notion as a prism through which to assess the various issues raised during the committee's inquiry.

2.9 Many submissions and witnesses argued that the independence of the Monitor will directly affect the efficacy of his or her work. The committee heard that various features of the bill, both individually and cumulatively, will impact on the actual or perceived independence of the Monitor.

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4 New South Wales Council for Civil Liberties, *Submission 12*, pp 1–2.

5 Senator the Hon Penny Wong, Minister for Climate Change and Water, *Senate Hansard*, 25 June 2009, p. 4260.

Title of the Monitor

2.10 Submitters and witnesses expressed concern that the title of the office and of the bill did not include the word 'independent'. The Law Council noted its disappointment that 'the term independent does not feature in the title of the [Monitor] Bill or in the title of the Monitor itself' arguing that:

> While many features of the [Monitor] underscore its independent character, the Law Council is of the view that it is of symbolic importance to include the term 'independent' in the title of the office.[6]

2.11 Similarly the AHRC recommended that the 'independent status of the Monitor should also be reflected in the title of his or her office.'[7]

Committee view

2.12 The committee is of the view that the inclusion of the word 'independent' in the title of the office and in the title of the bill will assist the public's understanding of the role of the Monitor as an independent reviewer of national security legislation. This in turn will improve public confidence in Australia's national security and terrorism laws.

Recommendation 2

2.13 The Committee recommends that the title of the bill be amended to: 'Independent National Security Legislation Monitor Bill 2009'

Recommendation 3

2.14 The Committee recommends that the bill be amended so that the Monitor be referred to as the 'Independent National Security Legislation Monitor'.

Legal Status of the Monitor

2.15 The Monitor is appointed under clause 11 of the bill. Subclause 11(1) reads as follows:

> The National Security Legislation Monitor is to be appointed by the Governor-General by written instrument, on a part-time basis.

2.16 Some submissions and witnesses expressed concerns that the bill did not sufficiently define the legal status of the Monitor. For example, the Gilbert + Tobin Centre of Public Law (Gilbert + Tobin Centre) argued that the bill did not address the legal status of the Monitor or whether it constitutes an independent statutory agency.[8]

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

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

8 Gilbert Tobin Centre of Public Law, *Submission 1*, p. 7.

The Law Council of Australia (the Law Council) also expressed these concerns recommending that the bill be amended to include a specific provision outlining whether the Monitor is to be an independent statutory agency.[9]

2.17 The Castan Centre for Human Rights Law (the Castan Centre) argued that the departments and agencies examined as part of the Monitor's work may often be part of the executive government and as a result:

> Unless that statutory independence is established and made unambiguous, there would be an inevitable tension, both a legal tension and a practical operational tension, if the monitor were called upon to undertake a review of the activities of those departments or agencies. So we think there could be improvements in the wording of the bill to make that independence clear.[10]

2.18 On a number of occasions the Government has sought to clarify the independent status of the Monitor. For example when the Monitor was first announced in December 2008, the Attorney-General, the Hon Robert McClelland MP stated that:

> The Government will establish a National Security Legislation Monitor to review the practical operation of counter-terrorism legislation on an annual basis. The Monitor will be an *independent statutory office within the Prime Minister's portfolio* and will report to Parliament.[11]

2.19 The bill's second reading speech refers to 'the establishment of an independent reviewer of terrorism laws' and goes on to highlight the Monitor's independent status:

> ...the role of the Monitor will be undertaken by one person who will be expected to be independent from the current administration of the counterterrorism legislation.[12]

2.20 In responding to questions about the statutory independence of the Monitor, officers from the Department of the Prime Minister and Cabinet (PM&C) told the committee that the monitor '…is an independent statutory appointment within the Prime Minister's portfolio so the position itself does not fall within the department.'[13]

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9 Law Council of Australia, *Submission 4*, p. 20.

10 Dr Patrick Emerton, Associate, Castan Centre for Human Rights Law, *Proof Committee Hansard*, 14 August 2009, p. 2–3.

11 The Hon Robert McClelland MP, Attorney-General for Australia, 'Comprehensive Response To National Security Legislation Reviews', Press Release, 23 December 2008, emphasis added.

12 Senator the Hon Penny Wong, Minister for Climate Change and Water, *Senate Hansard*, 25 June 2009, p. 4260.

13 Mr Garry Fleming, Assistant Secretary, Border Protection and Law Enforcement Branch, Department of the Prime Minister and Cabinet, *Proof Committee Hansard*, 14 August 2009, p. 26.

Committee view

2.21 While noting the concerns of some submitters and witnesses, the committee is satisfied that the bill provides sufficient statutory independence for the Monitor. The committee notes in particular the evidence of PM&C that the Monitor 'is an independent statutory appointment'. The committee also notes that the proposed appointment and office location arrangements for the Monitor are identical to those for the Commonwealth's independent Inspector-General of Intelligence and Security.[14]

Location of office, staffing and resources

2.22 Submitters and witnesses expressed concern that if the staff and the office of the Monitor were located within the PM&C, the independence of the Monitor may be reduced. For example, the Public Interest Advocacy Centre (PIAC) articulated these concerns stating:

> …the Bill fails to specify whether the Monitor will be a new independent office or part of an existing office of department…PIAC suggests that the Monitor should be a new, independent office to ensure that the Monitor is seen to be truly independent of government.[15]

2.23 During the public hearings, committee members questioned witnesses on whether the location of the office within a government department may undermine the independence of the Monitor. The Gilbert +Tobin Centre stated:

> I am not suggesting that the office should not be located within the Department of Prime Minister and Cabinet. Indeed, the Office of the Inspector-General of Intelligence and Security is also located within a government department and, indeed, that is necessary for administrative purposes. All I am suggesting is that that particular factor combined with other aspects of the legislation—things like the current reporting arrangements in sections 29 and 30—could have the effect of undermining public confidence in independence. If the office is going to be located within a government department, as it necessarily must be, then steps must be taken to ensure that it is balanced by clear indications of the independence of the office, for example, in the reporting requirements.[16]

14 That is, appointment by the Governor-General following consultation between the Prime Minister and the Leader of the Opposition. See below for office location details.

15 Public Interest Advocacy Centre, *Submission 15*, p. 8.

16 Ms Nicola McGarrity, Director, Terrorism and Law Project, Gilbert + Tobin Centre of Public Law, *Proof Committee Hansard*, 14 August 2009, p. 13.

2.24 PM&C officials advised the committee that the staff in the office of the Monitor would be employees of PM&C.[17]

2.25 The funding to establish the Monitor was announced in the 2009–10 Budget:

> ...the Government will provide $1.4 million over four years to establish the National Security Legislation Monitor in the Department of the Prime Minister and Cabinet, to review the operation of counter-terrorism and national security legislation.[18]

2.26 Several submissions and witnesses highlighted the level of resources allocated to the Monitor as being key to his or her effectiveness. The Law Council argued that ultimately 'the success of the Monitor is likely to be dependant upon the individual appointee and the resources he or she has at his or her disposal.'[19] The Law Council also stressed in its evidence to the committee that 'the monitor will require sufficient resources to be able to do this very important job.'[20] The Law Council compared the proposed resources of the Monitor, with the resources available to the United Kingdom's Independent Reviewer of Terrorism Laws, Lord Carlile:

> The Law Council was fortunate to meet with [Lord Carlile] when he visited Australia earlier this year. He certainly indicated that he thought that at least three or four staff were necessary to fulfil his role. When you look at the budget allocation for this office, it appears that that allocation would be quite stretched to cover three or four staff as well as the part-time monitor.[21]

2.27 Committee members questioned PM&C officers on the possible staffing and resources for the Monitor. Officers told the committee that two new positions would be created within PM&C to staff the Monitor's office, also telling the committee that:

> …we notionally have two people in our minds, but a lot of it will depend on how the monitor, once appointed, chooses to work—whether, for example, that is in short bursts with a heavy load for a couple of months in each annual cycle plus a bit more as needed, or whether the monitor might prefer to be doing a number of hours a week each week throughout the year.[22]

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17 Mr Garry Fleming, Assistant Secretary, Border Protection and Law Enforcement Branch, Department of the Prime Minister and Cabinet, *Proof Committee Hansard*, 14 August 2009, p. 25.

18 *Budget Paper No. 2, Budget Measures 2009–10*, May 2009, p. 372.

19 Law Council of Australia, *Submission 4*, p. 20.

20 Ms Rosemary Budavari, Director, Criminal Law and Human Rights Unit, Law Council of Australia, *Proof Committee Hansard*, 14 August 2009, p. 15.

21 Ms Rosemary Budavari, Director, Criminal Law and Human Rights Unit, Law Council of Australia, *Proof Committee Hansard*, 14 August 2009, p. 15.

22 Mr Garry Fleming, Assistant Secretary, Border Protection and Law Enforcement Branch, Department of the Prime Minister and Cabinet, *Proof Committee Hansard*, 14 August 2009, p. 26.

Committee view

2.28 The committee agrees with the Law Council that the success of the Monitor is likely, in part, to be dependant on the resources that he or she has at his or her disposal. However the committee is of the view that what is considered to be sufficient resources will ultimately depend on a range of factors including the quantity, timing and scope of reference. It is difficult to predict these in advance of the establishment of the Monitor. The committee considers that funding allocated in the 2009–10 Budget is sufficient for the initial establishment of the office. However the committee would be concerned if at some stage in the future the Monitor is unable to fulfil his or her functions because of lack of resources. While the committee will continue to assess funding for the Monitor through its Estimates and Annual Report processes, it believes that ongoing consideration by the government is also required.

Recommendation 4

2.29 The committee recommends that the Government actively and regularly assess the adequacy of the resources and staff allocated to the Monitor's office.

Appointment process

2.30 Subclause 11(2) outlines the process for the appointment of the Monitor:

> Before a recommendation is made to the Governor-General for the appointment of a person as the National Security Legislation Monitor, the Prime Minister must consult with the Leader of the Opposition in the House of Representatives.

2.31 An area of concern to submitters and witnesses was the proposed appointment process for the Monitor. The bill states that the Monitor is to be appointed by the Governor-General following consultation between the Prime Minister and the Leader of the Opposition. Submitters and witnesses expressed concern that this process may undermine the independence of the monitor. The International Commission of Jurists (Australia) (ICJA) articulated these concerns stating that: 'If the purpose of the legislation is to have an independent monitor then the monitor should be appointed by an independent non-political body.'[23]

2.32 In their joint submission, the Public Interest Law Clearing House and the Human Rights Law Resource Centre argued that:

> …it is considered that a transparent, and publicly accountable selection process, combined with comprehensively described functions, would assist to avoid any perception of lack of independence.[24]

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23 International Commission of Jurists (Australia), *Submission 5*, pp 4–5.

24 Public Interest Law Clearing House/Human Rights Law Research Centre, *Submission 6*, p. 11.

Committee View

2.33 The committee does not believe that a more detailed and lengthy appointment process than prescribed in the bill would improve the independence of the Monitor. The committee believes that the requirement for the Prime Minister to consult with the Leader of the Opposition before making a recommendation to the Governor-General is sufficient for ensuring the Monitor's independence. The committee notes that this process is the same as that used to appoint the Inspector-General of Intelligence and Security.

Qualifications of the Monitor

2.34 The issue of the Monitor's qualifications was also raised during the inquiry. Subclause 11(3) requires that a person must not be appointed as the Monitor unless in the Governor-General's opinion, the person is suitable for appointment because of the person's qualifications, training or experience.

2.35 The Australian Muslim Civil Rights Advocacy Network (AMCRAN) stated that it 'is of the firm view that this requirement does not meet the complexities of the role' arguing that the Monitor needs to 'have extensive legal background.'[25]

2.36 The committee questioned witnesses on whether the Monitor should be required to have a legal background. The Law Council responded:

> Not necessarily. I think in the way the bill is drafted is that the person or persons who are selected, if there is an amendment to the bill, have to have suitable qualifications and experience. Obviously, a legal background would be an advantage in reviewing legislation and how it has been operating, but we would not necessarily see that that would be an absolute requirement. It would be up to the Prime Minister, in consultation with the Leader of the Opposition, to select a person or persons with suitable qualifications.[26]

2.37 Officers from the Attorney-General's Department (AGD) told the committee that while legal qualifications would be taken into account 'it is the character and the experience of the person that are very important, not just the qualifications'.[27] Officers from PM&C supported this proposition, telling the committee that:

> I think that, clearly, relevant parts of the legal profession are going to be an obvious picking ground. A legal background will help. My only concern would be that, if you locked in that they had to have legal qualifications, you would potentially rule out someone who might be very well qualified to

25 Australian Muslim Civil Rights Advocacy Network, *Submission 14*, p. 4.

26 Law Council of Australia, *Submission 4*, p. 15.

27 Mr Garry Fleming, Assistant Secretary, Border Protection and Law Enforcement Branch, Department of the Prime Minister and Cabinet, *Proof Committee Hansard*, 14 August 2009, p. 24.

do it. You might not get the best candidate, just because they do not have legal qualifications.[28]

Committee view

2.38 The committee considers that prescribing minimum qualifications for the monitor is overly prescriptive and may exclude members of the community who would be well qualified to fulfil the role of monitor.

Referral mechanism

2.39 Many submissions raised the issue of how reviews by the Monitor will be initiated. In particular, a number of submitters and witnesses expressed concern that the Monitor's power to initiate his or her own inquiries was not clear. Others suggested that parties other than the Prime Minister or the Monitor should have the power to refer matters for report.

The Monitor's power to self-initiate inquiries

2.40 Clause 6 establishes the functions of the Monitor, part of which reads:

6 Functions of the National Security Legislation Monitor

(1) The National Security Legislation Monitor has the following functions:
- (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;
- (c) if a matter relating to counter-terrorism or national security is referred to the Monitor by the Prime Minister—to report on the reference.

2.41 Subclause 6(3) goes on to provide the Monitor with broad powers to do 'all things necessary or convenient to be done for or in connection with the performance of the Monitor's functions.'

2.42 Clause 7 then deals with the Prime Minister's powers to refer matters to the Monitor, including the power to refer matters on his or her own initiative or at the suggestion of the Monitor, to alter the terms of a reference and to give directions about the order in which the Monitor is to deal with references.

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28 Mr Garry Fleming, Assistant Secretary, Border Protection and Law Enforcement Branch, Department of the Prime Minister and Cabinet, *Proof Committee Hansard*, 14 August 2009, p. 24.

2.43 Several submitters noted that there are indications in the bill's supporting material that the Monitor has the power to self-refer matters. The Explanatory Memorandum states:

> ...the Monitor will be able to initiate his or her own reviews. It also provides scope for the Prime Minister to refer matters relating to counter-terrorism or national security to the Monitor to report on to the Prime Minister.[29]

2.44 When introducing the bill, Senator the Hon Penny Wong repeated that 'the Monitor may initiate his or her own investigations'.[30]

2.45 Despite these indications of the ability of the Monitor to self refer matters, the committee received evidence from numerous sources that the bill does not clearly specify who has the power to determine what matters will be referred to the Monitor for report.

2.46 A number of submissions have noted the contrast between the explicit references in the bill to the Prime Minister's powers of reference in paragraph 6(1)(c) and clause 7, and the lack of specific reference to the Monitor's powers in the same regard. Indeed, some submissions and witnesses suggested that the only matters which can be investigated by the Monitor are those matters referred by the Prime Minister.

2.47 The Law Council of Australia expressed this concern in their submission:

> ...that the [Monitor] may not have a clear power to initiate and report on his or her own inquiries. While the [Explanatory Memorandum] suggest [the Monitor] has power to initiate his or her own investigations, the language of the Bill itself does not make this clear. For example, clause 7 provides that the [Monitor] can suggest that the Prime Minster refer a matter for inquiry, but it does not empower the [Monitor] to initiate its own reference. Even if the functions contained in clause 6 are interpreted in a manner broad enough to empower the [Monitor] to initiate his or her own investigations, the only place the [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. The Law Council submits that it is essential to the independent character of the [Monitor] that he or she be clearly invested with the power to initiate his or her own inquiries and to report on any findings in a timely manner.[31]

2.48 The Gilbert + Tobin Centre of Public Law sought to have this issue addressed via an amendment to the bill:

> We are concerned that there is no explicit mention in section 6 of the Monitor's power to conduct inquiries upon his/her own initiative (beyond

29 Explanatory Memorandum, p. 4.

30 Senator the Hon Penny Wong, Minister for Climate Change and Water, *Senate Hansard*, 25 June 2009, p. 4260.

31 Law Council of Australia, *Submission 4*, p. 18.

> the obligation to lodge an annual report in section 29). 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.
>
> It is possible that this power is implicit in section 6(1), especially given the statement in the Second Reading speech that '[t]he Monitor may initiate his or her own investigations'. However, rather than leaving it to implication, this power should be expressly set out in the National Security Legislation Monitor Bill 2009.[32]

2.49 Similar concerns about the ability of the Monitor to commence reviews on his or her own initiative were expressed by the Public Interest Law Clearing House and Human Rights Law Research Centre, Civil Liberties Australia and the Federation of Community Legal Centres (Victoria).[33]

2.50 Mr Jonathan Hunyor, Director, Legal Section, Australian Human Rights Commission, accepted that the ability of the Monitor to initiate his or her own inquiries 'possibly falls within section 6(1) as we read it, but we agree that that is something that could and should be clarified'.[34]

2.51 Mr Garry Fleming Assistant Secretary, Border Protection and Law Enforcement Branch, Department of the Prime Minister and Cabinet advised that the Monitor's power to investigate matters on his or her own initiative is implicit in subclause 6(3):

> Within the core functions of the monitor, as expressed in clause 6 of the bill—reviewing the 'operation, effectiveness and implications' of the specific legislation and any other relevant law, and to 'consider' that legislation—under subclause (3) the monitor 'has the power to do all things necessary or convenient' for discharging that role. So, within that core role, he or she will not need a referral and can investigate anything on his or her own motion...[35]

Committee view

2.52 It is quite clear from the Explanatory Memorandum, the Minister's second reading speech and evidence provided by officials, that the Government's intention is to allow the Monitor to undertake inquiries on his or her own initiative, and not solely at the instigation of the Prime Minister. The committee supports this intent.

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32 Gilbert + Tobin Centre of Public Law, *Submission 1*, p. 5.

33 Public Interest Law Clearing House/Human Rights Law Resource Centre, *Submission 6*, pp 11–12; Civil Liberties Australia, *Submission 8*, p. 1; Federation of Community Legal Centres (Victoria), *Submission 9*, p. 2.

34 Mr Jonathan Hunyor, Director, Legal Section, Australian Human Rights Commission, *Proof Committee Hansard*, 14 August 2009, p. 9.

35 Mr Garry Fleming, Assistant Secretary, Border Protection and Law Enforcement Branch, Department of the Prime Minister and Cabinet, *Proof Committee Hansard*, 14 August 2009, p. 24.

2.53 Based on the number of times this matter was drawn to the committee's attention, the committee accepts the bill does not express this intention as clearly as it might. The committee further notes that the *Inspector-General of Intelligence and Security Act 1986* specifically allows the Inspector-General of Intelligence and Security to undertake many of its inquiry functions on 'the Inspector-General's own motion'.[36]

2.54 The committee sees no reason why the stated policy intent cannot be more clearly expressed in the bill.

2.55 The committee is of the view that clarifying the bill in this manner will enhance the perceived and actual independence of the Monitor.

Recommendation 5

2.56 The committee recommends that clause 6 of the bill be amended to state clearly that the National Security Legislation Monitor has the power to conduct inquiries on his/her own initiative on subjects which are within the functions of the Monitor.

Referrals by third parties

2.57 Several submissions and witnesses proposed that, in addition to the Prime Minister, other external parties should have the ability to refer matters to the Monitor for review and report. These suggestions were put forward to counter the perception that the Monitor's independence would be constrained by the referral mechanism only allowing references from the Prime Minister.

2.58 The Law Council of Australia argued that providing other parties with the ability to refer matters to the Monitor is necessary because the current situation 'invests the Executive Government with considerable control over the activities of the [Monitor]'.[37]

2.59 A suggestion shared by several submitters was to give the Parliamentary Joint Committee on Intelligence and Security (PCJIS) the ability to refer matters to the Monitor. This is currently provided for in the Independent Reviewer of Terrorism Laws Bill 2008 [No. 2], paragraph 8(1)(b).

2.60 The Law Council of Australia strongly endorsed giving the PCJIS the ability to refer matters to the Monitor:

> The PJCIS plays an important oversight role in respect of a number of key agencies responsible for implementing Australia‘s anti-terrorism laws, such

36 *Inspector-General of Intelligence and Security Act 1986*, s. 8.

37 Law Council of Australia, *Submission 4*, p. 17.

> as the Australian Security Intelligence Organisation, the Australian Secret Intelligence Service and the Department of Defence and has a specific review role in respect of key pieces of Australia's anti-terrorism legislation, such as the *Security Legislation Amendment (Terrorism) Act 2002*. Through its work, the PJCIS is well placed to identify any shortcomings or inefficiencies in the content and operation of Australia's anti-terrorism measures and to identify appropriate matters to refer to the [Monitor] for review. In addition, the bipartisan, bicameral nature of the PJCIS would further enhance the independent character of the work undertaken by the [Monitor].[38]

2.61 The Gilbert + Tobin Centre of Public Law and the Public Interest Advocacy Centre also supported vesting the power to refer matters in the PJCIS.[39]

2.62 The International Commission of Jurists Australia (ICJA) proposed the inclusion of state and territory attorneys-general in the referral process:

> The ICJA submits that the Committee might want to consider widening the referral process to include relevant governmental organizations and persons, particularly those persons with whom the Monitor will be able to liaise (as per section 10). The ICJA submits that a broader referral process will ensure that all counter-terrorism and national security legislation and Commonwealth criminal legislation is considered rather than just those chosen by the Prime Minister or the Monitor himself or herself. The Committee may thus want to consider the inclusion of State and Territory Attorneys General in the referral process.[40]

2.63 Civil Liberties Australia (CLA) proposed an extensive list of organisations and persons that should have the ability to refer matters to the Monitor:

> In CLA's opinion, references to the Monitor should be entitled to come from the Prime Minister, the Leader of the Opposition, the President of the Senate or the Speaker of the House of Representatives, as well as being able to be launched by an "own motion" process by the Monitor, without requiring the approval of a Prime Minister. Without at least the Leader of the Opposition involved, this legislation has a distinct party political sheen to it, whichever party is currently dominant: no party should have exclusive control – even temporarily – in such an important area of law.[41]

2.64 The Australian Muslim Civil Rights Advocacy Network (AMCRAN) suggested extending this ability to members of the community:

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38 Law Council of Australia, *Submission 4*, p. 17.

39 Gilbert + Tobin Centre of Public Law, *Submission 1*, pp 10–11; Public Interest Advocacy Centre, *Submission 15*, p. 8.

40 International Commission of Jurists Australia, *Submission 5*, p. 3.

41 Civil Liberties Australia, *Submission 8*, p. 1.

> AMCRAN submits that it would be both effective and pragmatic to provide a legislative mechanism to allow concerned individuals or groups with standing to be able to trigger review action by the Independent Reviewer.[42]

2.65 Officials from the Department of the Prime Minister and Cabinet pointed out that there is nothing to prevent a person or organisation suggesting a matter to the Monitor for investigation which falls within the core functions set out in clause 6.[43] However, there would appear to be no statutory requirement for the Monitor to act on such suggestions.

2.66 The committee notes that there is a risk that the references received by the Monitor could exceed its capacity to undertake effective reviews if those able to refer matters to the Monitor are not responsible for the allocation of resources. This risk was highlighted by Mr Geoffrey McDonald, First Assistant Secretary, National Security Law and Policy Division, Attorney-General's Department:

> My initial thought about the problem with [third party referrals] is that someone has to take responsibility for the resources that are available to the monitor, so it is important that one portfolio control that flow. In that way that portfolio can ensure that the monitor is given proper support.[44]

Committee view

2.67 The committee is of the view that a slight broadening in the referral mechanism is warranted in order to improve the independent nature of the Monitor. As drafted, the bill will only allow referrals from one side of politics.[45] This limitation may create the perception that the government of the day has control of the Monitor's activities.

2.68 The committee's preferred approach is that the bill should be amended to enable the PJCIS to refer matters relating to counter-terrorism or national security legislation to the Monitor. The PJCIS is a parliamentary committee comprised of both sides of politics. Over many years it has provided valuable input into the national security debate in Australia, including many sound recommendations to the

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42 Australian Muslim Civil Rights Advocacy Network, *Submission 14*, p. 4.

43 Mr Garry Fleming Assistant Secretary, Border Protection and Law Enforcement Branch, Department of the Prime Minister and Cabinet, *Proof Committee Hansard*, 14 August 2009, p. 26.

44 Mr Garry Fleming Assistant Secretary, Border Protection and Law Enforcement Branch, Department of the Prime Minister and Cabinet, *Proof Committee Hansard*, 14 August 2009, p. 26.

45 It is acknowledged that recommendations for review from any side of politics could be adopted by the Monitor provided the self-referral power is clarified. However, this rather indirect mechanism would mean that one side of politics is reliant on the Monitor to initiate these reviews.

government on national security laws.[46] As the committee noted earlier, referrals by the PJCIS are provided for under the Independent Reviewer of Terrorism Laws Bill 2008 [No. 2], a bill which was unanimously supported by the Legal and Constitutional Affairs Committee.[47] The committee agrees with the Law Council of Australia that 'the bipartisan, bicameral nature of the PJCIS would further enhance the independent character of the work undertaken by the [Monitor]'.

2.69 It is acknowledged that this approach has the potential to increase the work load of the Monitor. However, in the committee's view the benefits of bolstering the independence of the Monitor outweigh the minor resourcing constraints that may flow from a slight expansion of the referral mechanism. The committee also notes that in the context of the government's overall expenditure on national security activities, the outlay to establish and operate the Monitor will be modest.[48] So even a moderate increase in the cost of operating the Monitor will have a negligible impact on Australia's overall national security budget.

Recommendation 6

2.70 The committee recommends that the bill be amended to enable the Parliamentary Joint Committee on Intelligence and Security to refer matters relating to Australia's counter-terrorism and national security legislation to the National Security Legislation Monitor for review and report.

2.71 If this recommendation is adopted, consideration will need to be given to the reporting arrangements. Clearly the report would need to be provided to the PJCIS and preferably to the Prime Minister also.

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46 For example the *Review of Security and Counter Terrorism Legislation*, December 2006 and the *Inquiry into the Terrorist Organisation Listing Provisions of the* Criminal Code Act 1995, September 2007, Parliamentary Joint Committee on Intelligence and Security, www.aph.gov.au/house/committee/pjcis/index.htm (accessed 31 August 2009).

47 *Independent Reviewer of Terrorism Laws Bill 2008 [No. 2]*, Senate Legal and Constitutional Affairs Committee, October 2008, www.aph.gov.au/senate/committee/legcon_ctte/terrorism/report/report.pdf (accessed 31 August 2009).

48 The Government has allocated $1.4 million to establish the Monitor, with operational costs met from within the existing resourcing of the Attorney−General's portfolio with the funding being transferred from that portfolio to Prime Minister and Cabinet, *Portfolio budget statements 2009–10, budget related paper no.1.15A*: Prime Minister and Cabinet Portfolio, p.25. By comparison the Australian Homeland Security Research Centre estimates total government expenditure on national security of $8.0 billion over the period 2002–03 to 2011–12, *2008–09 Federal Budget Briefing on Homeland Security Expenditure*, May 2008, p. 4, www.homelandsecurity.org.au/files/2008-09_Federal_Budget_Briefing_on_Homeland_Security_Expenditure.pdf (accessed 31 August 2009).

Scope of reviews

2.72 The committee heard evidence relating to the scope of reviews undertaken by the Monitor. These included concerns relating to the laws which are subject to review, and whether the Monitor should have the function of examining proposed laws, and who the Monitor can consult in undertaking reviews.

Laws subject to review

2.73 Paragraph 6(1)(a) gives the Monitor the function of reviewing the operation, effectiveness and implications of Australia's counter-terrorism and national security legislation, and of any other law of the Commonwealth which relates to that legislation.

2.74 Counter-terrorism and national security legislation are defined in clause 4 as the following provisions of Commonwealth law:

(a) Division 3 of Part III of the Australian Security Intelligence Organisation Act 1979 and any other provision of that Act as far as it relates to that Division;

(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;

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

  (i) Division 3A of Part IAA and any other provision of that Act as far as it relates to that Division;

  (ii) sections 15AA and 19AG and any other provision of that Act as far as it relates to those sections;

  (iii) Part IC, to the extent that the provisions 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;

(d) Chapter 5 of the Criminal Code and any other provision of that Act as far as it relates to that Chapter;

(e) Part IIIAAA of the Defence Act 1903 and any other provision of that Act as far as it relates to that Part;

(f) the National Security Information (Criminal and Civil Proceedings) Act 2004.

2.75 This definition is essentially broadened by subparagraph 6(1)(a)(ii) which allows the Monitor to review 'any other law of the Commonwealth to the extent that it relates to' the above list.

2.76 By comparison, paragraph 6(1)(b), which requires the Monitor to consider whether Australia's counter-terrorism and national security legislation contains appropriate safeguards for protecting the rights of individuals and remains necessary, appears narrower as it does not include the 'any other law' phrase.

2.77 Some submissions discussed whether the prescribed list of 'counter-terrorism and national security legislation' is adequate. The Gilbert + Tobin Centre for Public

Law for example argued that the bill to 'some extent' rectifies the concern expressed by the Senate Standing Committee on Legal and Constitutional Affairs that the Independent Reviewer of Terrorism Laws Bill 2008 [No. 2], as introduced, lacked detail about which laws were subject to review. They noted the detailed definition in clause 4, and further note that paragraph 6(1)(a) should 'allay concerns' in this regard.[49]

2.78 The Law Council of Australia was 'pleased to see' the legislative provisions in clause 4:

> …which comprise the most significant legislative provisions dealing with the investigation and prosecution of terrorist activity and include provisions previously not subject to independent review.[50]

2.79 The Castan Centre for Human Rights Law noted that the list of relevant legislation is 'less extensive' than that proposed in the Independent Reviewer of Terrorism Laws Bill 2008 [No. 2] as amended by the Senate. Whilst noting the 'catch-all' provision of subparagraph 6(1)(a)(ii), they argue its use could be limited:

> Thus, for example, where clause 6(1)(b) directs the Monitor to consider the necessity of legislation, and the adequacy of the safeguards it contains, various pieces of legislation appear to be excluded which ought not to be, such as certain powers enjoyed by the Australian Federal Police pursuant to the *Australian Federal Police Act 1979 (Cth)* which are enlivened by reference to the offences created by Division 101 of the *Criminal Code (Cth)*.[51]

2.80 The Castan Centre proposes that the list in clause 4 should be expanded (particularly to include Division 72 of the *Criminal Code*) and that a catch all provision should be added to the definition in clause 4.[52]

2.81 The Public Interest Law Clearing House and Human Rights Law Resource Centre also expressed concerns that the scope of clause 4 and subparagraph 6(1)(a)(ii) 'may not cover laws that do not relate to Australia's counter-terrorism and national security legislation but nevertheless impact on Australia's approach to counter-terrorism or the human rights of Australian citizens'.[53]

2.82 One submission raised the possibility of increasing the scope of the Monitor to include review of state and territory laws:

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49 Gilbert + Tobin Centre for Public Law, *Submission 1*, p. 7. The Independent Reviewer of Terrorism Laws Bill 2008 [No 2] was subsequently amended by the Senate to include a list of legislation, following the report of the Senate Committee on Legal and Constitutional Affairs.

50 Law Council of Australia, *Submission 4*, p. 11.

51 Castan Centre for Human Rights Law, *Submission 7*, p. 3.

52 Castan Centre for Human Rights Law, *Submission 7*, p. 3.

53 Public Interest Law Clearing House/Human Rights Law Research Centre, *Submission 6*, pp 9–10.

> PIAC strongly submits that if the Monitor is to fulfil his functions of providing thorough reports of existing national security legislation he/she should be in a position to consider the entirety of the national security regime in Australia. PIAC is not convinced that clause 8(b) of the Bill, which provides that the Monitor may have regard to arrangements between the Commonwealth, the States and the Territories will enable the Monitor to do so. PIAC therefore recommends that the Bill be amended to enable the Monitor to consider all levels of the national security system.
>
> Alternatively, PIAC recommends that the Commonwealth government should negotiate with the States and territories so that they enact similar legislation to ensure that there are equivalent independent reviewers operating in each state and territory.[54]

2.83 The committee notes that paragraph 8(b) requires the Monitor to have regard to arrangements agreed from time to time between the Commonwealth, states and territories to ensure a national approach to countering terrorism.

Committee view

2.84 Various submissions appear to have identified a minor oversight in legislative drafting on this issue. Due to the absence of the 'any other law' phrase in paragraph 6(1)(b) the bill appears to allow the Monitor to review the 'operation, effectiveness and implications' of 'any other law of the Commonwealth to the extent that it relates to Australia's counter-terrorism and national security legislation'[55] but not to consider whether such 'other' legislation 'contains appropriate safeguards for protecting the rights of individuals'[56] and 'remains necessary'.[57] This would be a curious and perhaps unintended outcome. The committee makes a recommendation (Recommendation 7) on this subject at the end of the following section.

Review of relevant State legislation

2.85 Some submitters argued that the Monitor should have the authority to examine state and territory national security and terrorism legislation. For example PIAC argued that:

> The national security legislation expressly covered by the Bill is only a part of the existing raft of anti-terrorism legislation in force in Australia at the moment as all the states and territories have enacted their own counterterrorism legislation. PIAC strongly submits that if the Monitor is to fulfil his functions of providing thorough reports of existing national

54 Public Interest Advocacy Centre (PIAC), *Submission 15*, p. 6.

55 National Security Legislation Monitor Bill 2009, para. 6(1)(a).

56 National Security Legislation Monitor Bill 2009, subpara. 6(1)(b)(i).

57 National Security Legislation Monitor Bill 2009, subpara. 6(1)(b)(ii).

> security legislation he/she should be in a position to consider the entirety of the national security regime in Australia.[58]

2.86 The Law Council highlighted existing arrangements between the Commonwealth and State and Territory governments arguing that there 'may potentially be a conflict between the arrangements made between the Commonwealth, States and Territories in respect to counter-terrorism and Australia's international obligations in this area.' In this regard the Law Council suggested that:

> In the event of any conflict between Australia's international obligations and arrangements agreed to between the Commonwealth, States and Territories, the [Monitor] should be required to give priority to Australia's international human rights obligations when evaluating the content, effectiveness and operation of the particular provision in question.[59]

Committee view

2.87 The committee agrees that in order to effectively review Australia's counter terrorism and national security legislation, the Monitor will need to take into consideration the implications of any relevant law enacted by the States and Territories.

Recommendation 7

2.88 The committee recommends that paragraph 6(1)(b) of the National Security Legislation Monitor Bill 2009 be amended to include reference to 'any other law of the Commonwealth, the States or the Territories to the extent that it relates to Australia's counter-terrorism and national security legislation'.

Proposed legislation

2.89 Some submissions argued the Monitor should have the power to review proposed as well as existing legislation:

> The Law Council would also support broadening the mandate and functions of the [Monitor] beyond the consideration of existing legislation to include a review role in respect of proposed or draft legislative provisions relating counter-terrorism or national security. In the past, when proposed changes to Australia's counter-terrorism measures have been introduced they have often proceeded quickly through Parliament with little opportunity for robust scrutiny of their content and operation. Investing the [Monitor] with the power to review proposed additions or changes to Australia's anti-terrorism laws would enhance existing Parliamentary scrutiny mechanisms and help ensure that such proposed provisions are necessary and effective

58 Public Interest Advocacy Centre, *Submission 15,* p. 6.

59 Law Council of Australia, *Submission 4*, p. 16.

> in countering terrorism, contain appropriate safeguards for protecting the rights of individuals and comply with Australia's international obligations, including our international human rights obligations. This function could be added by amending subclause 6(1)(a) to include a reference to 'proposed additions or changes to any Commonwealth law to the extent that it relates to Australia‘s counterterrorism and national security legislation'.[60]
>
> We submit that the Monitor’s role should include active involvement in any proposals of new legislation, including contributing to and participating in relevant Senate Inquiries.[61]

2.90 Similar views were expressed the Sydney Centre for International Law and the Public Interest Advisory Centre.[62]

2.91 The Department of the Prime Minister and Cabinet; and the Attorney-General's Department have clarified that the Monitor does have the power to investigate proposed legislation or policy proposals (including the current National Security Legislation discussion paper), but only when such proposals are referred to him or her by the Prime Minister.[63]

2.92 There is a risk that asking the Monitor to examine matters which are before the Parliament could compromise the Monitor's perceived independence, through potential endorsement of government policy. Associate Professor Andrew Lynch, Centre Director, Gilbert + Tobin Centre of Public Law, discussed the shortcomings of asking the Monitor to examine proposed laws:

> …it does have the risk that the body might become an approval mechanism, whereas really the parliament must decide whether those changes to the laws are to be passed. We see the reviewer as having very much a review rather than a preview role in reporting to the government and to the parliament how those laws, once made, are actually operating in effect. Again, that concern is borne out by the approach taken by Lord Carlile in the UK on some issues, which was to indicate his support for proposed changes. That, in particular, was the incident which led to some concerns being expressed that part of his job was to sell the government’s policy on antiterrorism laws. So we think that the review function should be confined to exactly just that.[64]

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60 Law Council of Australia, *Submission 4*, p. 12.

61 Australian Muslim Civil Rights Advocacy Network, *Submission 14*, p. 5.

62 Sydney Centre for International Law, *Submission 2*, pp 3–4; Public Interest Advocacy Centre, *Submission 15*, p. 7.

63 Mr Garry Fleming, Assistant Secretary, Border Protection and Law Enforcement Branch, Department of the Prime Minister and Cabinet, *Proof Committee Hansard*, 14 August 2009, p. 25.

64 Associate Professor Andrew Lynch, Centre Director, Gilbert + Tobin Centre of Public Law, *Proof Committee Hansard*, 14 August 2009, p. 14

Committee view

2.93 The committee concurs with the views of the Gilbert + Tobin Centre on this issue. It is true that the Monitor may have valuable insights into proposed national security amendments. However, if publicising those views puts at risk the Monitor's independent status, then this will ultimately detract from the Monitor's broader objective as an independent reviewer of security legislation.

2.94 The committee notes that the Monitor won't be able to self-refer proposed legislation but that he or she may provide input if the matter is referred by the Prime Minister.

Complaints and operational matters

2.95 There appeared to be a degree of uncertainty among some witnesses about the role of the Monitor in investigating the activities of agencies.

2.96 Subclause 6(2) states that the Monitor is not responsible for considering individual complaints about the activities of Commonwealth agencies responsible for implementing counter-terrorism or national security legislation, or the resourcing and priorities of those agencies.

2.97 The Explanatory Memorandum explains that these exclusions are to 'provide greater clarity to the role and functions of the Monitor and to ensure no overlap with other oversight and accountability agencies such as the Inspector-General of Intelligence and Security and the Commonwealth Ombudsman.'[65]

2.98 The Attorney-General's Department explained that the focus of the Monitor is on the operation and effectiveness of national security legislation. The activities of agencies would be relevant only to the extent that these indicated problems in the legislation:

> Let us say the allegation was that Islamic people were being targeted unfairly. If the allegation was that they were being targeted unfairly because of procedures in the legislation—as a result of the way the legislation is drafted—then that would be a legitimate matter for the legislation monitor to consider. If, on the other hand, it was felt they were being targeted unfairly because there was some horrible policeman who was racist, or something like that, then that would be more appropriately dealt with by the Ombudsman and Inspector-General of Intelligence and Security functions. That is the sort of delineation. Those accountability mechanisms have been operating for some time and have worked very well.[66]

65 Explanatory Memorandum, p. 4.

66 Mr Geoffrey McDonald, First Assistant Secretary, National Security Law and Policy Division, Attorney-General's Department, *Proof Committee Hansard*, 14 August 2009, p. 23.

2.99 Some submissions and witnesses argued that the Monitor's powers in relation to investigating how the laws are administered are not clear. For example, the New South Wales Council for Civil Liberties argued:

> The significance of a law is to be seen not merely in bare text, but in how that text is interpreted by those who apply it. In particular, a law's reach may be significantly extended or diminished by the interpretation which is placed on its terms. It is not entirely clear that the monitor's functions, as proposed, cover this.[67]

2.100 The Castan Centre for Human Rights Law suggested that there is 'a degree of tension' between the bill's requirement for the Monitor to give emphasis to laws which have recently been applied by agencies (clause 9) and its prohibition on the Monitor reviewing the priorities and resources of agencies (paragraph 6(2)(a)). The Castan Centre suggested that paragraph 6(2)(a) be deleted and replaced with a provision 'making it clear that the Monitor's review function extends to the activities of agencies,'[68] to remove this ambiguity.

2.101 Some submissions and witnesses advocated a stronger role for the Monitor in dealing with complaints by individuals and oversight of operational matters. Civil Liberties Australia argued:

> It is hard to comprehend why such functions of the agencies are not the responsibility of the Monitor. Being able to review agency priorities in enforcing their own legislation, and what lies behind the selective decision-making, is crucial to effective functioning of the laws and should be in the province of the Monitor. In addition, the Monitor should be empowered to consider individual complaints about the activities of the agencies, which may well point to systemic problems in legislation and how it operates in practice.[69]

2.102 The New South Wales Council for Civil Liberties proposed that the Monitor should have the ability to determine whether anti-terrorism legislation was being used for other purposes.[70]

Committee view

2.103 The committee is of the view that if the Monitor were to become involved in individual complaints or cases, which can be the subject of much public scrutiny and political debate, then that would potentially compromise his or her independence or perceived independence.

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67 New South Wales Council for Civil Liberties, *Submission 12*, p. 3.

68 Castan Centre for Human Rights Law, *Submission 7*, p. 8.

69 Civil Liberties Australia, *Submission 8*, p. 1.

70 New South Wales Council for Civil Liberties, *Submission 12*, p. 3.

2.104 The committee is also of the view that individual complaints are best dealt with by existing accountability and oversight mechanisms (such as the Commonwealth Ombudsman or the Inspector-General of Intelligence and Security). The Monitor's role ought to focus on whether or not the laws are necessary and contain appropriate safeguards, rather than considering the outcome of a particular case. The committee therefore accepts that such matters should be specifically excluded by the bill.

2.105 However, while the committee does not consider it appropriate for the Monitor to investigate and make judgments on individual cases, clearly the Monitor must be able to examine the way in which the legislation is being administered, to the extent necessary to determine whether that legislation is meeting its original purpose. The committee therefore recommends that the bill be amended to require the monitor to assess whether the legislation is being used as intended.

Recommendation 8

2.106 The committee recommends that the bill be amended to require the Monitor to assess whether counter-terrorism and national security legislation is being used as intended.

Consultation with other agencies

2.107 The Office of the Privacy Commissioner sought greater clarity about the way in which the Monitor will consult other agencies. However, it sought this clarification in the Explanatory Memorandum rather than in the bill itself:

> In the Office's opinion the Explanatory Memorandum could provide some further detail in relation to the Monitor's functions under clause 10 (2), by explaining that it would be expected that the Monitor would consult and take account of the views of oversight and accountability agencies on matters relevant to their particular jurisdiction. For example, the Monitor could be expected to consult with the Privacy Commissioner on matters that may significantly affect the handling of individuals' personal information or other aspects of personal privacy.[71]

2.108 The Australian Human Rights Commission (AHRC) suggested that the bill could be strengthened by including the AHRC in subclause 10(2) as an agency which may be consulted.[72] This was supported by the Castan Centre for Human Rights Law.[73]

71 Office of the Privacy Commissioner, *Submission 10*, p. 6.

72 Australian Human Rights Commission, *Submission 11*, p. 8.

73 Castan Centre for Human Rights Law, *Submission 7*, p. 8.

2.109 Perhaps the simplest suggestion in relation to clause 10 of the bill came from Civil Liberties Australia:

> To extend the ability of the Monitor to engage in community consultation, or to consult as widely as he or she likes, CLA recommends the addition of *(2) (e) any other person or organisation.*[74]

Committee view

2.110 The committee notes that the bill already provides the Monitor with the power 'to do all things necessary or convenient to be done for or in connection with the performance of the Monitor's functions'.[75] However, the committee is of the view that unless there is a sound reason for not allowing the monitor to consult with key independent agencies, including the Office of the Privacy Commissioner and the Australian Human Rights Commission, that these sorts of organisations should be added to clause 10.

Recommendation 9

2.111 The committee recommends that the bill be amended to allow the Monitor when performing his or her functions, to consult with independent statutory agencies such as the Office of the Privacy Commissioner and the Australian Human Rights Commission, as the Monitor considers necessary.

Review criteria

2.112 Several submissions and witnesses discussed the criteria which the Monitor should use in reviewing national security legislation.

2.113 Clause 3 states that the Monitor is appointed to 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;

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

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

2.114 The bill provides the functions of the Monitor are to:

- review the 'operation, effectiveness and implications' of legislation (paragraph 6(1)(a));

74 Civil Liberties Australia, *Submission 8*, p. 1.

75 National Security Legislation Monitor Bill 2009, subclause 6(3).

- consider whether the legislation 'contains appropriate safeguards for protecting the rights of individuals' (subparagraph 6(1)(b)(i));
- consider whether the legislation remains necessary (subparagraph 6(1)(b)(ii));

2.115 The bill also requires the Monitor to 'have regard to' Australia's obligations under international agreements (subclause 8(a)).

2.116 The committee heard a number of views concerning whether the criteria the Monitor will use to review legislation are adequately stated in the bill:

> No priorities among these criteria are suggested. Nor is it clear why some are mentioned multiple times and others only once.[76]
>
> In our view section 8 of the amended Independent Reviewer of Terrorism Laws Bill 2008, provides a much clearer outline of the mandate of the Reviewer. This section provides an unambiguous mandate to assess both the legislation and its operation in terms of not only human rights, privacy and other international obligations but also to assess any adverse social consequences. In our view this section should be adopted for the Monitor.[77]

2.117 Other submissions expressed a view that the Monitor should make use of an expanded set of criteria when reviewing legislation:

> PILCH and the HRLRC consider that the Monitor should be required to have regard to a non-exhaustive list of relevant considerations when determining review priorities, including but not limited to:
>
> - Australia's human rights obligations
> - the extent to which the laws under review alter fundamental legal principles;
> - whether the relevant laws are effective and workable, both within their own terms, and in combination with other legislation; and
> - whether there are any less-restrictive means by which the objectives of the relevant legislation could be achieved.[78]

2.118 Areas of particular focus in submissions were whether the bill contains adequate consideration of the impact of anti-terrorism laws on human rights and the rights of individuals, whether the Monitor has sufficient scope to consider whether the laws adequately adopt Australia's international obligations, and whether the Monitor has sufficient power to consider the proportionality of legislation.

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76 Castan Centre for Human Rights Law, *Submission 7*, p. 4.

77 Federation of Community Legal Centres (Victoria), *Submission 9*, p. 2.

78 Public Interest Law Clearing House/Human Rights Law Research Centre, *Submission 6*, p. 14.

Rights of Individuals

2.119 A number of submissions discussed the extent to which the bill requires the Monitor to be mindful of human rights issues.

2.120 The Sydney Centre for International Law argued the bill does not adequately address human rights standards. They propose that, in the absence of an Australian bill of rights, this could be resolved by making more direct reference to the International Covenant on Civil and Political Rights (ICCPR):

> Terrorism laws have the very real potential to negatively impinge on fundamental human rights. Special provision for review based on human rights is important since terrorism laws can lack effective review mechanisms, and also human rights challenges cannot be raised directly in the courts given the absence of a federal Bill of Rights. Mandating compliance with Australia's obligations under the ICCPR will enhance the legitimacy of the government's antiterrorism legislation, both within Australia and abroad.[79]

2.121 Whilst noting that safeguards for human rights may fall into subclause 6(1) (rights of individuals) and clause 8 (international standards), the Law Council of Australia stated:

> …neither clause 6 nor clause 8 makes specific reference to human rights principles. The Law Council is of the view that specifying these particular matters in clause 6 would provide a concerted focus on the impact of Australia's anti-terrorism laws on the rights of individuals and help ensure that Australian laws in this area meet international human rights standards.[80]

2.122 This view was shared by the Public Interest Law Clearing House (PILCH) and Human Rights Law Research Centre (HRLRC):

> …PILCH and the HRLRC are concerned that clause 6 does not require the Monitor review the impact of Australia's counter-terrorism and national security legislation on international human rights standards and obligations. Although this role of the Monitor is perhaps implicit in given the objects of the Bill, an express provision would avoid any ambiguity. Accordingly, PILCH and the HRLRC submit that clause 6 should be amended to expressly require the Monitor to review the impact of Australia's counter-terrorism and national security legislation on international human rights standards and obligations.[81]

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79 Sydney Centre for International Law, *Submission 2*, p. 3.

80 Law Council of Australia, *Submission 4*, p. 12.

81 Public Interest Law Clearing House/Human Rights Law Research Centre, *Submission 6*, p. 11.

2.123 The Explanatory Memorandum notes in relation to the requirement in clause 8 for the Monitor to have regard to Australia's international obligations, that the Monitor:

> …must have regard to Australia's human rights obligations such as the International Convention on Civil and Political Rights and the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment. In addition, the Monitor must also have regard to international instruments that Australia has become a party to which require Australia to enact a strong counter-terrorism framework such as the 16 United Nations counter-terrorism conventions and protocols and the United Nations Security Council Resolutions 1267 and 1373 concerning the freezing of assets of terrorists.[82]

2.124 Ensuring that counter-terrorism and national security legislation is 'consistent with Australia's international obligations, including human rights obligations' is also specifically referred to as one of the objects of the bill.[83]

2.125 During the committee's public hearings, Departmental officials confirmed that Australia's international human rights obligations will be a core consideration for the Monitor in carrying out his or her statutory functions.[84]

2.126 With regard to a related issue, the ICJA expressed concern that the reference to 'rights of individuals' in the bill is not clearly defined:

> The ICJA questions which 'rights of individuals' the legislation is referring to. The phrase 'rights of individuals' is not defined in the Bill. This being so the phrase can be interpreted in numerous ways and can be defined both inclusively and exclusively. This is because in Australia we do not have a Bill of Rights or a Charter of Rights, which clearly set outs [sic] what are 'the rights of individuals'.[85]

2.127 The Office of the Privacy Commissioner suggested that this could be resolved through the provision of a 'non-exhaustive list of the kinds of rights that the Monitor should take into consideration' (such as privacy) in the Explanatory Memorandum.[86]

Committee view

2.128 The committee notes that the bill specifies the level of consideration the Monitor is to give to Australia's human rights obligations. Clause 8 clearly states that,

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82 Explanatory Memorandum, p. 5.

83 National Security Legislation Monitor Bill 2009, subclause 3(c).

84 Mr Garry Fleming, Assistant Secretary, Border Protection and Law Enforcement Branch, Department of the Prime Minister and Cabinet, *Proof Committee Hansard*, 14 August 2009, p. 26.

85 International Commission of Jurists (Australia), *Submission 5*, p. 4.

86 Office of the Privacy Commissioner, *Submission 10*, p. 5.

when performing his or her statutory functions, the Monitor 'must have regard to Australia's obligations under international agreements.' Officials clarified that human rights obligations will be a core consideration in this regard. This fact is confirmed by the Explanatory Memorandum which states that the Monitor 'must have regard to Australia's human rights obligations...'[87] The committee also notes the explicitly expressed objective of the bill in ensuring 'that Australia's counter-terrorism and national security legislation...is consistent with Australia's international obligations, *including human rights obligations*'.[88]

2.129 While fully supporting these requirements in the bill, the committee believes that the bill could be further strengthened by *requiring* the Monitor to assess whether the legislation is consistent with Australia's international human rights obligations. This would provide the Government, the Parliament and other interested parties with important and useful information on Australia's compliance with international obligations further promoting confidence in the operation of national security and counter terrorism legislation.

Recommendation 10

2.130 The committee recommends that the bill be amended to require the Monitor to assess whether the legislation is consistent with Australia's international human rights obligations.

2.131 The committee further notes the concerns raised during the inquiry regarding the lack of definition for the phrase 'rights of individuals' in clause 6. The committee suggests that Government consider providing a definition of the phrase 'rights of individuals' in order to provide the Monitor with appropriate guidance on the nature of the rights the bill is intended to protect.

Proportionality

2.132 Many submissions welcomed the inclusion in the bill of the requirement to consider whether national security laws remain necessary. However, some submissions called for the Monitor to consider whether the laws under review are in proportion to the scale of the threat being legislated against:

> While this function may be implicit, it may be useful for the Explanatory Memorandum to specify that the Monitor's considerations under clause 6(1)(b)(ii) include among other things, an assessment of whether any limitation of individuals' rights to privacy (and other rights) under counterterrorism and national security legislation is proportional to an identified threat or potential threat of terrorism.[89]

87 Explanatory Memorandum, p. 5.

88 National Security Legislation Monitor Bill 2009, paragraph 3(c), emphasis added.

89 Office of the Privacy Commissioner, *Submission 10*, p. 5.

> Paragraph 6(1)(b) includes appropriately the requirement that the monitor report on whether anti-terrorism laws are necessary, and subparagraph (i) allows the monitor to propose new safeguards. But the monitor is not given the function of considering whether a law is proportionate to the threat of terrorism at the time, nor, crucially, to advise that a law is intolerable.[90]

Committee view

2.133 The committee notes that the Sheller Review report (Report of the Security Legislation Review Committee) used proportionality as the 'guiding principle' in its review of national security legislation.[91] Furthermore the Clarke review, which recommended that the government establish a national security legislation monitor, indicated that the Monitor should 'scrutinise all aspects of counter-terrorism legislation to ensure that the use of anti-terrorism powers is proportionate...'.[92] Finally, the Independent Reviewer of Terrorism Laws Bill 2008 [No. 2] expressly states that a function of the Independent Review is to assess whether terrorism laws 'are proportional to the extant threat of terrorism'.[93]

2.134 The committee is of the view that inclusion of the criterion of proportionality will enable the Monitor to assess whether national security legislation strikes the right balance between the protection of our national security and the protection of Australian individual values and freedoms.

2.135 The committee is of the view that inclusion of the criterion of proportionality will enable the Monitor to assess whether national security legislation strikes the right balance between the protection of our national security and the protection of Australian individual values and freedoms.

2.136 The committee agrees with the proposition that in undertaking his or her reviews, the Monitor should be expressly required to assess whether the existing counter-terrorism legislation is a proportionate response to the threat posed to national security.

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90 New South Wales Council for Civil Liberties, *Submission 12*, p. 3.

91 *Report of the Security Legislation Review Committee*, June 2006, p. 3, 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 (accessed 31 August 2009).

92 *Report of the Inquiry into the Case of Dr Mohamed Haneef*, November 2008, p. 256, www.haneefcaseinquiry.gov.au/www/inquiry/rwpattach.nsf/VAP/(3A6790B96C927794AF1031D9395C5C20)~Volume+1+FINAL.pdf/$file/Volume+1+FINAL.pdf (accessed 31 August 2009)

93 National Security Legislation Monitor Bill 2009, paragraph 8(1)(fb).

Recommendation 11

2.137 The committee recommends that the bill be amended to require the Monitor to assess whether the legislation being reviewed remains a proportionate response to the threat posed to national security.

Reporting requirements

2.138 A large number of submissions and witnesses commented on the reporting requirements of the Monitor proposed in Part 4 of the bill. This Part sets out two key reporting requirements: the provision of an annual report and reports on references from the Prime Minister.

Availability of reports

2.139 Subclause 29(1) requires that the Monitor must present an annual report to the Prime Minister relating to the performance of the Monitor's functions as set out in paragraphs 6(1)(a) and (b).

2.140 Subclause 29(5) requires that the Prime Minister must present an annual report of the Monitor to each House of the Parliament within 15 sitting days of receiving the report.

2.141 In evidence to the committee departmental officials clarified the bill's reporting requirements:

> **Senator LUDLAM**—...Could you just confirm for us then that apart from the annual reporting mechanism—I think the intention there is reasonably clear—the monitor will not be reporting in any form directly to the parliament?
>
> **Mr McDonald**—No.
>
> **Senator LUDLAM**—Will the referrals that come from the Prime Minister's office be made public? Will the parliament know when the Prime Minister has requested some activity of the monitor?
>
> **Mr Fleming**—That is not a requirement in the legislation.[94]

2.142 Submitters and witnesses expressed concern that only the annual report of the Monitor would be tabled in the Parliament, while reports on reviews conducted by the Monitor were not required to be tabled.

2.143 For example the Castan Centre noted that while the annual report of the Monitor would be provided to Parliament, 'there is no provision for the presentation to Parliament of the results of any other review work undertaken by the Monitor.'[95] Similarly the Australian Human Rights Commission (AHRC) argued that the bill 'does

94 *Proof Committee Hansard*, 14 August 2009, p. 25.

95 Castan Centre for Human Rights Law, *Submission 7*, p. 10.

not require the Prime Minister to table reports made by the Monitor in response to a reference from the Prime Minister.'[96] The ICJA submitted that:

> There is some concern that if reports are only being made available to the Prime Minister there is a real risk that the reports may not be made publicly available… [T]his restriction seems at odds with the Monitor's information gathering functions and the whole purpose of the legislation.[97]

2.144 In its submission, the Castan Centre argued that the intended function of clause 30 (relating to reporting on references) when read in conjunction with clauses 6(1)(b) and 7, 'appears to be to permit the Prime Minister to direct the Monitor to undertake a review whose conclusions may well not be presented to the Parliament.'[98] While not offering a firm view on the desirability of such an outcome the Castan Centre noted that this risked 'capture of the Monitor by the Commonwealth Executive.'[99] In evidence presented to the committee the Castan Centre argued that:

> Our submission does not take a strong view on the question of whether the Prime Minister should be obliged to give to the parliament all reviews which the Prime Minister commissions, because there are competing considerations. Publicity and transparency are highly desirable but equally, given the current state of disarray surrounding the administration and operation of these laws, I think it would be highly desirable that the Prime Minister get better advice than currently seems to be being given, and to that extent there may be some advantage in having an independent person who can give confidential advice to the Prime Minister.[100]

2.145 The Law Council also expressed its concerns regarding:

> ...the absence of the requirement in the [Bill] that these report be tabled in Parliament or otherwise be made publicly available. This means that the Prime Minister retains full control over what matters the [Monitor] inquires into and whether the public is able to access the [Monitor]'s findings. It leaves to the Prime Minister's discretion whether a Government response to the [Monitor]'s is warranted and the Parliament and the public can be denied the opportunity to evaluate whether the Government's response to any findings made by the [Monitor] is appropriate.[101]

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96 Australian Human Rights Commission, *Submission 11*, p. 6.

97 International Commission of Jurists (Australia), *Submission 5*, p. 3.

98 Castan Centre for Human Rights Law, *Submission 7*, p. 10.

99 Castan Centre for Human Rights Law, *Submission 7*, p. 10.

100 Dr Patrick Emerton, Associate, Castan Centre for Human Rights Law, *Proof Committee Hansard*, 14 August 2009, p. 3.

101 Law Council of Australia, *Submission 4*, p. 26.

2.146 In a similar vein, the AHRC noted that not requiring the Prime Minster to table the Monitor's reports to Parliament 'may undermine public confidence in the independence of the monitor.'[102]

2.147 In its 9th Alert Digest of 2009 the Senate Scrutiny of Bills Committee drew senators' attention to the fact that where the Monitor has provided a report to the Prime Minister 'there is no provision requiring the Prime Minister to present to the Parliament the report, an abridged version of the report or a statement announcing the reference or completion of the report.'[103] The Scrutiny of Bills committee has sought the Cabinet Secretary's advice on this matter and observed that the arrangement as currently proposed 'may be considered to insufficiently subject the exercise of legislative power to parliamentary scrutiny.'[104]

Committee view

2.148 The committee observes that, whether the Monitor's reports are provided to the Prime Minister alone or also to the Parliament, is an issue that goes to the heart of the Monitor's independence.

2.149 The committee is of the view that the reporting arrangements as drafted would be adequate if the intention was to establish a government department, where the department's primary responsibility is serve the government of the day. However, in this instance the government has made clear its intention for the Monitor to be independent statutory body. In the committee's view the Monitor's reporting requirements need to reflect the independent nature of the position.

2.150 The committee acknowledges that in order to properly perform his or her role the Monitor will need to access and assess confidential and classified material. The committee believes that the sensitive nature of this material must be respected. However, in the committee's view that should not preclude a version of the report from being tabled in Parliament. The Monitor should seek to present statistical and other information regarding the operation and effectiveness of terrorism laws in a manner that can be made available to the public. Taking this approach would enhance public confidence in the Monitor's independence.

2.151 The committee notes that under subclause 29(7) the Monitor must prepare and give to the Prime Minister a supplementary report that sets out any sensitive information that has been excluded from the Monitor's Annual Report. The committee sees no practical reason why a similar approach cannot be taken for referrals by the Prime Minister.

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102 Australian Human Rights Commission, *Submission 11*, p. 6.

103 *Alert Digest No. 9 of 2009*, Senate Scrutiny of Bills Committee, August 2009, pp 74–75.

104 *Alert Digest No. 9 of 2009*, Senate Scrutiny of Bills Committee, August 2009, p. 75.

Recommendation 12

2.152 The Committee recommends that the bill be amended to require the Monitor to prepare two versions of any report that requires reference to sensitive material. The first version would be an unedited version for the Prime Minister, and the second, an edited version with references to sensitive material excluded for tabling in both Houses of Parliament.

Exclusion of material from the annual report

2.153 Subclause 29(3) contains a list of material that must not be contained in the annual report of the Monitor, for example:

- any operationally sensitive information;
- any information that, if included in the report, would or might endanger a person's safety; and
- information that might prejudice the conduct of Australia's foreign relations.

2.154 Subclause 29(4) requires that the Monitor must get the advice of the responsible minister, or responsible ministers, concerned as to whether any part of the annual report contains information referred to in subclause 29(3).

2.155 Many submitters and witnesses were critical of these restrictions. In its submission, the Gilbert + Tobin Centre argued that 'every effort should be made…to prevent the executive branch of government from having any involvement in the preparation of a report prior to its being tabled in Parliament.'[105] Similarly the Law Council noted that 'the ability of the Executive Government to determine what information should be excluded from the [Monitor's] Annual Report also has the potential to undermine the independent character of the office.'[106] Expanding on this point, the Law Council argued that:

> These provisions appear to detract from the central value of an independent reviewer of terrorism laws: namely the provision of independent, accessible information to the public regarding the practical operation of terrorism measures.[107]

2.156 The ICJA highlighted the same concerns as several witnesses and submitters that subclause 29(3) provides that certain information may be excluded from the Monitor's annual report. The ICJA stated that 'this provision had the potential to undermine…the provision of readily accessible information to the public'[108] noting that:

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105 Gilbert + Tobin Centre of Public Law, *Submission 1*, p. 11.

106 Law Council of Australia, *Submission 4*, p. 24.

107 Law Council of Australia, *Submission 4*, p. 25.

108 International Commission of Jurists (Australia), *Submission 5*, p. 4.

> The ICJA understands that on some occasions a report may contain information that is highly sensitive. We submit however that on those occasions the report could be worded to ensure that sensitive material is not at risk of publication.[109]

2.157 Departmental officials told the committee that the reporting requirements as defined in the bill were designed to ensure that ongoing operations were not prejudiced as well as being conscious of the sensitivities in relation to information that is sourced from overseas. The committee heard that:

> When the government made its decision—and the ministers in the government were certainly aware that the panel idea, or reporting directly to parliament, were possibilities—it was felt that, given the complexity of the security environment, it was probably best to have the monitor report through the Prime Minister. Just to give a bit of granularity to that, when it came to the Clarke inquiry, for example, we experienced huge difficulties in that often the information does not come from this country. Often it comes from other countries and we have to be very careful about sensitivities in relation to the information that is sourced from other countries. Quite often it is not apparent, on the face of it, what the sensitivity is, so this mechanism and the sort of model we have got here enable us to explore those matters. You would probably appreciate that much of the safety of Australians in the context of terrorism and acts of foreign interference and so on does depend on intelligence security cooperation with other countries. If you do not respect those other countries' sensitivities then you might find yourself not getting sufficient information.[110]

Committee view

2.158 The committee, while acknowledging the concerns expressed in submissions, is of the view that there need to be mechanisms to avoid the inadvertent release of sensitive material. The release of such material has the potential to be highly damaging to the organisations and persons involved and also risks Australia's international relations. For this reason the committee supports the proposed arrangements for excluding sensitive material from the Monitor's Annual Report.

Government response

2.159 A number of submitters and witnesses pointed to the importance of the government publicly responding to the Monitor's reports and recommendations. For example, when asked what was most important amendment that could be made to the bill, Mr Jonathon Hunyor of the Australian Human Rights Commission responded:

> ...the main thing would be to ensure that the government responds to the reports, so there should be an explicit requirement in respect of the reports

109 International Commission of Jurists (Australia), *Submission 5*, p. 4.

110 Mr Geoffrey McDonald, First Assistant Secretary, National Security Law and Policy Division, Attorney-General's Department, *Proof Committee Hansard*, 14 August 2009, p. 22.

> of the monitor, which, as I have said, we think should follow reviews even when they are not referred by the Prime Minister. In our view the key improvement would be to ensure that those reports are tabled in parliament and that those reports are responded to by government. We think that would improve the effective operation and also the integrity of the monitor in the system set up under the bill.[111]

Committee view

2.160 In this regard the committee notes the comprehensive response the government tabled in both Houses of Parliament in December 2008 to a series of bipartisan and independent reviews of our national security legislation conducted over the past three years. The committee agrees that if this practice was adopted for the Monitor's reports it would improve the effective operation and integrity of the Monitor. It would also enhance the Australian community's confidence that our law enforcement and security agencies have the tools they need to ensure national security, while ensuring the laws and powers are balanced by appropriate safeguards.

2.161 If the committee's recommendation on releasing a version of the Monitor's reports to Parliament is adopted (recommendation 12 refers), then it flows that the government should prepare and table a response to the Monitor's report. The committee believes that it is reasonable to expect that government responses will be tabled in the Parliament within a predetermined timeframe. The committee is of the view that the government should respond within six months of receipt of a report as this will allow the Government sufficient time to consider the Monitor's report while also providing the Parliament access to timely information.

Recommendation 13

2.162 The committee recommends that, if its earlier recommendation to require the tabling of the Monitor's reports in both Houses of Parliament is adopted, then the government be required to table a response to the Monitor's reports in both Houses of Parliament, within six months of receipt of the report.

Senator Helen Polley

Chair

111 Mr Jonathon Hunyor, Director, Legal Section, Australian Human Rights Commission, *Proof Committee Hansard,* 14 August 2009, p. 10.

Coalition Additional Comments

National Security Legislation Monitor

1.1 Whilst Coalition Senators support the passage of the Bill if amended as recommended by the committee, they would like to note their concerns regarding the location of the Monitor within the Department of Prime Minister and Cabinet.

1.2 The location of the Monitor within this Department may have an adverse impact on the independent nature of the Monitor. The Monitor should not be an instrument of the Government of the day and it should not be perceived this way by the public. Locating the Monitor within a Government Department could result in such a perception.

1.3 The Coalition Senators do not agree with the recommendation that the Monitor be required to assess whether legislation is consistent with Australia's international human rights obligations (Recommendation 10).

1.4 There are many international instruments to which Australia is signatory, some of which have been ratified into domestic law and some which have not. The legislation which the Monitor will be asked to oversee is domestic legislation and the existing domestic legal safeguards are the appropriate standard by which to judge it. Introducing a wide range of international instruments adds needless complexity to the Monitor's task, without demonstrably adding to the effectiveness of the process.

1.5 Recommendation 11 addresses the appropriate test.

Senator Cory Bernardi

Deputy Chair

Australian Greens Additional Comments

National Security Legislation Monitor

1.1 The Australian Greens support the establishment of an office to review the operation of the many pieces of interlocking legislation dealing with offences relating to terrorism.

1.2 This function is essential to address the 30 new laws and more than 80 amendments to the Criminal Code and the Crimes Act introduced in the name of the 'war on terror', which dramatically increased state powers of surveillance and detention in the absence of the countervailing protection of a bill of rights.

1.3 This office has the potential to play an essential accountability role in making clear to the Government and the broader public whether these laws are necessary, proportionate and effective at meeting their stated objective. It is therefore an alarming sign of the Government's priorities that the office will be headed by a part time position with only two staff, with scant reporting obligations, and the ability for the executive to sanitise those reports which do become public. This is against the backdrop of $8 billion forecast spending on billion national security out to 2012 for rapidly expanding agencies operating without many of the accountability checks which apply to other Commonwealth agencies. It is hoped that at a bare minimum this Committee's recommendations will be heeded and that in the course of the Senate debates we can set a more appropriate mandate for this office.

1.4 The National Security Legislation Monitor Bill and the inquiry into it has benefited from several previous Private Members and Senator's Bills and inquiries regarding the establishment of a mechanism to review Australia's anti-terrorism laws. The UK included such a review mechanism when anti-terrorism laws were passed there. Australia did not follow this model, although such an office has been recommended by:

- the Security Legislation Review Committee chaired by the Hon Sheller AO QC, June 2006;
- Parliamentary Joint Committee on Intelligence and Security in Dec 2006 and again in 2007;
- Senate Legal and Constitutional Committee in October 2008;
- The Senate through passage of a Private Senator's Bill in November 2008;
- The government's response to various reviews issued on 23 December 2008.

1.5 The enactment of some of the terror laws resulted in significant departures from established principles of Australian law and should be repealed rather than reviewed. This review mechanism should be run in parallel with efforts to repeal the more egregious components of the terror laws as outlined in the *Anti-Terrorism Laws Reform Bill (2009)***.**

There are some laws which are so extreme, so repugnant, redundant or otherwise inappropriate that should be abolished and do not deserve the dignity of being subject to review. These laws include those that allowed the Haneef scandal to unfold, and include excessive 'dead time', undue surveillance and invasion of privacy. The laws relating to sedition and the 'reckless possession of a thing' are also amongst the laws that should be abolished.

1. Resources

1.6 The Committee's fourth recommendation draws attention to the fact that the government propose one part time Reviewer with two support staff. Given that the reviewer is to conduct analysis of the array of complex terror laws, review them every time they are used, or when the PM requests, or when the Reviewer so chooses, this is clearly a very modest staffing arrangement. As the demands on the Monitor increase so too should resources. The Monitor will require resources to facilitate advice from high-level and often very expensive legal minds, and means to travel to hold hearings and attend gatherings to report on the activities of the office.

2. Independence

1.7 The independence of this office is vital if this exercise is to increase public confidence in balanced terror laws, which is why the Greens have argued that it should contain the word 'independent' in the title. The Greens would prefer the term Independent Reviewer of Terrorism Laws, not only because the word 'monitor' evokes high school scenarios, but also because the laws should be reviewed and changed, not minded.

1.8 The Greens believe that the Explanatory Memorandum for this Bill should clarify that the Monitor is empowered to vet and appoint staff. Evidence provided by the Department of Prime Minister and Cabinet that they already had specific staff “in our minds” for the Monitor's office, does not bode well for the independence of the Monitor, thus clarification is needed in the Explanatory Memorandum.

3. Human Rights

1.9 In many respects this exercise is about human rights, an attempt to answer the enduring question about whether the anti-terrorism laws strike a balance between security and the protection of civil and political rights. The Australian Greens have consistently sought to link the efforts of this review mechanism to Australia's human rights obligations under the Treaties and Covenants we have signed, and also believe that the Human Rights Commissioner should be able to make references to the Monitor in addition to the Parliamentary Joint Committee on Intelligence and Security.

4. Scope

1.10 The scope of what the Reviewer can examine needs to be clarified by the government. It is essential that the Reviewer is not unduly limited to having regard to related and consequential impacts on legislation that may not at first appear to be strictly related to national security legislation, but which are considered relevant and utilised in connection with terrorism offences. In addition, we propose that the Monitor / Reviewer be given a specific mandate to examine whether the terror laws have been used in other contexts, whether they be industrial, environmental or organised crime contexts, to identify whether 'scope creep' is occurring.

5. Penalties

1.11 It is appropriate that the Monitor has been conferred powers to compel people to a hearing and to produce documents and information. However, all of the penalties for failure to comply do not apply if the person has a "reasonable excuse" which includes not having to "answer a question, produce a document or thing or provide information on the grounds that to do so might tend to incriminate the person or expose the person to a penalty." This represents a gaping hole in possible sources of evidence the Reviewer might draw from.

6. Limitations on the Reviewer

1.12 The Reviewer is not to review the priorities or use of resources by agencies. This poses a difficulty when the means to implement the laws and the safeguards within institutions are very much pertinent to the evaluation/assessment task assigned to the Reviewer. The Reviewer is also not to consider any individual complaints. This becomes blurred when each individual use of the laws triggers a review. High profile terrorism cases will invariably link the Monitor's work to the cases of individuals.

7. Annual Report

1.13 It should be noted that there is a lengthy list of things that may not be referred to in the annual report (in Section 29 (3) a, b, c, d, and e), each beginning with *any information* that might prejudice national security, the function of any agency, that would endanger a person's safety, from a document or deliberations of Cabinet of a Committee of the Cabinet or Commonwealth or State, about which the Monitor has to get advice from Minister/s. Several of these provisions can be interpreted very broadly, making for possibly extremely brief annual reports. It is essential that the annual reports are not vetted in advance by Ministers including the Prime Minister; such editing as is necessary to remove operationally sensitive information should be undertaken by the Monitor – not the Government - prior to the reports being tabled in Parliament.

8. Prime Minister's Referrals

1.14 In addition to making references, the Prime Minister can currently determine the order in which the Reviewer attends to the workload, which could overburden and divert the efforts of the office. For this reason, the number of references by the Prime Minister and their subject should be made public.

9. Reporting

1.15 As the bill stands currently, the only reporting obligations of the Monitor to Parliament may be heavily edited annual report. We believe it is essential that the Monitor be required to table a report (subject to the same conditions described in 8, above) with the Government required to provide a response within a period of 6 months.

1.16 The laws that were hastily created in Australia following the crimes of 11 September must be reviewed to determine which merit retention and modernisation. Mistakes were inevitable when the government of the day did not allow the parliament to debate each bill individually even though the anti-terrorism legislative package constituted some of the most dramatic changes ever made to Australia's security and legal environment.

1.17 Two hundred pages of legislation and explanatory memoranda were introduced into the House of Representatives at 8pm and were expected to be debated at 12 noon the next day, leaving entirely inadequate time for review and analysis. Amendments were made available to the Senate less than 24 hours before the commencement of debate in that Chamber, effectively stripping the parliament of the time necessary to ensure that the laws were adequate to prevent, deter and pursue terrorists while ensuring that any limits on free speech or association struck an acceptable balance. The parliament was set up to fail, and fail it did. While the establishment of the Reviewer's office is overdue, proper time should be taken to consider amendments so that this office can enjoy cross-party support.

1.18 The Australian Greens are deeply committed to the principle of nonviolence. Nonviolence is one of the four interconnecting pillars that are the foundation of our party's policy and practice. We condemn the violent crime of terrorism, and view nonviolence as a creative, planned, positive force to resolve conflict, believing it to be the best way to transform oppressive power, symbols and behaviour. While some leaders and commentators deeply fear the accusation of being "soft on terrorism" believing it to be corrosive of their public perception, standing and masculinity, the Greens believe that to maintain the anti-terrorism laws in their current form is corrosive of democracy itself and the rule of law upon which it is based. The benefit of hindsight and the passage of time have revealed many of the laws as irrational, unworkable or extreme. It is high time they were reviewed.

Senator Scott Ludlam

Appendix 1

Submissions Received

Submission Number	Submitter
1	Gilbert + Tobin Centre of Public Law
2	Sydney Centre for International Law
3	The Law Society of New South Wales
4	Law Council of Australia
5	International Commission of Jurists Australia
6	Public Interest Law Clearing House and Human Rights Law Resource Centre
7	Castan Centre for Human Rights Law
8	Civil Liberties Australia
9	Federation of Community Legal Centres (Victoria)
10	Office of the Privacy Commissioner
11	Australian Human Rights Commission
12	New South Wales Council of Civil Liberties
13	Australian Lawyers for Human Rights
14	Australian Muslim Civil Rights Advocacy Network
15	Public Interest Advocacy Centre

Additional Information Received

Response to Question on Notice taken by Australian Muslim Civil Rights Advocacy Network at a public hearing on 14 August 2009

Response to Question on Notice taken by the Department of Prime Minister and Cabinet at a public hearing on 14 August 2009

Response to Questions on Notice taken by the Australian Human Rights Commission at a public hearing on 14 August 2009

Response to Questions on Notice taken by the Gilbert + Tobin Centre of Public Law at a public hearing on 14 August 2009

Appendix 2

Public Hearing and Witnesses

Canberra, Friday 14 August 2009

BUDAVARI, Ms Rosemary, Director, Criminal Law and Human Rights Unit,
Law Council of Australia

EMERTON, Dr Patrick, Associate,
Castan Centre for Human Rights Law

FLEMING, Mr Garry, Assistant Secretary, Border Protection and Law Enforcement Branch, Department of the Prime Minister and Cabinet

HUME, Ms Maree, Principal Legal Officer, Security Law Branch,
Attorney-General's Department

HUNYOR, Mr Jonathon Neil, Director, Legal Section,
Australian Human Rights Commission

LYNCH, Associate Professor Andrew, Centre Director,
Gilbert + Tobin Centre of Public Law

McDONALD, Mr Geoffrey, First Assistant Secretary, National Security Law and Policy Division, Attorney-General's Department

McGARRITY, Ms Nicola, Director, Terrorism and Law Project,
Gilbert + Tobin Centre of Public Law

SCHOKMAN, Mr Ben, Senior Lawyer,
Human Rights Law Resource Centre and Public Interest Law Clearing House

WOOD, Mr John, Board Member,
Australian Muslim Advocacy Civil Rights Network