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NEW SOUTH WALES



FACULTY OF LAW

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Committee Secretary
Senate Standing Committee on Legal and Constitutional Affairs
Department of the Senate
PO Box 6100
Parliament House
Canberra ACT 2600
Australia

Dear Committee Secretary,

Inquiry into Independent National Security Legislation Monitor Repeal Bill 2014

Thank you for the opportunity to make a submission to this inquiry. We do so in our capacity as members of the Gilbert + Tobin Centre of Public Law at the Faculty of Law, University of New South Wales. We are solely responsible for the views and content in this submission.

Our recommendation to the inquiry is that the Independent National Security Legislation Monitor Repeal Bill 2014 should not be passed. This is for four primary reasons:

- The function of the office of Independent National Security Legislation Monitor ('Independent Monitor') is not concluded;
- Ongoing and holistic review provides the most effective form of oversight of anti-terrorism legislation;
- The office of Independent Monitor has improved on other models of review; and
- A lack of political will to implement the recommendations of the Independent Monitor is not a sound basis for abolishing the office.

1 Reasons for Establishing the Independent National Security Legislation Monitor

The office of Independent Monitor was established in 2010 to provide for the continuous review of all of the anti-terrorism legislation enacted by the Commonwealth Parliament since the September 11 terrorist attacks on the United States. In so doing, this office was designed to overcome some of the deficiencies of the existing ad hoc model of anti-terrorism review.

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Before the September 11 terrorist attacks, Australia had no federal anti-terrorism laws. Five new anti-terrorism laws were enacted in 2002 alone.¹ A further 56 laws have been enacted since.² Australia's inexperience in legislating against terrorism, and the speed with which the Commonwealth Parliament was asked to enact new legislation, understandably led to concerns regarding the oversight of both the content and the use of those laws. The Parliament therefore legislated to require a review into the 'operation, effectiveness and implications' of the first tranche of anti-terrorism legislation as soon as practicable three years after their commencement.³ The Security Legislation Review Committee ('SLRC') was established to conduct that review.

As well as making substantive recommendations for reform of the new laws, the 2006 report of the SLRC also recommended further oversight of the counter-terrorism regime. It considered it to be important that 'Australian governments have an independent source of expert commentary on the legislation.'⁴ It therefore recommended that '[e]ither an independent reviewer should be appointed, or a further review by an independent body such as the SLRC should be conducted in three years.'⁵ It offered the example of the United Kingdom's Independent Reviewer of Terrorism Legislation as a potential model for an Australian office, with the following distinct features:

The Independent Reviewer would be required to provide a report to the Attorney-General every twelve months, which the Attorney-General should be obliged to table in parliament. The report would deal with: (a) the operation and effectiveness of Part 5.3 of the Criminal Code, and (b) the implications for the operation and effectiveness of part 5.3 of any Government proposals for the amendment of terrorism laws.⁶

Two further reviews were also conducted in 2006. The Australian Law Reform Commission ('ALRC') was asked to review the new sedition laws which had been introduced by the *Anti-Terrorism Act [No. 2] 2005* (Cth),⁷ and the Parliamentary Joint Committee on Intelligence and Security ('PJCIS') reviewed substantially the same legislation as the SLRC.⁸

In conducting its Review of Security and Counter Terrorism Legislation, the PJCIS endorsed the earlier recommendation of the SLRC for the establishment of an independent reviewer.⁹ The PJCIS highlighted three factors in support of this, namely, 'the breadth and significance

¹ *Security Legislation Amendment (Terrorism) Act 2002* (Cth), *Suppression of the Financing of Terrorism Act 2002* (Cth), *Criminal Code Amendment (Suppression of Terrorist Bombings) Act 2002* (Cth), *Border Security Legislation Amendment Act 2002* (Cth), and *Telecommunications Interception Legislation Amendment Act 2002* (Cth).

² George Williams, 'The Legal Legacy of the War on Terror' (2013) 12 *Macquarie Law Journal* 3, 7.

³ *Security Legislation Amendment (Terrorism) Act 2002* (Cth) s 4.

⁴ SLRC, *Report of the Security Legislation Review Committee* (2006) 6.

⁵ *Ibid* 6.

⁶ *Ibid* 203.

⁷ ALRC, *Fighting Words: A Review of Sedition Laws in Australia*, Report 104 (2006).

⁸ The PJCIS examined the *Security Legislation Amendment (Terrorism) Act 2002* (Cth), *Suppression of the Financing of Terrorism Act 2002* (Cth), *Criminal Code Amendment (Suppression of Terrorist Bombings) Act 2002* (Cth) and *Border Security Legislation Amendment Act 2002* (Cth). Unlike the SLRC, it did not review the *Telecommunications Interception Legislation Amendment Act 2002* (Cth). See PJCIS, Parliament of Australia, *Review of Security and Counter Terrorism Legislation* (2006) xi.

⁹ *Ibid* [2.42]-[2.55].

of anti-terrorism measures; the fragmented nature of review so far; and the ongoing importance of counter terrorism policy into the future.’¹⁰ The PJCIS recommended:

[A] model that takes a holistic approach to terrorism laws with a statutory mandate to report annually to the Parliament. This suggests a single independent appointee, rather than periodic review by an independent committee.

A single appointee would overcome the existing fragmentation by providing a consistent and identifiable focal point for the community and the executive agencies. The appointment should be someone of high standing who commands respect and is trusted as an impartial and informed source of information and analysis. He or she must be free to set their own priorities and have access to all relevant information, including security sensitive information where necessary.¹¹

The case for the establishment of an office of independent reviewer was further strengthened by the independent inquiry into the case of Dr Mohamed Haneef. The inquiry was conducted by a retired judge, the Hon John Clarke QC. He considered that a strong office of independent review was essential to overcome some of the problems he had faced in conducting his inquiry, in particular, the absence of powers to compel information from government agencies.¹² In his report, Clarke highlighted that: ‘At times I felt that my lack of coercive powers affected the timeliness of responses from some departments and agencies and individuals’. He therefore proposed an office of independent reviewer with coercive powers relating to the: ‘production of documents which might override claims of public interest immunity or legal professional privilege; appearances before an inquiry; maintenance of confidentiality; and the protection of witnesses.’¹³

The then Labor government responded favourably to the recommendations of these inquiries, stating that ‘[o]ngoing review of the counter-terrorism legislation is consistent with the Government’s policy imperative to ensure the laws operate in an effective and accountable manner’. The main reasons for the creation of a new office of independent reviewer were then outlined:

The National Security Legislation Monitor will bring a more consolidated approach to ongoing review of the laws. This will avoid the past practice of ad hoc reviews on particular aspects which has resulted in a less holistic approach and can be resource-intensive for both the reviewing body and the relevant agencies involved in the review.

It is only after there has been experience with the legislation that its practical operation and effectiveness, and implications for national security and human rights can be fully assessed. A formal mechanism for regularly examining the use of the laws and drawing out lessons from their practical operation would ensure ongoing improvement of those laws.¹⁴

¹⁰ Ibid [2.43].

¹¹ Ibid [2.56]-[2.57].

¹² John Clarke, *Report of the Clarke Inquiry into the Case of Dr Mohamed Haneef – Vol I* (2008) 16-17.

¹³ Ibid.

¹⁴ *Parliamentary Joint Committee on Intelligence and Security Review of Security and Counter Terrorism Legislation Government Response to Recommendations* (2008)

<file:///infpwfs510.ad.unsw.edu.au/Staff035\$/z3382819/Downloads/http---www.aphref.aph.gov.au-house-committee-pjcis-securityleg-govresp%20(2).pdf>.

On 25 June 2009, the then Labor government introduced the National Security Legislation Monitor Bill 2009 into the Commonwealth Parliament. That bill had a forerunner in the form of a private members bill first proposed by Petro Georgiou in the House of Representatives and then by Senators Judith Troeth and Gary Humphries. This Committee held an inquiry into that bill, however, it was ultimately not supported by the government. Instead, it waited to bring forward its own bill. That bill received royal assent as the *Independent National Security Legislation Monitor Act 2010* (Cth) on 13 April 2010 and entered into force the following day.

2 The Role and Functions of the Independent National Security Legislation Monitor

The primary role of the office of Independent Monitor is to assist Ministers in ensuring that Australia's counter-terrorism and national security legislation:

- is effective in deterring and preventing terrorism and terrorism-related activity which threatens Australia's security;
- is effective in responding to terrorism and terrorism-related activity;
- is consistent with Australia's international obligations, including its human rights obligations, counter-terrorism obligations and international security obligations; and
- contains appropriate safeguards for protecting the rights of individuals.¹⁵

The Independent Monitor has three main functions:

1. to review the operation, effectiveness and implications of:
 - a. Australia's counter-terrorism and national security legislation;¹⁶ and
 - b. any other law of the Commonwealth to the extent that it relates to Australia's counter-terrorism and national security legislation;
2. to consider whether that legislation:
 - a. contains appropriate safeguards for protecting the rights of individuals; and
 - b. remains proportionate to any threat of terrorism or threat to national security, or both; and
 - c. remains necessary; and
3. to assess whether that legislation is being used for matters unrelated to terrorism and national security.¹⁷

¹⁵ *Independent National Security Legislation Monitor Act 2010* (Cth) s 3.

¹⁶ *Ibid* s 4. This body of legislation is defined as:

- 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*.

¹⁷ *Ibid* s 6(1).

The Independent Monitor carries out these functions on his or her own initiative. However, the Prime Minister and the PJCIS may also refer a matter relating to counter-terrorism or national security to the Independent Monitor for review.¹⁸

The Independent Monitor is required to present to the Prime Minister an annual report covering the functions of the office as soon as practicable after 30 June in each reporting year and no later than 31 December.¹⁹ The Prime Minister must cause a copy of that report to be tabled in each House of the Parliament within 15 sitting days after the day on which it is received.²⁰

Bret Walker SC was appointed by the Governor-General as the first Independent Monitor on 21 April 2011.²¹ In his three years in office, Walker has provided three annual reports to the Prime Minister. A fourth report was scheduled to be submitted to the Prime Minister in April 2014.²²

3 Analysis of the Government's Reasons for Repeal

The Coalition government has expressed four reasons for abolishing the office of the Independent Monitor. We disagree. Set out below is our response to each of these reasons. It is our view that the office continues to serve an important function in the anti-terrorism context.

A. The Independent Monitor's review function is not concluded

The Prime Minister has declared that 'all relevant legislation has already been reviewed'.²³ However, this fails to appreciate the role of the office of Independent Monitor as a standing mechanism for the ongoing evaluation of anti-terrorism laws.

While the four reports prepared by Walker will have made mention of every piece of legislation specifically cited for review under the terms of the *Independent National Security Legislation Monitor Act 2010* (Cth), this does not amount to a full review of every aspect of Australia's anti-terrorism laws. For example, there are a number of other relevant laws which have not been reviewed by the Independent Monitor, such as the *Telecommunications Interception Legislation Amendment Act 2002* (Cth). In part, this is due to the sheer number of laws and a lack of time to subject each piece of legislation to in-depth scrutiny. More importantly, however, and consistent with how the office of Independent Monitor was envisaged, the reports can only focus on how the laws are operating at any particular point in time. In some areas, there is currently insufficient evidence on the use of particular anti-terrorism measures. For example, in his third report, the Independent Monitor noted that due to 'the paucity of occasions in actual criminal proceedings when the [*National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth)] has been argued in a fully contested fashion,' his conclusions regarding the use of this legislation were 'provisional, in the nature of a progress report only'.²⁴

¹⁸ Ibid ss 7 and 7A.

¹⁹ Ibid s 29(1).

²⁰ Ibid s 29(5).

²¹ <<http://www.dpmc.gov.au/INSLM/index.cfm>>.

²² Bret Walker, *Independent National Security Legislation Monitor Annual Report* (2013) 1.

²³ Commonwealth, *Parliamentary Debates*, House of Representatives, 19 March 2014, 1 (Tony Abbott).

²⁴ Bret Walker, *Independent National Security Legislation Monitor Annual Report* (2013) 124.

Even where there has been direct evidence about the use of the legislation for the Independent Monitor to consider, it is inapt to describe his reports as ‘complete’ or to regard the purpose of the office as spent. Reporting on the *continuing* necessity of the substance of the laws, as well as the use made by Commonwealth agencies and State police of the array of powers contained therein is the essence of the Independent Monitor’s function.

B. Ongoing and holistic review provides the most effective form of oversight of anti-terrorism laws

The Explanatory Memorandum to the Independent National Security Legislation Monitor Repeal Bill 2014 states that ‘the Government considers that placing the laws in a constant or continuous state of wholesale review has not proven to be the optimal form of oversight’.²⁵ However, as highlighted above, an office of ongoing review was recommended as the best form of review by both the PJCIS and the ad hoc reviews conducted by the SLRC and the Hon John Clarke QC.

The establishment of an office of ongoing independent review aimed to remedy some of the problems which arose in the prior practice of appointing ad hoc reviews to investigate the anti-terrorism laws. Ad hoc reviews have been relied upon in three situations. First, in circumstances where the Commonwealth Parliament has been concerned about particular aspects of the anti-terrorism laws, it has written a post-enactment review clause into those laws. This accounts for the creation of the SLRC, as well as the establishment of the Council of Australian Governments Review of Counter-Terrorism Legislation (‘COAG Review’). The COAG Review examined a broad range of federal and state and territory anti-terrorism laws, including those providing for preventative detention orders, control orders, anti-terrorism policing powers, and a range of terrorism offences in the *Criminal Code Act 1995* (Cth).²⁶ The second situation in which ad hoc reviews have been established is in response to individual cases where the use of the anti-terrorism laws has raised concerns, for example, the inquiry by the Hon John Clarke QC into the case of Dr Mohamed Haneef.²⁷ The final category includes those situations where matters are referred to a standing parliamentary committee. In particular, the PJCIS has reviewed a number of Australia’s anti-terrorism laws, including those relating to the special questioning and detention powers bestowed upon the Australian Security and Intelligence Organisation (‘ASIO’), the proscription of terrorist organisations and terrorist financing.²⁸ It has, however, by no means been able to review every aspect of all of Australia’s anti-terrorism laws.

The reliance upon ad hoc inquiries has created a fragmented and sporadic review process which is deficient in three key respects. First, prior to the creation of the office of Independent Monitor, a number of the anti-terrorism laws had never been subject to oversight. For example, the *Anti-Terrorism Act [No. 3] 2004* (Cth), which provided for the confiscation of travel documents and prevented suspects from leaving Australia, had not been subject to any review. Neither had the *National Security Information (Criminal and Civil*

²⁵ Explanatory Memorandum, Independent National Security Legislation Monitor Repeal Bill 2014 (Cth).

²⁶ COAG, *Review of Counter-Terrorism Legislation* (2013).

²⁷ John Clarke, *Report of the Clarke Inquiry into the Case of Dr Mohamed Haneef – Vol I* (2008).

²⁸ PJCIS, Parliament of Australia, *Review of Security and Counter Terrorism Legislation* (2006); PJCIS, Parliament of Australia, *Inquiry into the Terrorist Organisation Listing Provisions of the Criminal Code Act 1995* (2007); PJCIS, Parliament of Australia, *Report of the Inquiry into Potential Reforms of Australia’s National Security Legislation* (2013).

Proceedings) Act 2004 (Cth), which severely curtailed fair trial and due process rights by limiting the defendant's access to the broadly defined category of 'national security information'. Secondly, different reviews have been granted different terms of reference and different powers to access information from the government and the intelligence and security agencies. As a consequence of this, the different review bodies have often made conflicting recommendations on a particular issue. This has allowed the government to point to a lack of consensus and thus avoid implementing the proposed reforms. Thirdly, once ad hoc reviews have been completed and have submitted their report to the government, they are unable to exert any further pressure on the government to implement their recommendations.

The office of Independent Monitor does not suffer from these deficiencies. It was established to provide continuing review of all of Australia's anti-terrorism and national security laws. The Independent Monitor is not required to review every piece of national security and anti-terrorism legislation every year. Given the large number of anti-terrorism laws in operation, it would be impractical to require otherwise. However, the important point is that the Independent Monitor is not precluded from re-examining a law which he or she has previously subjected to review if it is considered necessary to fulfil the function of the office. The Independent Monitor is responsible for determining which legislation to review subject to one condition only. The *Independent National Security Legislation Monitor Act 2010* (Cth) requires the Independent Monitor to 'give particular emphasis to provisions of that legislation that have been applied, considered or purportedly applied by employees of agencies that have functions relating to, or are involved in the implementation of, that legislation during that financial year or the immediately preceding financial year.'²⁹

Unlike the ad hoc reviews, the Independent Monitor's terms of reference remain constant. As well as reviewing 'the operation, effectiveness and implications of the laws', he or she must also consider whether the legislation 'remains proportionate to any threat of terrorism or threat to national security, or both' and remains necessary.³⁰ This means that the Independent Monitor is able to judge the value of the laws not only on whether they function adequately but whether they are fit for purpose in terms of the existing level of terrorist threat. This is vital for an appreciation of the need for a standing mechanism of anti-terrorism law review: what is proportionate today may not be proportionate in the near future. The *Independent National Security Legislation Monitor Act 2010* (Cth) recognised the importance of periodic review of the laws in light of the threat of terrorism at a particular time.

In contrast to the ad hoc model of review used previously, the ongoing nature of the review conducted by the office of Independent Monitor means that it can continue to emphasise to government the need for action in response to its recommendations. Walker did just this in his third report. He provided an outline of some of the main recommendations that had been made in the second annual report; in particular, those which if implemented would 'enhance the CT [counter-terrorism] Laws with respect to their effectiveness in countering terrorism'.³¹ He then highlighted that, with respect to these recommendations, 'the INSLM [Independent National Security Legislation Monitor] has heard nothing about a governmental or official response'.³² An office of ongoing review, such as the Independent Monitor, can continue, through annual reporting requirements, to highlight the lack of government progress in implementing reform.

²⁹ *Independent National Security Legislation Monitor Act 2010* (Cth) s 9.

³⁰ *Ibid* s 6.

³¹ Bret Walker, *Independent National Security Legislation Monitor Annual Report* (2013) 4.

³² *Ibid*.

C. The office improves on other models of review

The Explanatory Memorandum to the Independent National Security Legislation Monitor Repeal Bill 2014 points out that ‘Australia has a comprehensive range of standing and ad hoc oversight and accountability measures already in place. These measures include existing independent oversight bodies such as Parliamentary Committees, and executive powers to appoint ad hoc review ... Comprehensive oversight of relevant counter-terrorism and national security legislation will remain despite this repeal’.³³ We acknowledge the existence (actual and potential) of other means by which anti-terrorism laws may be reviewed. However, we believe that for the same reasons as outlined in the previous section above, the office of the Independent Monitor is an improvement upon other models of review and should be retained.

There are two additional features of the office of Independent Monitor that distinguish it from other review options. These are, first, the value of *independent* expert advice to government and, secondly, the range of powers bestowed upon the Independent Monitor by the *Independent National Security Legislation Monitor Act 2010* (Cth). There is no other office which fulfils the function of providing continuous review of the content and use of the anti-terrorism laws which has the same coercive information-gathering powers of the Independent Monitor.

(i) Independence

When the parliament established the office of Independent Monitor, it created an appointment, tenure and remuneration process which would guarantee the independence of that office. The Independent Monitor is appointed by the Governor-General on the recommendation of the Prime Minister, who must have consulted with the Leader of the Opposition in the House of Representatives.³⁴ The Independent Monitor is appointed for a period of three years and may be reappointed only once.³⁵ He or she is appointed in accordance with the criteria used in selecting agency heads for the Australian Public Service. For the appointment of Walker, the first Independent Monitor, the Department of the Prime Minister and Cabinet and the Attorney-General’s Department:

developed an initial list of 30 possible candidates. In consultation with the former Cabinet Secretary, Senator the Hon Joseph Ludwig, this was ultimately reduced to a short-list of seven. These candidates were invited to submit an application to the National Security Adviser. A list of those individuals interested in being considered for the position was subsequently provided to the Prime Minister.³⁶

The independence of the Independent Monitor is also guaranteed by the part-time nature of the post. The Independent Monitor is not reliant on the position for income and is thus not beholden to the government. The appointment of the Independent Monitor may also only be terminated in a narrow set of circumstances.³⁷ These conditions of appointment mean that the Independent Monitor can make any recommendation – even those that are potentially

³³ Explanatory Memorandum, Independent National Security Legislation Monitor Repeal Bill 2014 (Cth).

³⁴ *Independent National Security Legislation Monitor Act 2010* (Cth) ss 11(1) and 11(2).

³⁵ *Ibid* s 12.

³⁶ Australia, FOI Request [SEC=UNCLASSIFIED] (6 December 2012).

³⁷ *Independent National Security Legislation Monitor Act 2010* (Cth) s 19.

politically unpopular – safe in the knowledge that the government cannot easily terminate his or her appointment or threaten the withdrawal of payment.

(ii) Powers to access information

In order to carry out the functions of the office, the Independent Monitor is granted two specific powers to obtain information. First, he or she may hold a hearing and issue a notice summoning a person to attend, either to give evidence or to produce documents or things specified in the notice.³⁸ Secondly, the Independent Monitor may request, by written notice, a person to provide the information or to produce the documents or things referred to in the notice.³⁹ It is an offence to fail to comply with these powers.⁴⁰ What these powers mean, in essence, is that the Independent Monitor has the same access to information as does the government of the day. The government is, therefore, not easily able to reject the Independent Monitor's recommendations on the grounds that it is privy to classified material which he or she has not seen. This gives the Independent Monitor's recommendations considerable weight.

Past ad hoc reviews have generally not had such powers of access. The SLRC, for example, had no powers to access classified material⁴¹ and nor did the COAG Review. With regard to its examination of the control order regime, the latter highlighted that it did 'not have access to classified material', nor did it receive 'any sensitive or confidential briefing on either case' in which a control order was issued.⁴² Its recommendations were therefore dependent upon publicly available material and any evidence presented to it during private briefings. In these circumstances the COAG Review gave significant weight to the submission by the Australian Federal Police ('AFP') about the utility of the measures under review.

The Independent Monitor is not so constrained. In his review of the control order legislation, for example, Walker had full access to all of the 'files for every operation where the AFP gave consideration to applying for a CO [control order], including the two COs that were applied for and issued.'⁴³ The Independent Monitor could, therefore, judge for himself whether the legislation was effective, necessary, proportionate to the threat of terrorism, and contained appropriate safeguards. Having examined all the relevant material, the Independent Monitor: 'found no evidence that Australia was made appreciably safer by the existence of the two COs issued.'⁴⁴ The Independent Monitor's report continued: 'It follows that neither CO was reasonably necessary for the protection of the public from a terrorist act.'⁴⁵

D. A lack of political will to implement reforms is not a sound basis for repeal

Prime Minister Tony Abbott has used the former Labor government's lack of response to the Independent Monitor's recommendations as one of the reasons for abolishing this office. He has stated that 'the former government ignored all the monitor's recommendations.'⁴⁶ However, in our opinion, this is not a persuasive reason for repeal. It is entirely within the

³⁸ Ibid ss 21-23.

³⁹ Ibid s 24.

⁴⁰ Ibid s 25.

⁴¹ SLRC, *Report of the Security Legislation Review Committee* (2006) 23-24.

⁴² COAG, *Review of Counter-Terrorism Legislation* (2013) 56.

⁴³ Bret Walker, *Independent National Security Legislation Monitor Declassified Annual Report* (2012) 12.

⁴⁴ Ibid 14.

⁴⁵ Ibid.

⁴⁶ Commonwealth, *Parliamentary Debates*, House of Representatives, 19 March 2014, 1 (Tony Abbott).

powers of the government to remedy the current lack of response by beginning to engage constructively with the office of Independent Monitor and its recommendations. This office was created to examine the anti-terrorism and national security laws for the purpose of ensuring that Australia had the greatest possible level of protection against the threat of terrorism. Walker has made a number of recommendations that he regards as being essential in order to improve the operation and efficacy of those laws. While it might be expected that the government would be reluctant to implement those of the Independent Monitor's recommendations which proposed winding back Australia's anti-terrorism regime, there is no logical explanation for why it has not implemented the Independent Monitor's reforms which were aimed to improve it. Walker has expressed concern in this regard:

When there is no apparent response to recommendations that would increase powers and authority to counter terrorism, some scepticism may start to take root about the political imperative to have the most effective and appropriate counter-terrorism laws. That would be, in the opinion of the INSLM, a regrettable atmosphere in which future and continued assessment and improvement of Australia's CT Laws are undertaken.⁴⁷

The Coalition government 'considers the best way forward is to work through the large number of recommendations made by the Monitor'.⁴⁸ This would demonstrate progress. However, there is no need to abolish the Independent Monitor in the process of working through the recommendations already made by the office. Indeed, there is much to be said for the value of retaining the Independent Monitor to assist in the evaluation of those changes and their impact.

Even in the absence of any constructive engagement by the Commonwealth government with the Independent Monitor's recommendations, the reports produced by the office serve three important functions which justify its retention.

First, whilst the object of the office is to 'assist Ministers' in ensuring that Australia's anti-terrorism and national security laws are effective, consistent with international obligations and contain appropriate safeguards, it is ultimately the whole of the Commonwealth Parliament that is responsible for enacting anti-terrorism legislation. The reports of the Independent Monitor are essential to inform parliamentary debate on the drafting and reform of this legislation. This is particularly relevant given that two pieces of federal anti-terrorism legislation are subject to sunset clauses which will expire in the next two years: the control order and preventative detention order regimes in the *Anti-Terrorism Act [No. 2] 2005* (Cth) in 2015 and ASIO's special powers regime in the *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003* (Cth) in 2016. As noted earlier in this submission, the Independent Monitor has had access to all the relevant files relating to these regimes. However, ordinary members of the parliament will not have such access when it comes time to debate whether the legislation should be repealed or continued. The Independent Monitor's reports will therefore play an important role in providing parliamentarians with information, based on all the available evidence, regarding the operation, effectiveness, implications, proportionality and necessity of these aspects of the anti-terrorism laws.

⁴⁷ Bret Walker, *Independent National Security Legislation Monitor Annual Report* (2013) 6.

⁴⁸ Explanatory Memorandum, Independent National Security Legislation Monitor Repeal Bill 2014 (Cth).

Secondly, the office of Independent Monitor is able to keep anti-terrorism law on the agenda, in terms of public and political debate. This enables an additional layer of scrutiny in an area of law which is highly controversial. Through publication of his annual reports, the Independent Monitor has been able to release into the public domain new information regarding the operation of Australia's anti-terrorism laws. For example, until the Independent Monitor's second report was tabled in the parliament, it was not known that control orders had been considered on more than the two occasions in which actual orders were made. The Independent Monitor revealed that the AFP had considered applying for control orders in 23 other cases.⁴⁹ The Independent Monitor's report also highlighted the circumstances in which it had considered doing so. These included: two occasions in which the AFP considered applying for a control order post-conviction; one post-acquittal; one following withdrawal of criminal charges; six occasions during a criminal trial against the contingency of acquittal; ten occasions where insufficient evidence existed to prosecute for terrorist offences and five times during a criminal investigation before charges had been brought.⁵⁰

Thirdly, the Independent Monitor is able to keep watch upon the government's progress in implementing proposed reforms. As noted earlier in this submission, one of the main failings with the previous model of ad hoc review was that once a report had been submitted, the review body had little capacity to further monitor the government's implementation of its recommendations. In contrast, the Independent Monitor has been able to highlight the government's lack of response in his reports. This allows the Independent Monitor not only to keep pressure on the government to implement the proposed reforms, but also engages the public, academics and civil society to pressure parliamentarians into holding the government to account. The Independent Monitor thus plays a far broader role in terms of government accountability than simply proposing recommendations for reform.

4 Conclusion

The Commonwealth government's justifications for abolition of the Independent Monitor by enactment of this bill are based upon a failure to appreciate the central justification for creating the office, that is, to provide continuous and ongoing review of Australia's anti-terrorism laws. The unanimous support for the establishment of such an office by several earlier review bodies – ranging from the PJCIS, ad hoc committees and inquiries – should not be lightly set aside. The office of Independent Monitor overcomes well-recognised deficiencies in the sporadic and ad hoc review process which presaged its creation. For as long as the exceptional criminal offence provisions, special measures of detention and control, and also vast investigative powers enacted in the wake of September 11 remain in force, there remains important work for the Independent Monitor to perform.

Yours sincerely,

Dr Jessie Blackbourn

Professor Andrew Lynch

Ms Nicola McGarrity

Professor George Williams AO

⁴⁹ Bret Walker, *Independent National Security Legislation Monitor Declassified Annual Report* (2012) 13.

⁵⁰ *Ibid.*