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# Independent National Security Legislation Monitor Repeal Bill 2014

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## **Senate Legal and Constitutional Affairs Legislation Committee**

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## Acknowledgement

The Law Council of Australia wishes to acknowledge the assistance of the New South Wales Bar Association, the Law Society of South Australia, the Bar Association of Queensland, its National Criminal Law Committee and its National Human Rights Committee in the preparation of this submission.

## Executive Summary

The Law Council of Australia is pleased to provide this submission to the Senate Legal and Constitutional Affairs Legislation Committee (the Committee) in response to its inquiry into the *Independent National Security Legislation Monitor Repeal Bill 2014* (the Bill), which seeks to abolish the role of the Independent National Security Legislation Monitor (the Monitor).

The Law Council considers that the role of the Monitor continues to be a necessary and effective form of scrutiny of Australia's national security and counter terrorism legislation. It does not support the passage of the Bill, for the reasons set out below.

While the Law Council has always acknowledged the need to safeguard Australia's national security and supported measures to protect the community from possible terrorist acts, it has often raised its strong concerns about national security measures that detract from established principles of the Australian criminal justice system, fail to comply with international human rights standards or abrogate rule of law principles. On this basis, Law Council supported and welcomed the establishment of the Monitor's role.

The Monitor's position was established to address a specifically identified need for independent ongoing review of Australia's national and counter-terrorism functions. This need was identified in a number of detailed parliamentary inquiries and other public reviews of Australia's national security legislation. The establishment of the Monitor was designed to overcome difficulties with existing oversight mechanisms, including a fragmented and sporadic approach. The Monitor's review functions are broad and include information-gathering powers. This enables the Monitor to provide comprehensive, consistent and central oversight across the full range of national security and counter-terrorism legislation. This level of oversight is lacking in other review mechanisms. The Law Council is concerned therefore, that the removal of the Monitor's role will leave a gap in the existing mechanisms to review and report on the operation, effectiveness and implications and Australia's counter-terrorism and national security legislation.

While the Monitor has provided a comprehensive range of reports to date, the Law Council does not agree that his role is complete. The establishment of the Monitor's role specifically recognised the need for ongoing review, given the potential for significant developments to arise in the future which fall within the Monitor's mandate. For example, new international conflicts with national security dimensions are likely to result in changing assessments about the necessity, proportionality and effectiveness of existing legislation, as well as the possible introduction of significant new legislation. Continuing review therefore provides an effective form of scrutiny of Australia's counter-terrorism and national security legislation, taking into account their unique nature and the dynamic context in which they operate.

Furthermore, the Law Council notes that several provisions of Australia's anti-terrorism laws have not yet been fully tested, and the Monitor's conclusions about these provisions are accordingly only preliminary. In addition, there remain relevant national security and counter-terrorism laws which the Monitor has not yet considered.

Since the first Monitor was appointed, the Law Council has welcomed his valuable contribution to the national debate concerning Australia's anti-terrorism and national security laws, noting that he has provided a number of detailed, comprehensive reports on a range of issues. His reports have been balanced, incorporating a focus on increasing the laws' operational effectiveness, as well as their necessity and proportionality. They provide an important resource, not only for Government, but for those outside Government who lack access to classified materials but retain concerns about the

necessity and exercise of these laws. The Law Council is also aware of the Monitor's influence in contributing to the development of the broader international response to terrorism threats.

The Law Council welcomes the Government's intention to respond to the Monitor's outstanding recommendations, and looks forward to a community consultation in this regard. It shares the Government's and Monitor's disappointment that there has been no response to the Monitor's recommendations to date. However, it does not consider that this lack of response precludes the need for future scrutiny. Rather, it leads to the conclusion that the *Independent National Security Legislation Act 2010* (Cth) (the Act) should instead be amended to require the Government of the day to respond to the Monitor's recommendations promptly.

The Law Council notes that the Bill was presented as part of a broader repeal exercise to remove the duplication of responsibilities and streamline government. It does not agree with this characterisation of the Monitor's role. On the contrary, it notes that the Monitor's comprehensive and thorough work has returned extraordinary value to the Australian community in return for a very modest level of expenditure.

If, contrary to the Law Council's view, the Committee considers that a continuous ongoing role for the Monitor is not required, the Law Council recommends that the Committee consider support for a periodic reviewing role for the Monitor instead of outright repeal. For instance, the Act could be amended to provide for review once every two years. The Law Council submits that the Act should then also be amended to require the Government to provide a public response to the Monitor's recommendations within six months.

## Background

1. Since the rapid introduction of a vast array of legislation concerning national security and counter terrorism, the Law Council has been calling for a system of independent review to ensure that these laws meet their public safety objectives, while at the same time not unduly burdening fundamental rights and freedoms.
2. The Law Council was instrumental in advocating that the position of the Monitor be established. In 2008-09, for example, it provided a number of public submissions, media statements and letters strongly supporting the role.<sup>1</sup>
3. After legislation establishing the position of the Monitor was passed with bipartisan support in 2010, the Law Council issued further statements urging the Government to move swiftly to appoint the Monitor and ensure adequate resourcing of the role.
4. The Law Council welcomed the appointment of the first appointed Monitor, Mr Bret Walker SC, in April 2011, and has since provided six submissions responding to the Monitor's reviews.

## Establishment of the Monitor position – addressing a unique regime

5. The office of the Monitor was created to ensure that Australia's counter-terrorism and national security laws that were enacted or enhanced since 11 September 2001 operate in an effective, accountable manner and are consistent with Australia's international obligations, including our human rights, counter-terrorism and international security obligations.<sup>2</sup>
6. The Law Council considers that it is essential to appreciate the broader context in which the Monitor's role was introduced. As observed by NSW Chief Justice Spigelman:  
  
*The particular nature of terrorism has resulted in a special, and in many ways unique, legislative regime.*<sup>3</sup>
7. The Law Council notes that from 2001 until the present day, the Commonwealth Parliament has passed over 50 separate pieces of legislation dealing with terrorism and security. These were generally presented as a temporary response to an emergency threat, and were accompanied by significant budget increases.

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<sup>1</sup> See for instance Law Council Media Release, 27 April 2011 at <http://www1.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/mediaReleases/1115%20Law%20Council%20applauds%20appointment%20of%20Independent%20National%20Security%20Legislation%20Monitor.pdf>; Letter to the Prime Minister on 1 October 2010; Letter to the then Cabinet Secretary, Senator Joe Ludwig on 21 June 2010; See <http://www1.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/IndependentNationalSecurityLegislationMonitor.pdf>; See Media Release, 8 September 2009 at <http://www1.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/mediaReleases/MR2309%20Independent%20Monitor%20of%20Anti-Terror%20Laws%20Should%20be%20Implemented%20Swiftly.pdf>

<sup>2</sup> The Hon. Robert McClelland MP, *Second Reading Speech to the Independent National Security Legislation Monitor Bill 2010*, 17 March 2010, p 2846.

<sup>3</sup> *Lodhi v R* [2006] NSWCCA 121 at 66.

8. While undoubtedly the threat of international terrorism poses significant complexities and challenges for law makers, it is important to recall that the introduction of these laws after the attacks of 11 September 2001 caused significant concern within the Australian community. There were concerns that they may 'disproportionately impact on minorities and risk undermining the principle of equality, which is the cornerstone of democracy and essential to the maintenance of community cohesion'.<sup>4</sup> In addition, many of the legislative measures introduced departed from established principles of the Australian criminal law and the rule of law, and restrict individual rights. For example:
- (a) unlike traditional criminal offences, terrorism offences rely on broad definitions, such as that of 'terrorist act', and are wide enough to cover preparatory conduct engaged in before criminal intent has been formed, without the need to prove a connection to a specific terrorist act;<sup>5</sup>
  - (b) under Division 105 and 104 of the *Criminal Code Act 1995* (the Criminal Code), a person's liberty can be controlled or restricted *without* the person being charged, convicted or even suspected of committing a criminal offence;
  - (c) Part 1C of the *Crimes Act 1914* (the Crimes Act), which allows for up to seven days 'dead time' to be excluded from the calculation of the investigation period in terrorism cases, and may result in a possible period of detention without charge for up to eight days, possibly more; and
  - (d) certain terrorist organisation offences, which are based on a system for proscribing organisations as terrorist organisations, shift the focus of criminal liability from a person's conduct to their associations – for example, they criminalise mere association with, or membership of, proscribed terrorist organisations.<sup>6</sup> A problem with this proscription process is that it may involve the attribution of defining characteristics and commonly shared motives or purposes to a group of people based on the statements or activities of certain individuals within the group.
9. For many years, the Law Council has submitted that the exceptional nature of Australia's anti-terrorism measures – and the often disproportionate impact they have on the enjoyment of individual rights – should not become normalised within the Australian criminal justice system and must be subject to regular and comprehensive review. As noted by the Parliamentary Joint Committee on Intelligence and Security (the PJCS), without regular and comprehensive review of anti-terrorism measures,

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<sup>4</sup> Parliamentary Joint Committee on Intelligence and Security Review of Security and Counter Terrorism Legislation, December 2006, Canberra, para [3.2].

<sup>5</sup> See offences contained in Part 5.3 of the Commonwealth Criminal Code and the definition of 'terrorist act' in section 100.1 of the Criminal Code. For further discussion of the Law Council's concerns regarding this definition and related offences see Law Council of Australia submission to Senate Legal and Constitutional Legislation Committee Inquiry into *Security Legislation Amendment (Terrorism) Bill 2002 [No.2] and Related Bills*, April 2002; Law Council of Australia submission to Senate Legal and Constitutional Legislation Committee Inquiry into *Anti-Terrorism Bill 2004*, 29 April 2004; Law Council of Australia submission to Senate Legal and Constitutional Legislation Committee Inquiry into *Anti-Terrorism Bill (No. 2) 2004*, 15 July 2004. See also Law Council of Australia, *Shadow Report to Australia's Common Core Document*, submitted to the UN Human Rights Committee on 29 August 2008 available at <http://www.lawcouncil.asn.au/sublist.html?section=&month=&year=2008&search=&searchon=titles>

<sup>6</sup> For terrorist organisation offences see Division 102 of the Commonwealth Criminal Code. Law Council of Australia submission to Senate Legal and Constitutional Legislation Committee Inquiry into *Security Legislation Amendment (Terrorism) Bill 2002 [No.2] and Related Bills*; Law Council of Australia submission to Attorney-General, House of Representatives, *Criminal Code Amendment (Terrorist Organisation) Bill* 3 March 2004.

'there is a real risk that the terrorism law regime may, over time, influence legal policy more generally with potentially detrimental impacts on the rule of law'.<sup>7</sup>

10. The Law Council has shared these concerns, and notes that such laws may indeed be having a "copycat effect" across other Australian jurisdictions in response to other criminal threats. For example, the Commonwealth and the majority of states and territories have passed laws in recent years designed to combat serious and organised crime by proscribing certain groups and organisations and criminalising association with these groups. These laws are often called 'anti-bikie' laws but actually have a wider application.

## Establishment of the Monitor position – addressing a gap in oversight and transparency

11. The exceptional nature of these anti-terrorism measures, their potential impact on individual rights and freedoms, coupled with concerns that such standards may become normalised within the Australian criminal justice system and the deficiencies with existing ad hoc models of anti-terrorism review led to significant support for a separate, independent reviewer of Australia's counter-terrorism laws.
12. In particular, the findings from three independent inquiries supported the establishment of an independent reviewer, including the Security Legislation Review Committee (the Sheller Committee) (2006), the PJCIS (2006) and the Hon. John Clarke QC *Inquiry into the Case of Dr Muhamed Haneef* (2008). Each of these reports is briefly considered below.

### The Sheller Committee Recommendations

13. The Sheller Committee was established in October 2005 to review the 'operation, effectiveness and implications' of the first package of terrorism and security legislation as soon as practicable three years after their commencement.<sup>8</sup> Its report was tabled by the Attorney-General in June 2006.<sup>9</sup>

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<sup>7</sup> The Parliamentary Joint Committee on Intelligence and Security's Review of Security and Counter Terrorism Legislation was tabled in December 2006 (PJCIS Report) para [2.48] available at <http://www.aph.gov.au/house/committee/pjcis/securityleg/index.htm>.

<sup>8</sup> Parliament legislated to require the Attorney-General to initiate this review under section 4 of the *Security Legislation Amendment (Terrorism) Act 2002* (Cth). The first package of terrorism legislation included amendments made by the *Security Legislation Amendment (Terrorism) Act 2002*; the *Suppression of the Financing of Terrorism Act 2002*; the *Criminal Code Amendment (Suppression of Terrorist Bombings) Act 2002*; and the *Border Security Legislation Amendment Act 2002*; the *Telecommunications Interception Legislation Amendment Act 2002*; and the *Criminal Code Amendment (Terrorism) Act 2003*. The Attorney-General established the independent Security Legislation Review Committee on 12 October 2005 under the Chairmanship of the Honourable Simon Sheller AO QC (the Sheller Committee). The Sheller Committee was made up of representatives of major stakeholder organisations. It conducted a public inquiry, receiving 29 submissions and taking evidence from 18 witnesses over 5 days of hearings in Melbourne, Sydney, Canberra and Perth.

<sup>9</sup> The Sheller Committee reported to the Attorney-General and the PJCIS on 21 April 2006. Its report was tabled by the Attorney-General on 15 June 2006 and is available at: [http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/\(03995EABC73F94816C2AF4AA2645824B\)~SLRC+Report-t-+Version+for+15+June+2006\[1\].pdf/\\$file/SLRC+Report-t-+Version+for+15+June+2006\[1\].pdf](http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(03995EABC73F94816C2AF4AA2645824B)~SLRC+Report-t-+Version+for+15+June+2006[1].pdf/$file/SLRC+Report-t-+Version+for+15+June+2006[1].pdf) (the Sheller Report).



14. The Committee noted that given the relatively short time in which the legislation had been in operation, there was a limit to the value of the review in 2006.<sup>10</sup> However, it was noted that in the next few years, when more would be known about the operation of such laws, an independent body would be better placed to fully assess their operation and effectiveness.<sup>11</sup> The Committee noted that:

*It is important that the ongoing operation of the provisions, including the views taken of particular provisions by the courts, be closely monitored and that Australian governments have an independent source of expert commentary on the legislation.*<sup>12</sup>

15. For this reason, the Committee recommended that:

*...the government establish a legislative-based timetable for continuing review of the security legislation by an independent body, such as the [Sheller Committee], to take place within the next three years.*<sup>13</sup>

16. The Committee noted the existence of several possible models to provide ongoing review of terrorism legislation, such as a public advocate, a public interest monitor (PIM) and an independent reviewer.<sup>14</sup>

#### PJCIS Recommendations

17. A further review of some of Australia's terrorism laws took place in 2006, this time by the PJCIS.<sup>15</sup> The PJCIS released its report entitled *Review of Security and Counter Terrorism Legislation* (the PJCIS Report) on 4 December 2006.<sup>16</sup>

18. Chapter 2 of the PJCIS Report considered the need for ongoing review of terrorism laws by an Independent Reviewer or independent committee.<sup>17</sup> The PJCIS made recommendations, including that:<sup>18</sup>

- the Government appoint an independent person of high standing who commands respect and is trusted as an impartial and informed source of information and analysis as an Independent Reviewer of terrorism law in Australia;

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<sup>10</sup> As at the date of submissions to the Sheller Committee, twenty-four people had been charged with offences under the amended provisions of the Criminal Code originally enacted in 2002. In only two of these matters have the accused been tried. See Sheller Report para [18.1].

<sup>11</sup> Sheller Report para [18.1].

<sup>12</sup> Sheller Report, p 6.

<sup>13</sup> Sheller Report para [18.2].

<sup>14</sup> In respect of a role for a public advocate or a public interest monitor, the Committee concluded that 'there is merit in further investigation and consideration by all governments of the establishment of a body similar to the Special Advocate and/or [a Public Interest Monitor].' See Sheller Report para [18.9]-[18.17]

<sup>15</sup> Pursuant to paragraph 29(1)(ba) of the *Intelligence Services Act 2001*, the PJCIS was required to review the operation, effectiveness and implications of the *Security Legislation Amendment (Terrorism) Act 2002*; *Border Security Legislation Amendment Act 2002*; *Criminal Code Amendment (Suppression of Terrorist Bombings) Act 2002*; and *Suppression of the Financing of Terrorism Act 2002* and report to each House of the Parliament and to the responsible Minister, as soon as practicable after the third anniversary of the laws coming into force. The PJCIS was also required to take account of the findings of the Sheller Committee Report, see *Security Legislation Amendment (Terrorism) Act 2002* section 4.

<sup>16</sup> The Parliamentary Joint Committee on Intelligence and Security's Review of Security and Counter Terrorism Legislation was tabled in December 2006 (PJCIS Report) available at <http://www.aph.gov.au/house/committee/pjcis/securityleg/index.htm>.

<sup>17</sup> See PJCIS Report paras [2.42]-[2.62]. The majority of witnesses supported the proposal for further review of terrorism laws, see PJCIS Report para [2.54].

<sup>18</sup> PJCIS Report Recommendation 2 at p.22.



- the Independent Reviewer be free to set his or her own priorities and have access to all necessary information including security sensitive information where necessary; and
- the Independent Reviewer report annually to the Parliament.

19. The PJCIS adopted this view after considering the breadth and significance of the anti-terrorism measures, the fragmented nature of review so far and the ongoing importance of counter terrorism policy into the future.<sup>19</sup>

20. The PJCIS noted that the limited mandate of existing review mechanisms had prevented a more holistic assessment of the terrorism law framework.<sup>20</sup> As a result, broader questions relating to operational practices of police, the interpretation of new powers, the scope and application of offence provisions, the conduct of trials and the management of prisoners had fallen outside the terms of reference.<sup>21</sup>

21. The Committee described the existing system of review as 'limiting the capacity for independent, ongoing and comprehensive examination of how terrorism laws are operating'.<sup>22</sup>

22. The PJCIS preferred a single independent appointee, rather than periodic review by an independent committee.<sup>23</sup> It was observed that:

*A single appointee would overcome the existing fragmentation by providing a consistent and identifiable focal point for the community and the executive agencies.*<sup>24</sup>

#### Clarke Inquiry

23. In December 2008, the Hon John Clarke QC, who had been appointed to conduct an inquiry into the case of Dr Mohamed Haneef, recommended that consideration be given to the appointment of an independent reviewer of Commonwealth counter-terrorism laws.<sup>25</sup>

24. He further recommended that the Government 'consider incorporating in legislation the special arrangements and powers that would apply to inquiries and other independent reviews and investigations involving matters of national security'.<sup>26</sup> This

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<sup>19</sup> PJCIS Report paras [2.43] and [2.50].

<sup>20</sup> Ibid, paras [2.50].

<sup>21</sup> Ibid, para [2.50]. For example, the *Anti Terrorism Act 2004* (Cth), which increased maximum questioning and detention times by police for terrorist offences; *Anti Terrorism Act (No.2) 2004* (Cth), which provides for the transfer of prisoners on security grounds, by order of the Attorney-General, between States and Territories; *Anti Terrorism Act (No.3) 2004* (Cth), which, among other things, provided for the confiscation of travel documents and prevents persons from leaving Australia; *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth), which provided a regime for non-disclosure of security sensitive information.

<sup>22</sup> PJCIS Report para [2.53].

<sup>23</sup> At the PJCIS Committee's inquiry, the Commonwealth Attorney-General's Department suggested that the parliamentary committee system is more inclusive and effective than an individual reviewer. The Committee acknowledged the important role of the parliamentary committee, but found that a case had been established for independent ongoing oversight of Australia's terrorism laws. See PJCIS Report para [2.59]; see also AGD, *Transcript*, 1 August 2006, p. 8.

<sup>24</sup> PJCIS Report para [2.57].

<sup>25</sup> The Hon John Clarke QC, *Report of the Clarke Inquiry into the Case of Dr Mohamed Haneef – Vol I* (2008), Recommendation 4, p 256 at [https://web.archive.org/web/20120813055417/http://www.haneefcaseinquiry.gov.au/www/inquiry/rwpattach.nsf/VAP/\(3A6790B96C927794AF1031D9395C5C20\)~Volume+1+FINAL.pdf/\\$file/Volume+1+FINAL.pdf](https://web.archive.org/web/20120813055417/http://www.haneefcaseinquiry.gov.au/www/inquiry/rwpattach.nsf/VAP/(3A6790B96C927794AF1031D9395C5C20)~Volume+1+FINAL.pdf/$file/Volume+1+FINAL.pdf).

<sup>26</sup> Ibid, pp 16-17.

recommendation was made on the basis that after conducting his own inquiry, which raised community concerns regarding compliance with Australia's international human rights obligations, he found that his lack of coercive powers 'affected the timeliness of responses from government'.<sup>27</sup>

#### Law Council support for recommendations

25. A private members' bill seeking to establish an independent reviewer role was introduced by a number of Coalition MPs in 2008.<sup>28</sup>
26. Responding to the Committee's inquiry into the bill, the Law Council supported the introduction of an independent reviewer. In particular, it supported the view that there were existing gaps and fragmentation in oversight and transparency, contending that there were limitations to past and present review mechanisms.
27. The Law Council submitted that a comprehensive, independent evaluation of Australia's terrorism laws - that considered the content and operation of such laws and explored their impact on the practices of law enforcement and intelligence officers, courts and the community more broadly - was urgently needed in Australia.
28. Without such evaluation, it stated that existing review mechanisms were unlikely to identify systemic operational problems or assess whether measures that impact significantly on the rights of individuals were actually effective in combating terrorism and continue to be necessary.
29. In response to this inquiry, this Committee provided in-principle support for the establishment of an independent review mechanism for Australian-related terrorism legislation, provided that additional detail was given concerning the independent reviewer's role and function.<sup>29</sup>

#### Establishment of the Monitor Position

30. In 2009, the former Australian Government introduced its own bill establishing the Monitor's role,<sup>30</sup> and the Act entered into force on 14 April 2010.
31. In doing so, the former Australian Government noted 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'.<sup>31</sup> The primary reasons for the establishment of the role of the Monitor were outlined as:

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<sup>27</sup> Ibid, p 16.

<sup>28</sup> Independent Reviewer of Terrorism Laws Bill 2008 (No 2). Former MP Petro Georgiou introduced this bill as a private member's bill, which was co-sponsored by Senators Judith Troeth and Gary Humphries. It was not in its form supported by the former Government, which instead introduced its own Bill.

<sup>29</sup> Senate Legal and Constitutional Affairs Committee, *Report Independent Reviewer of Terrorism Laws 2008* [No. 2], October 2008, p 20.

<sup>30</sup> On 25 June 2009 the Senate, on the recommendation of the Selection of Bills Committee, referred the National Security Legislation Monitor Bill 2009 to the Finance and Public Administration Legislation Committee for inquiry and report. The Law Council provided a submission to the Senate Committee on Finance and Public Administration Legislation's Inquiry in July 2009 - see <http://www.lawcouncil.asn.au/lawcouncil/index.php/divisions/criminal-law-and-human-rights/anti-terror-law?layout=edit&id=143>.

<sup>31</sup> Australian Government Response to Recommendations made by the Parliamentary Joint Committee on Intelligence and Security Review of Security and Counter Terrorism Legislation (2008) at <http://www.ag.gov.au/NationalSecurity/Counterterrorismlaw/Pages/ReviewofAustraliascounter-terrorismlaws.aspx>.

*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 to those laws.<sup>32</sup>*

## Role, Function and Information Gathering Powers of the Monitor

32. The Act established the role of the office of the Monitor to assist Ministers in ensuring that Australia's counter-terrorism and national security legislation is effective in deterring, preventing and responding to terrorism and terrorism-related activity which threatens Australia's security, is consistent with Australia's international human rights, counter-terrorism, and international security obligations, and contains appropriate safeguards<sup>33</sup>
33. The functions of the Monitor include reviewing on his or her own initiative, the operation, effectiveness and implications of Australia's counter-terrorism and national security legislation or any other law of the Commonwealth as it relates to such legislation.<sup>34</sup> The Monitor can also consider, on his or her own initiative, whether that legislation contains appropriate safeguards for protecting the rights of individuals remains proportionate to any threat of terrorism or threat to national security, or both, and remains necessary.<sup>35</sup>
34. The Prime Minister may also refer a matter to the Monitor relating to counter-terrorism or national security. In addition, the Monitor may assess whether Australia's counter-terrorism or national security legislation is being used for matters unrelated to terrorism and national security.<sup>36</sup>
35. In the performance of his or her functions under the Act the Monitor has the power to hold hearings including private hearings;<sup>37</sup> summon a person to attend a hearing to

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<sup>32</sup> Ibid.

<sup>33</sup> Section 3 of the *Independent National Security Legislation Monitor Act 2010* (Cth). 'Counter terrorism and national security legislation' is defined in section 4 of the Act to include: 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; 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; Division 3A of Part IAA of the [Crimes Act 1914](#) and any other provision of that Act as far as it relates to that Division; sections 15AA and 19AG of the [Crimes Act 1914](#) and any other provision of that Act as far as it relates to those sections; Part IC of the [Crimes Act 1914](#), 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; Chapter 5 of the Criminal Code and any other provision of that Act as far as it relates to that Chapter; Part IIIAAA of the [Defence Act 1903](#) and any other provision of that Act as far as it relates to that Part; and the *National Security Information (Criminal and Civil Proceedings) Act 2004*.

<sup>34</sup> Ibid.

<sup>35</sup> Ibid.

<sup>36</sup> Ibid

<sup>37</sup> Ibid, section 21.

give evidence or produce documents;<sup>38</sup> require a person to take an oath or affirmation at a hearing;<sup>39</sup> request the production of a document or thing;<sup>40</sup> retain documents or things.<sup>41</sup> A person commits an offence if he or she:

- is served with a notice to attend a hearing and fails to attend;
- is served with a notice to attend a hearing and fails to be sworn or to make an affirmation at the hearing;
- fails to answer a question at the hearing that the Monitor requires the person to answer;
- receives a notice to produce a document or thing specified in the notice and fails to produce the document or thing; or
- receives a notice to provide information specified in the notice and fails to provide the information.<sup>42</sup>

36. The Monitor must present to the Prime Minister an annual report covering the functions of the office as soon as practicable after 30 June, and no later than 31 December.<sup>43</sup> Where the annual report contains national security sensitive information the Monitor is also required to present the Prime Minister with a declassified annual report.<sup>44</sup> The Prime Minister must table the declassified report in each House of Parliament within 15 sitting days after the day on which it is received.<sup>45</sup>

37. Mr Bret Walker SC was appointed by the Governor General on 21 April 2011 as the first Monitor under the Act. During his three year term he provided three reports with a fourth report scheduled to be released shortly.

#### Monitor's reports to date

38. The Monitor's first report highlighted key areas for investigation and notified a provisional agenda for further work.

39. The Monitor's second report focused upon the powers relating to questioning warrants and questioning and detention warrants under the *Australian Security and Intelligence Organisation Act 1979* (Cth) (the ASIO Act), and control orders and preventative detention orders under the Criminal Code

40. The Monitor's third annual report was released by the Australian Government on 17 December 2013, and included recommendations which relate to the Monitor's inquiries concerning the financing of terrorism and national security information.

41. The Monitor has recently completed his fourth inquiry, this time into the *Crimes (Foreign Incursions and Recruitment) Act 1978* (Cth), the terrorism offences under Part 5.3 of the Criminal Code and Part AAA of the *Defence Act 1903* (Cth), the *Australian Passports Act 2005* (Cth), outstanding Issues for Consideration in

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<sup>38</sup> Ibid, section 22.

<sup>39</sup> Ibid, section 23.

<sup>40</sup> Ibid, section 24.

<sup>41</sup> Ibid, section 27.

<sup>42</sup> Ibid, section 25.

<sup>43</sup> Ibid, subsections 29(1) and 29(2).

<sup>44</sup> Ibid, subsections 29(2A) and 29(3).

<sup>45</sup> Ibid, subsection 29(5).

Appendix 3 of the Monitor's First Annual Report in regards to sections 15AA and 19AG, Division 3A of Part IAA and Part IC of the Crimes Act. The Law Council looks forward to the publication of the report of this inquiry.

## Addressing Reasons for the current Bill

42. The Law Council understands that the current Bill has been introduced by the Government on the basis that the role of the Monitor is no longer required as:

- the Monitor's role is complete in that he has now reviewed all relevant legislation;<sup>46</sup>
- a process of continuing review is not the most effective form of scrutiny in the field of anti-terrorism;<sup>47</sup>
- the other available parliamentary and executive oversight mechanisms adequately enable review of counter-terrorism legislation;<sup>48</sup>
- the former Government ignored all the Monitor's recommendations<sup>49</sup> and now the best way forward is to work through the large number of recommendations made by the Monitor, and to continue engaging with the other extant and extensive range of existing independent oversight bodies.<sup>50</sup>

43. The Law Council makes the following comments in response to these arguments.

### **Role of the Monitor is not complete**

44. While the Monitor has provided a comprehensive range of reports to date, the Law Council does not agree that his role is complete.

45. For example, the Law Council notes that several provisions of Australia's anti-terrorism laws have not yet been fully tested by the courts and/or agencies' operations, and the Monitor's conclusions about these provisions to date have accordingly been only preliminary.

- (a) For example, in his third report, the Monitor noted that in finding that the NSI Act has not detracted from the provision of a fair trial in criminal proceedings to date, the paucity of occasions in which its provisions have been argued in a fully contested fashion in such proceedings renders this conclusion 'provisional, in the nature of a progress report only';<sup>51</sup> and
- (b) The Monitor also noted that Australia's single practical experience of financing of terrorism offences being prosecuted under the UN Charter Act reveals 'little about the efficacy of the legislation in preventing or deterring such conduct'.<sup>52</sup>

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<sup>46</sup> Prime Minister Tony Abbott, Commonwealth, *Parliamentary Debates*, House of Representatives, 19 March 2014, p 2355.

<sup>47</sup> *Ibid.*

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

<sup>49</sup> Prime Minister Tony Abbott, Commonwealth, *Parliamentary Debates*, House of Representatives, 19 March 2014, p 2355.

<sup>50</sup> Explanatory Memorandum, Independent National Security Legislation Monitor Repeal Bill 2014 (Cth).

<sup>51</sup> B. Walker SC, Independent National Security Legislation Monitor, *Annual Report*, 7 November 2013, p 124 at <http://www.dpmc.gov.au/publications/INSLM/index.cfm>.

<sup>52</sup> *Ibid.*, p 40.

In addition, the Monitor concluded that it was difficult to assess the efficacy of Part 3 and 4 of the UN Charter Act due to the limited number of prosecutions brought under those parts.<sup>53</sup>

46. In addition, Commonwealth laws which are relevant to Australia's counter-terrorism and national security framework have yet to be reviewed by the Monitor. These include the:

- *Telecommunications (Interception and Access) Act 1979* (the TIA Act), including amendments made by the *Telecommunications Interception Legislation Amendment Act 2002*. The PJCIS has recommended that the Government should seek the Monitor's views when conducting a review of the TIA Act,<sup>54</sup>
- *Intelligence Services Act 2001*: the PJCIS has also recommended that the Government should seek the views of the Monitor in relation to this Act;<sup>55</sup>
- potential implications due to Australia's ratification of the United Nations *Convention on Cybercrime*, for instance, the use of cybercrime for espionage or sabotage purposes. This is particularly pertinent as our national security agencies have seen in recent years, the 'scale and sophistication of cyber espionage conducted against Australian government and private sector systems increase significantly'.<sup>56</sup>

47. Other national security and counter-terrorism legislation, which is also noted on the Australian Government's website,<sup>57</sup> that does not appear to have been reviewed by the Monitor includes the:

- *Surveillance Devices Act 2004*. This legislation establishes procedures for officers to obtain warrants, emergency authorisations and tracking device authorisations for the installation and use of surveillance devices in relation to criminal investigations and other initiatives which may be relevant in protecting Australia's national security;
- *Aviation Transport Security Act 2004* – this Act seeks to enhance the structure of the aviation security regulatory framework and provide flexibility in order to remain responsive to the increased focus on terrorist activity and new threats of unlawful interference with aviation;<sup>58</sup>
- *Crimes (Aviation) Act 1991* – this legislation seeks to strengthen Australia's international and domestic aviation security regime by ensuring for example that aviation-related crimes carry appropriately severe penalties;
- *Crimes (Ships and Fixed Platforms) Act 1992* – contains offences relating to the safety of a ship or a fixed platform; and

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<sup>53</sup> Ibid, pp 3, 23, 52

<sup>54</sup> Recommendation 18 of the PJCIS *Report of the Inquiry into Potential Reforms of Australia's National Security Legislation*, May 2013.

<sup>55</sup> Ibid, Recommendation 41.

<sup>56</sup> ASIO Report to Parliament 2012-2013, p 5 at <http://www.asio.gov.au/img/files/ASIO-Report-to-Parliament-2012-13.pdf>.

<sup>57</sup> See <http://www.nationalsecurity.gov.au/WhatAustraliaisdoing/Pages/Laws-to-combat-terrorism.aspx>.

<sup>58</sup> See revised Explanatory Memorandum to the Aviation Transport Security Bill 2003, 27 March 2003.



- *Maritime Transport and Offshore Facilities Security Act 2003* – establishes a scheme to safeguard against unlawful interference with maritime transport and establishes security levels.

48. Furthermore, the Law Council considers that arguments that the Monitor's role is complete do not address the original intention for the role to be continuous, as discussed below.

## **Continuing review is an effective, necessary and valuable form of scrutiny**

49. As outlined above, the role of the office of the Monitor was established as an ongoing review mechanism in recognition of the ongoing potential for significant developments to arise in the future which fall within the Monitor's mandate.

50. As noted in the *Counter-Terrorism White Paper (2010)*, threats to national security are persistent yet evolving and it is important to ensure that agencies are able to meet changing threats and developments while upholding fundamental rights and freedoms.<sup>59</sup> The Law Council considers that changing threats or new international conflicts with national security dimensions are likely to result in new assessments about the necessity, proportionality and effectiveness of existing legislation, as well as the possible introduction of significant new legislation.

51. For instance, recent concerns by ASIO relating to Australians participating in the conflict in Syria and returning back with an increased capability to commit terrorist acts<sup>60</sup> have triggered the Monitor to focus in his forthcoming fourth report upon whether Australia's counter-terrorism laws are adequate and proportionate to deal with such a threat.

52. This changing national security landscape underscores the need for a continuing role of the Monitor to ensure that the laws are operating fairly and that they are effective at meeting these emerging challenges. From time to time, this is likely to necessitate the revisiting of earlier conclusions made.

53. The Monitor's responsiveness to such developments also indicates that the role appears to be an efficient and effective way to identify future legislative change and to build an evidence-based case for why any changes may be needed.

54. As noted above, both the Sheller Committee and the PJCIS Committee also recognised the important function of an independent mechanism for the ongoing assessment of anti-terrorism laws. Academics have also acknowledged that changing threat levels necessitate an ongoing review process.<sup>61</sup>

55. Ultimately, the Law Council considers that a mechanism for continuing review should be considered in light of community concerns about Australia's anti-terrorism and national security laws, given their departure from basic criminal justice principles, as well as fears that they may disproportionately impact upon particular Australian communities. Such concerns are exacerbated by the fact that much of the

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<sup>59</sup> Australian Government, *Counter-Terrorism White Paper: Securing Australia, Protecting Our Community*, 2010, pp i-ii, 3.

<sup>60</sup> ASIO Report to Parliament 2012-2013, pp viii, 3 at <http://www.asio.gov.au/img/files/ASIO-Report-to-Parliament-2012-13.pdf>.

<sup>61</sup> See for example Jessie Blackburn and Nicola McGarrity, 'The Independent Security Monitor's unfinished work', *Inside Story*, 3 April 2014.

intelligence material upon which they are based and exercised is classified, and – generally, for good reason - unavailable to the public.

56. The independent role of the Monitor, who has strong information gathering-powers and access to classified material, should not therefore not be underestimated as a means of helping to reassure the broader community where it is appropriate to do so, while nevertheless pointing out where reforms are needed to ensure that laws are necessity and proportionate, and operationally effective.

## **Role of the Monitor provides oversight lacking from other review mechanisms**

57. In his second reading speech for the Bill, the Parliamentary Secretary to the Prime Minister stated that the Bill formed:

*... part of the government's strong commitment to reduce bureaucracy and streamline government. The government is working to remove, as far as possible, duplication of responsibilities across Commonwealth agencies and between different levels of government.*

*The government remains firmly in support of independent oversight of counter-terrorism and national security legislation, however, multiple independent oversight mechanisms already exist which perform this role. These include the Inspector-General of Intelligence and Security, the Australian Commission for Law Enforcement Integrity, the joint parliamentary committees on law enforcement and intelligence and security, and the parliament itself. The executive also has powers to appoint ad hoc reviews.<sup>62</sup>*

58. The Law Council notes that the Commonwealth Ombudsman also has a role which is relevant to existing current national security and counter-terrorism oversight mechanisms.
59. However, as noted by the Sheller Committee and the PJCIS (see discussion above) each of these review mechanisms have a limited mandate and the Monitor's role was established to overcome difficulties with existing oversight mechanisms, including a fragmented and sporadic approach.
60. In this context, it is important to recognise that the calls for establishing an ongoing Monitor position came from some of the parliamentary committees which are now cited as providing adequate ongoing oversight mechanisms, such as the PJCIS, and from executive ad-hoc reviews, such as the Sheller Committee (see above). Since then, the PJCIS has recommended that the Government should expressly seek the views of the Monitor in relation to key legislation.<sup>63</sup> This helps to emphasise the value of the Monitor's role in addition to parliamentary committees such as the PJCIS.
61. The Law Council considers that the Monitor's review functions are much broader than other mechanisms, providing comprehensive and ongoing oversight from a central

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<sup>62</sup> The Hon. Josh Frydenberg MP, *Second Reading Speech: Independent National Security Legislation Monitor Repeal Bill 2014*, House of Representatives, Australian Parliament, Wednesday 19 March 2014

<sup>63</sup> The PJCIS has recommended that the Government should seek the Monitor's views as a 'key agency' when: conducting a review of the *Telecommunications (Interception and Access) Act 1979* (Recommendation 18 of the PJCIS *Report of the Inquiry into Potential Reforms of Australia's National Security Legislation*, May 2013); and considering implementing draft amendments to the *ASIO Act 1979* and the *Intelligence Services Act 2001* (Recommendation 41 of the PJCIS *Report of the Inquiry into Potential Reforms of Australia's National Security Legislation*, May 2013).

vantage point, across the full range of national security and anti-terrorism legislation and across the full range of agencies invested with instructive powers under these laws.

62. For instance:

- (a) Unlike the Inspector-General of Intelligence and Security (the IGIS), the Commonwealth Ombudsman, the PJCIS, the Parliamentary Joint Committee on Law Enforcement (PJCLE) and the Australian Commission for Law Enforcement Integrity (ACLEI), the Monitor may address *both* national security and law enforcement agencies in his or her assessment of the efficacy of Australia's counter-terrorism laws.
  - (i) For example, as previously highlighted, the IGIS reviews the activities of key intelligence agencies, and does not review intelligence or security matters of other Commonwealth agencies such as the Australian Federal Police (AFP) (other than at the Prime Minister's request).<sup>64</sup> It would not, for example, be able to initiate of its own motion a review of an agency's activities where that agency is not defined as being within the ambit of an 'intelligence agency' – for example, by the AFP.
  - (ii) Similarly, the focus of the PJCIS is on intelligence rather than law enforcement agencies.<sup>65</sup>
  - (iii) The PJCLE is responsible for monitoring the AFP and Australian Crime Commission's (ACC) functions. It does not have oversight of intelligence agencies.

63. There are also other key differences between the Monitors' functions and those of other existing review mechanisms:

- (a) For example, the IGIS' role is to ensure that intelligence agencies act legally and with propriety, comply with ministerial guidelines and respect human rights. It is therefore primarily focused on the conduct of those agencies, rather than reviewing the appropriateness of national security and counter-terrorism laws.<sup>66</sup> The Monitor, unlike IGIS, also has the power to conduct a hearing and compel the production of documents and/or information;
- (b) Similarly, the role of the Commonwealth Ombudsman is more focused on investigating the conduct of Commonwealth agencies, including the AFP. It is not, however, more generally focused on reviewing the appropriateness of national security and counter-terrorism laws;
- (c) The PJCIS is precluded from initiating on its own motion a review (other than its prescribed functions, for example, reviewing the administration and expenditure of intelligence agencies). Matters must instead be referred to the PJCIS for review by the responsible Minister or either House of Parliament.<sup>67</sup> Compared with the PJCIS (or PJCLE), the Monitor, being a non-parliamentarian appointed by the Governor General, on the recommendation

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<sup>64</sup> Subsection 9(3), *Inspector-General of Intelligence and Security Act 1986* (Cth).

<sup>65</sup> Section 29, *Intelligence Services Act 2001*(Cth).

<sup>66</sup> The Law Council recognises that the IGIS and the Commonwealth Ombudsman may provide submissions in relation to law reform proposals.

<sup>67</sup> Section 29 of the *Intelligence Services Act 2001* (Cth). The PJCIS may request a responsible Minister to refer a particular matter to it for review.

of the Prime Minister, with the concurrence of the Leader of the Opposition, brings with it the clear perception of independence from the political process.

- (d) The PJCLE's functions do not include a number of activities including reviewing sensitive operational information or methods open to the AFP, particular operations or investigations undertaken by the AFP, or conducting inquiries into individual complaints about the activities of the AFP.<sup>68</sup> Beyond its general review functions, it is also reliant on either House of Parliament to refer it to inquire into any question in connection with its functions.<sup>69</sup> In addition, the Commissioner of the AFP is not required to comply with a PJCLE request for information if satisfied that the information is sensitive and that public interest in its disclosure would be outweighed by the prejudicial consequences.<sup>70</sup>
- (e) ACLEI is responsible for preventing, detecting and investigating serious and systemic corruption issues, including in the AFP. Accordingly, its role is very different to the Monitor.

64. The Bar Association of Queensland (QLD Bar) has also noted that given their broad remit, these other oversight bodies are not sufficiently focused (or resourced) to extend the same scrutiny which has been delivered by the Monitor. For instance, the IGIS's remit already covers the activities of six separate intelligence agencies. ACLEI is already responsible for preventing, detecting and investigating serious and systemic corruption issues in the ACC, the Australian Customs and Border Protection Service and the AFP. Given these existing areas of responsibility, the QLD Bar considers that it is unrealistic to expect the IGIS or ACLEI will be able to provide an appropriate level of oversight of Australia's counter-terrorism and national security laws.

65. In relation to Executive-appointed ad-hoc reviews of anti-terrorism laws (such as the Sheller and Council of Australian Governments (COAG) Reviews), the Law Council does not wish to underestimate the valuable role that these reviews have played in the past. However, it does make the following comments about the Monitor's role vis-à-vis such reviews:

- (a) In contrast to the Monitor's broad legislative mandate, ad-hoc reviews may be more limited, according to the particular terms of reference which are determined by the Executive. This undermines the overall coherence and consistency of such reviews.
- (b) Executive-appointed ad-hoc reviews may not permit access to classified material, or may not appoint reviewers with the security clearance to enable such access. In contrast, the Monitor's access to classified information allows him or her to have an in-depth understanding of the threat, potential operational difficulties and the appropriateness of the legislative response; this also ensures that the Monitor's recommendations carry sufficient weight.
  - (i) In this light, the Law Council notes commentary which has contrasted the access to information of the Monitor in the production of his second

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<sup>68</sup> Subsection 7(2), *Parliamentary Joint Committee on Law Enforcement Act 2010* (Cth).

<sup>69</sup> *Ibid*, paragraph 7(1)(h).

<sup>70</sup> *Ibid*, subsection 9(2).

annual report released in May 2013, compared to the COAG Committee<sup>71</sup> report which was released in the same month.<sup>72</sup>

- (c) In addition, Executive-appointed ad hoc reviews may be hampered by their lack of information-gathering powers. This was a real issue raised in the Clarke report, as discussed above. In contrast, the Monitor's legislated role provides him or her with significant powers, including summoning a person to give evidence or produce documents. It is also an offence to fail to comply with the Monitor's directions.
- (i) In this light, a member of the Law Council's Military Justice System Working Group has commented that from 1977 to 2001, there was a general expectation that a Royal Commission (which does hold coercive information gathering powers) would be periodically conducted into the intelligence community, and that this was thought to be an important oversight function given that intelligence functions are necessarily performed in secret.<sup>73</sup> However, this expectation appears to have fallen away since the events of 2001, which reinforces the importance of the Monitor's ongoing role.
- (d) An ongoing Monitor role helps to ensure that the spotlight remains appropriately on important outstanding recommendations to which the Government has yet to respond. Ad-hoc inquiries do not allow for this ongoing focus.

66. It is also worth noting when contrasting the Monitor's role with Parliament or the Executive as oversight mechanisms, the Monitor is independent: he or she is appointed by the Governor-General on the recommendation of the Prime Minister, in consultation with the Leader of the Opposition of the House of Representatives.<sup>74</sup> Accordingly, the ongoing independent role of the Monitor better allows Australia's national security legislation framework to be examined from a perspective that is separate from the strong political mandates members of Parliamentary Committees may legitimately hold in respect of matters relevant to national security. In addition, the Monitor has access to a comprehensive range of classified and internal information, unlike ordinary Members of Parliament.

67. The QLD Bar has also noted that the parliament-based oversight bodies are not equipped to offer the levels of independence and expertise that are so clearly required when reviewing Australia's counter-terrorism and national security laws.

68. For the reasons set out above, the Law Council considers that no other independent oversight mechanisms exist to perform such a role. As such, the removal of the Monitor's role is likely to leave a gap in the existing mechanisms to review and report

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<sup>71</sup> The COAG Review of Counter-Terrorism was conducted by a committee chaired by The Hon. Anthony Whealy QC, and reported in May 2013.

<sup>72</sup> Monica Biddington, *Counter-Terrorism Laws: Review and Reform*, Australian Parliament Law and Bills Digest, available at: <http://www.coagctreview.gov.au/committee/Pages/default.aspx>[http://www.aph.gov.au/About\\_Parliament/Parliamentary\\_Departments/Parliamentary\\_Library/pubs/BriefingBook44p/CounterTerrorism](http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/BriefingBook44p/CounterTerrorism).

<sup>73</sup> For example, the Royal Commission into Intelligence and Security (final report October 1977, conducted by the Hon. Mr Justice Robert Hope); the Royal Commission on Australia's security and intelligence agencies (final report May 1985, conducted by the Hon. Mr Justice Robert Hope); Commission of Inquiry into the Australian Secret Intelligence Service (final report May 1995, conducted by Justice Gordon Samuels and Mike Codd).

<sup>74</sup> Subsections 11(1) and 11(2) of the *Independent National Security Legislation Act 2010* (Cth).



on the operation, effectiveness and implications of Australia's counter terrorism and national security legislation.

69. The Law Council notes that the comprehensive, thorough and valuable work provided by the Monitor has returned extraordinary value to the Australian community in return for a very modest level of expenditure. In this context, it notes that the Monitor is a part-time position, supported by a part-time policy adviser.
70. If the Monitor's position is abolished, the Law Council submits that the Committee and Government should consider the effect that removal may have on weakening public confidence in Australia's national security measures. It further submits that the Committee and the Government would need to consider what alternative scrutiny mechanisms it would need to employ (for instance a public interest monitor with a role in monitoring the issue of control orders and preventative detention orders)<sup>75</sup> in order to achieve effective review and comprehensive independent oversight of counter-terrorism and national security legislation.

### **Role of the Monitor is valuable at both the domestic and international levels**

71. The Law Council does not intend in this submission to respond in detail to individual recommendations made by the first Monitor. It considers that such a policy discussion would be more appropriate as part of a public consultation regarding the Government's proposed response to these recommendations.
72. Nevertheless, the Law Council wishes to emphasise that the first Monitor has provided an important and significant contribution to the national debate about these laws. His recommendations have been balanced, focusing on increasing their operational effectiveness, as well as their necessity and proportionality.
73. For example, the Monitor has recommended that special questioning powers held by ASIO should remain, but that ASIO's powers to detain people for questioning should be reconsidered, and appropriate powers which are narrower in scope should be instead be made available to law enforcement agencies to question and detain suspects. The Monitor has explained that this recognises the legitimate need of ASIO to ensure the attendance of a person for questioning, while balancing the rights of individuals not to be unnecessarily detained on a pre-emptive basis.<sup>76</sup>
74. The Monitor's recommendations which have been particularly intended to enhance the effectiveness of counter-terrorism laws include those to:
- (a) authorise control orders against persons convicted of terrorism, after their release from imprisonment to which they have been sentenced, if they are

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<sup>75</sup> Under the control order regime in Division 104 of the Criminal Code there is a limited role of the Queensland Public Interest Monitor, if the person subject to the control order is from Queensland. For example, the Queensland Public Interest Monitor is entitled to receive a copy of the interim control order and a notification if the control order is confirmed, see ss104.12(5), 104.14(4)(b), 104.18(3)(b), 104.31 of the Criminal Code. No such role is provided in respect of preventative detention orders made under Division 105, however, s105.49 provides the Division 105 does 'not affect a function or power that the Queensland public interest monitor, or a Queensland deputy public interest monitor, has under a law of Queensland'.

<sup>76</sup> Recommendations V/1 and V/2, See B. Walker SC, Independent National Security Legislation Monitor, *Annual Report*, 20 December 2012, at <http://www.dpmc.gov.au/publications/INSLM/index.cfm>.



shown to be unsatisfactory with respect to their rehabilitation and continued dangerousness;<sup>77</sup>

- (b) lower the requirement for the issue of ASIO questioning warrants, so as to eliminate the last resort test and replace it with the satisfaction of the Attorney-General and the issuing authority that the issue was reasonable in all the circumstances;<sup>78</sup> and
- (c) exclude from the definition of “terrorist act” of conduct which would ensure the plain impossibility of terrorism being alleged against soldiers.<sup>79</sup>

75. In performing this work the Monitor has helped to reassure Australians that our national security and counter-terrorism legislative framework is subject to appropriate scrutiny.

76. While the Law Council may not always agree with every recommendation made by the Monitor, it considers that this reinforces the independent nature of the Monitor’s role. Regardless of the Law Council’s views on particular recommendations, the Law Council considers the degree of insight that the Monitor brings to discussion of Australian anti-terrorism laws invaluable, given his powers, access to classified information, and comprehensive understanding of the full range of these laws.

77. Further, it is important to recognise that the considered and perceptive conclusions of the Monitor inform not only the domestic but international debate on the globally important issues of security and terrorism.

78. For example, the UK Independent Reviewer of Terrorism Legislation, Mr David Anderson QC, has referred to the Act in his evidence to a UK parliamentary committee, as a model for the establishment of independent review.<sup>80</sup> The Law Council has also received feedback from the UK Independent Reviewer that the Australian Monitor role has also garnered respect as a model of independent review with officials, non-government organisations and others in Denmark, the Netherlands, Israel, Canada and the United States.

## **Government’s consideration of Monitor’s recommendations does not preclude the need for future scrutiny**

79. The Australian Government has stated that the role of the Monitor is being abolished because ‘the former government ignored all the Monitor’s recommendations’ and ‘the best way forward is to work though the large number of recommendations with the extensive range of existing oversight bodies’.

80. The Law Council recognises that to date there has been no Government response to any of the Monitor’s detailed, well-considered and balanced recommendations. It supports and welcomes the current Government’s intention to respond to the Monitor’s outstanding recommendations. However, it considers that the need for consideration by Government of the existing recommendations is not a legitimate reason for repeal; it does not preclude the need for future ongoing comprehensive

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<sup>77</sup> Ibid, Recommendation II/4.

<sup>78</sup> Ibid, Recommendation IV/1.

<sup>79</sup> Ibid, Recommendation VI/3.

<sup>80</sup> UK Independent Reviewer of Terrorism Legislation, Mr David Anderson QC, Evidence to Parliamentary Joint Committee on the Draft Modern Slavery Bill, 6 March 2014 at <https://terrorismlegislationreviewer.independent.gov.uk/joint-committee-on-draft-modern-slavery-bill-2014/>.

oversight of Australia's national security and counter terrorism legislation which – as noted above – the role of the Monitor effectively provides.

81. Nonetheless, the Law Council submits that the lack of Government response to date highlights a need for the Act to be strengthened by requiring the Government of the day to provide a prompt public response to the Monitor's recommendations – for example, within six months. It therefore recommends that the Act should be amended in this regard.

## Conclusion

82. The Law Council is concerned by the Bill's proposed abolition of the position of the Monitor. The Monitor is tasked with reviewing Australia's counter-terrorism and national security laws to consider whether these laws contain appropriate safeguards for protecting the rights and freedoms of individuals, remains proportionate to any threat of terrorism or threat to national security and remain necessary. The oversight function and powers of the Monitor are unparalleled in the Australian national security legislation scrutiny framework. This type of review is critical to ensuring that Australian laws are working well to protect the community from the threat of terrorism, but also to striking a balance between this important goal and that of limiting people's freedoms only when absolutely necessary.

## **Attachment A: Profile of the Law Council of Australia**

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The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Large Law Firm Group, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- The Large Law Firm Group (LLFG)
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of approximately 60,000 lawyers across Australia.

The Law Council is governed by a board of 17 Directors – one from each of the Constituent Bodies and six elected Executives. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive, led by the President who serves a 12-month term. The Council's six Executive are nominated and elected by the board of Directors. Members of the 2013 Executive are:

- Mr Michael Colbran QC, President
- Mr Duncan McConnel President-Elect
- Ms Leanne Topfer, Treasurer
- Ms Fiona McLeod SC, Executive Member
- Mr Justin Dowd, Executive Member
- Dr Christopher Kendall, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.