



THE UNIVERSITY OF
NEW SOUTH WALES



FACULTY OF LAW

GILBERT + TOBIN CENTRE
OF PUBLIC LAW

28 January 2015

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

The *Independent National Security Legislation Monitor Repeal Bill 2014* ('the bill') contains amendments to the *Independent National Security Legislation Monitor Act 2010* (Cth) ('the INSLM') and the *Australian Human Rights Commission Act 1986* (Cth).

Thank you for the opportunity to make a submission to this inquiry on the bill. We make this submission in our respective capacities as a member and affiliate 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.

We respond to the bill's contents as follows:

1 Amending the INSLM to ensure the Monitor can review proposed as well as existing national security legislation

Section 6 of the INSLM makes it clear that the Monitor's original and current function is one of review of existing laws. This is a direct reflection of the Monitor's office being based upon the United Kingdom's Office of the Independent Reviewer of Terrorism Laws, which is also designed as a mechanism of post-enactment, operational scrutiny. Support for establishing the Monitor to perform in this way was found in the final reports of the Security Legislation

SYDNEY 2052 AUSTRALIA
Telephone: +61 (2) 9385 9654
Facsimile: +61 (2) 9385 1175
www.gtcentre.unsw.edu.au

Review Committee ('SLRC'),¹ the Parliamentary Joint Committee on Intelligence and Security ('PJCIS'),² and the report of retired judge the Hon John Clarke QC into the 2007 investigation and charging of Dr Mohamed Haneef with terrorism offences.³ Enlargement of the Monitor's role so as to provide pre-enactment scrutiny of proposed counter-terrorism and national security legislation would add a function to the office that is neither possessed by its United Kingdom antecedent nor was envisaged by any of the major reviews which recommended its creation in Australia.

Empowering the Monitor to assess anti-terrorism bills would risk distorting the political debate and parliamentary scrutiny of such measures. In this context the Monitor's views would necessarily be of a more speculative (albeit, still highly-informed) nature than his existing reporting function which is based on observation, including access to highly classified material and discussion with police and intelligence services staff, of the law's operation. Yet inevitably the Monitor's views on any draft legislation would occupy a privileged place in debate about the proposed measures despite the fact that the challenge of safeguarding the Australian community and preserving essential freedoms is a fine balance and often turns on questions of degree and differing perspectives.

Australia's inaugural Monitor, Mr Bret Walker SC, indicated that he appreciated the difficulties of investing too much store in the opinions of a lone reviewer. Walker's response to this was to emphasise the extent and depth of his consultations:

...the questions that the INSLM is required to address about the CT Laws involve value judgements. ... considering the effectiveness and appropriateness of the CT Laws is not best carried out by a solitary person. As I have recorded previously, and again in this Report, officers of the Commonwealth and many scholars and other commentators, as well as my professional colleagues, are essential sources of experience, opinion and testing, in carrying out the INSLM's statutory functions.⁴

It is not clear how the Monitor would be able to pursue a similar method when reporting on proposed laws rather than reviewing those which, having been enacted, have been the subject of consideration and use by authorities as well as observation by others.

There is no doubt that reports of the Monitor as to the operation, effectiveness and implications of existing law provide an extremely valuable resource in examining and debating the necessity and design of new anti-terrorism laws. This is clearly demonstrated by paras 29-30 of the bill's Explanatory Memorandum. But ultimately, the questions are ones for the elected representatives of Parliament, informed by the submissions of relevant agencies of the executive, civil society NGOs and members of the Australian community. Formalising the Monitor's input at this stage would significantly alter the dynamic of parliamentary deliberation.

¹ Security Legislation Review Committee, *Report of the Security Legislation Review Committee* (2006), 203.

² Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Review of Security and Counter Terrorism Legislation* (2006), 16-20 [2.42]-[2.55].

³ John Clarke QC, *Report of the Clarke Inquiry into the Case of Dr Mohamed Haneef – Vol I* (2008), 255-56.

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

The United Kingdom experience shows that allowing contributions to pre-enactment debate on proposed anti-terrorism laws would have the unfortunate effect of the Monitor being drawn into the political fray and thus endangering the perception of his or her independence which is so essential to the review functions of the office. This problem was demonstrated during the House of Lords debate on a 2008 bill which sought to increase the period that police could detain terrorist suspects prior to charge to 42 days. Lord Carlile QC, the United Kingdom's first Independent Reviewer, sought to 'assist' any of their Lordships who 'may possibly still be open-minded about this issue'.⁵ In doing so, he reminded the Lords that his opinion was 'one that is briefed and refreshed, if necessary, on a daily basis, and which I try to keep up to date'.⁶ In effect, Lord Carlile sought to use information to which he alone had access as Independent Reviewer in order to influence parliament's decision on counter-terrorism legislation.⁷ Lord Carlile's strong support for the bill led to one commentator to remark:

Far from being an independent reviewer who should be looking to protect the interests of the public from ever-encroaching legislation, it appears that Carlile sees himself instead as an enthusiastic advocate for the government.⁸

The current Independent Reviewer, David Anderson QC, has adopted a different approach. Whilst he regularly gives evidence before the UK's parliamentary committees, he does not comment on aspects of the proposed legislation that might fall within his remit of post-enactment scrutiny. In evidence to the Joint Committee on Human Rights on the Counter-Terrorism and Security Bill, Anderson highlighted that because of the nature of his position, 'it would have been wrong for me to have been involved in the formulation of these policies. My job is to come in after the event and say whether they are being properly operated.'⁹ He also refused to comment on whether he thought the new measures were lawful, on the grounds that 'I don't think it would be a very good start if I announced right at the beginning that they were obviously lawful or unlawful.'¹⁰ Participating in pre-legislative scrutiny of proposed bills, might not only jeopardise the Monitor's independence, but might also risk prejudicing future post-enactment scrutiny.

We do not support enlargement of the Monitor's role so as to provide pre-enactment scrutiny of proposed counter-terrorism and national security legislation.

2 Amending the INSLM to make it clear in the objects clause that the Monitor is required to consider whether Australia's national security legislation is a proportionate response to the national security threat faced

Section 6(1)(b)(ii) of the INSLM expressly includes in the Monitor's functions consideration of whether any legislation 'remains proportionate to any threat of terrorism or threat to

⁵ House of Lords (UK), *Parliamentary Debates* Vol 704, 13 October 2008 col 503.

⁶ House of Lords (UK), *Parliamentary Debates* Vol 704, 13 October 2008 col 503.

⁷ See also: Jessie Blackburn, 'Independent reviewers as alternative: an empirical study from Australia and the United Kingdom', in Fergal F. Davis and Fiona de Londras (eds.) *Critical Debates on Counter-Terrorism Judicial Review* (Cambridge University Press, 2014), 174-176.

⁸ Inayat Bunglawala, 'Carlile's curious reasoning', *The Guardian*, 18 December 2007.

⁹ Joint Committee on Human Rights (UK), *Uncorrected Transcript of Oral Evidence* (2012), 4 [Q6].

¹⁰ Joint Committee on Human Rights (UK), *Uncorrected Transcript of Oral Evidence* (2012), 11 [Q15].

national security, or both'. This aspect of the Monitor's functions is not, unlike the others found in section 6, reflected in the objects clause in section 3.

We support the amendment of s 3 as proposed by Sch 1 item 3 of the bill, but in accordance with our stance in the preceding section, would delete 'or would be' from the proposed s 3(ba).

3 *Amending the INSLM to enable the Senate Committees on Legal and Constitutional Affairs to refer matters to the Monitor for inquiry*

It is clear from the Explanatory Memorandum (paras 85-87) that the bill's amendment of the INSLM to enable the Senate Committees on Legal and Constitutional Affairs to refer matters to the Monitor for inquiry goes hand in hand with the bill's central purpose of expanding the Monitor functions to the pre-enactment stage. It is not difficult to envisage the likely impact upon the Committee's work of involving the Monitor in an assessment of any particular anti-terrorism bill which is before it. For the reasons given in section 1 of this submission, we do not support amendments which would empower the Committees in this way.

For the sake of clarity, we wish to point out that there is no inconsistency in voicing opposition to this proposal while the Monitor may be referred matters under existing provisions of the INSLM by the PJCIS. The latter has a distinct responsibility for national security matters and exists to fulfil post-enactment review functions which occasionally may complement those of the Monitor. Importantly, the PJCIS does not engage in pre-enactment legislative scrutiny. While the Senate's References Committee on Legal and Constitutional Affairs also does not carry out scrutiny of bills it is not clear that it is necessary for it to refer matters to the Monitor for reporting in order to assist it with relevant inquiries in the national security context.

We do not support empowering the Senate Committees on Legal and Constitutional Affairs to refer matters to the Monitor for inquiry.

4 *Amendments enabling the Australian Human Rights Commission to refer matters to the Monitor for inquiry*

The proposal to enable the Australian Human Rights Commission ('the AHRC') to refer matters to the Monitor for inquiry does not raise issues with respect to the involvement of the latter in pre-enactment legislative scrutiny.

The case made in the Explanatory Memorandum (para 74) to the bill is that this amendment would 'facilitate an efficient and effective dialogue between Australia's independent expert authority on human rights, the Australian Human Rights Commission, and the person appointed to review Australia's counter-terrorism and national security laws for, among other things, compliance with Australia's international human rights obligations.'

But while this initially has an appealing logic, the necessity of a formal referral power from the AHRC is not apparent. Given that the AHRC is 'uniquely placed to identify whether and to what extent these laws are engaging with or infringing upon human rights' (para 76), it is not clear what that organisation would gain by referring such questions to the Monitor.

Enabling the AHRC to refer matters to the Monitor might have the unintended effect of concentrating scrutiny of national security laws in the office of the Monitor and limiting public debate on human rights. If anything, there would seem more value in the Monitor seeking information (such as in that described in the example at para 77) from the AHRC as a critical aspect of fulfilling his or her own review of the law's operation.

There is nothing in the INSLM which prevents the Monitor from seeking information from, or even the views of the AHRC commissioners, on complaints and concerns in the community about the human rights implications of anti-terrorism law (see section 6(3)). Of course, published reports or submissions by the AHRC on this topic are resources which the Monitor may have recourse to in support of his or her own findings.

While it might be anticipated that the AHRC would use a power to refer matters to the Monitor sparingly, there are workload issues to consider in keeping the references limited to those of the Prime Minister and the PJCIS. The office of Monitor was not primarily intended to be a tool available to an array of different actors in the national security space. As the INSLM makes clear, the office is first and foremost *independent* and the Monitor exercises its functions 'on his or her own initiative' (section 6(1)(a) and (b)).

We do not support enabling the Australian Human Rights Commission to refer matters to the Monitor for inquiry.

5 *Amendments to ensure that the position of Monitor is a full time position, cannot be left vacant and is supported by appropriate staff*

Section 11(1) of the INSLM provides that the Monitor is to be appointed on a part-time basis. In debates about the creation of the office, it was accepted that this constituted a guarantee of its independence. The Monitor is not reliant on the position for income and is thus not beholden to the government. This reflected views on the strengths of the United Kingdom's office of Independent Reviewer, which is similarly a part-time position.¹¹

The Explanatory Memorandum cites an increased work-load as the justification for making appointment to the office on a full-time basis. In the main, our response to this is the earlier rejection in this submission of expanding the Monitor's functions to include pre-legislative scrutiny and to respond to references from the Senate Committees on Legal and Constitutional Affairs and the Australian Human Rights Commission. But if workload remains a concern, then rather than appointing one full-time Monitor, we would advocate revisiting the idea of a panel of three part-time Monitors. The merits of this model for managing the workload were seen by the United Kingdom Parliament's Joint Committee on Human Rights in 2008.¹² In Australia, the SLRC recommended in 2006 that a committee of persons, not dissimilar to itself, should be appointed to provide further review of the operation of anti-terrorism legislation.¹³ In 2008, while acknowledging that a single

¹¹ David Anderson has repeatedly highlighted that his independence as Independent Reviewer is derived from the part time nature of the position. See: David Anderson QC, 'The Independent Review of Terrorism Laws' (2014) *Public Law*, 403-420, 420.

¹² United Kingdom Parliament, Joint Committee on Human Rights, *Twenty-Fourth Report: Counter-Terrorism Policy and Human Rights Government Responses to the Committee's Twentieth and Twenty-First Reports and other Correspondence* (2008), 20.

¹³ SLRC, above n 1, 201.

appointment ‘offers administrative simplicity and possibly financial advantages’, the Senate Standing Committee on Legal and Constitutional Affairs ultimately recommended a panel of part-time reviewers be appointed. In doing so it cited not just the issue of workload, but also ‘the opportunity to stagger new appointments, therefore promoting continuity over time’ and reducing ‘the risk of perceived lack of independence’ that might come with a lone reviewer.¹⁴

We do not support appointment of the Monitor on a full-time basis.

The long silence as to the successor to Mr Bret Walker SC as Monitor after his term concluded on 20 April 2014 was deeply unsatisfactory, especially after the government’s decision earlier in the year to abolish the office altogether (which it subsequently abandoned) and the later prominence of terrorism and national security issues, including fresh legislative responses, in the national spotlight by September.

We support Sch 1, item 15 of the bill and the insertion of a new section 11(2A) into the INSLM

The first rationale given by the Explanatory Memorandum (para 111) for the proposed Division 3 to Part 2 is ‘to support the expanded and full time role of the Monitor, and in recognition of changes to the Monitor’s functions’. We have rejected expanding the Monitor’s functions to include pre-legislative scrutiny and to respond to references from the Senate Committees on Legal and Constitutional Affairs and the Australian Human Rights Commission. In turn, this led us to reject appointing the Monitor on a full-time basis. For these reasons, we feel it would be inconsistent to support Sch 1, item 17 of the bill.

But additionally, we are not persuaded of the second rationale given by the Explanatory Memorandum in support of the proposed Division: the desirability of enabling the Monitor to ‘appoint an expert to assist with a particular inquiry’. Even noting the presence of a similar power held by the Inspector-General of Intelligence and Security, this seems to run counter to the purposes of the Monitor as an independent watchdog of the anti-terrorism laws, their operation, effectiveness and impact. Those functions seem ones which should be able to be fulfilled by an appropriate appointee without the need for supplementation.

We do not support alterations to the staffing arrangements proposed by Sch 1, item 17 of the bill.

6 *Amending INSLM to ensure that all reports of the Monitor are tabled in Parliament and that the Government is required to respond to the recommendations of the Monitor within six months of tabling.*

In his third annual report, Bret Walker SC outlined some of the main recommendations he had made in his report of the preceding year. In particular, he noted those which if implemented would ‘enhance the CT [counter-terrorism] Laws with respect to their effectiveness in countering terrorism’ before reporting that, with respect to these recommendations, ‘the INSLM [Independent National Security Legislation Monitor] has heard nothing about a governmental or official response’.¹⁵ Walker concluded:

¹⁴ Parliament of Australia, Senate Standing Committee on Legal and Constitutional Affairs, *Inquiry into the Independent Reviewer of Terrorism Laws Bill 2008 [No. 2]* (October 2008), 20.
¹⁵ Bret Walker, *Independent National Security Legislation Monitor Annual Report* (2013), 5.

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.¹⁶

In his final report, Walker said the 'official silence' that met the recommendations in his third annual report prompted repetition of this same comment.¹⁷ Perhaps because of this, the Attorney-General's Department recently published its response to a number of the Monitor's recommendations.¹⁸ However, it did so only in respect of those recommendations which it either had implemented, or planned to implement, in last year's counter-terrorism laws. It still has not provided a response to the vast majority of the recommendations made by the Monitor.

The bill's amendments designed to elicit a more constructive engagement by the executive with the Monitor's reports are welcome in redressing the problem encountered by the first incumbent of the office. The requirement of a government response will enhance the Monitor's utility as an ongoing mechanism to ensure Australia has the anti-terrorism laws that it needs and which are both working effectively and with the least possible interference with fundamental freedoms.

That said, we make a cautionary point in closing. The type of response provided by the government should ideally be one which respects the purpose and function of independent scrutiny. It must not become an easy box-ticking exercise which the government can fulfil simply by publishing vague assertions about 'supporting' the Monitor's recommendations in principle or keeping the Monitor's recommendations 'under review'.¹⁹ At the present time, the absence of any meaningful response to the vast majority of the Monitor's recommendations has been lamented. . But it would be little, in fact no, improvement if the government published merely token responses to the Monitor's recommendations. For the Monitor's office to fulfil the purposes for which it was created by the Parliament, the government of the day must actually engage with the reports it receives. That does not, to be clear, mean it must simply accept recommendations of the Monitor but it should explain what its response is to each and why.

¹⁶ Ibid, 6.

¹⁷ Bret Walker, *Independent National Security Legislation Monitor Annual Report* (2014), 2.

¹⁸ Attorney-General's Department, 'Submission to the Parliamentary Joint Committee on Intelligence and Security Inquiry into the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (2014)', Attachment B, 1-16.

¹⁹ The government's response to anti-terrorism reviews conducted by the Security Legislation Review Committee, the Australian Law Reform Commission and the Haneef Inquiry were broadly positive, accepting many of the recommendations proposed. However, little attempt was made to implement the relevant reforms. See: Andrew Lynch, 'The Impact of Post-Enactment Review on Anti-Terrorism Laws: Four Jurisdictions Compared' (2012) *Journal of Legislative Studies*, 63-81, 65-66. In the United Kingdom, the government regularly publishes its response to the Independent Reviewer's reports; however, these are often superficial. See for example: HM Government, *The Government Response to the Report by David Anderson Q.C. on Terrorism Prevention and Investigation Measures in 2012* (2013).

We support the amendment to sections 29 and 30 of the INSLM to require the Prime Minister to respond to the Monitor's report within six months of tabling to the Parliament.

Yours sincerely,

Professor Andrew Lynch and Dr Jessie Blackburn