

Inquiry into the *Independent National Security Legislation Monitor (Improved Oversight and Resourcing) Bill 2014* –
Submission, Teneille Elliott

Committee Secretary
Senate Standing Committee on Legal and Constitutional Affairs
PO Box 6100
Parliament House Canberra ACT 2600
AUSTRALIA

12th March 2015

Dear Committee Secretary

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

1. Thank you for the opportunity to make a submission to the inquiry into the *Independent National Security Legislation Monitor (Improved Oversight and Resourcing) Bill 2014* (the Bill). I make this submission in my capacity as a doctoral candidate at the National Security College, The Australian National University. I note that I was also the Adviser to the former Independent National Security Legislation Monitor (INSLM), Mr Bret Walker SC, from 2011 to 2014. The content in this submission, and all views expressed herein, are my own.
2. Paragraph 5 of the Explanatory Memorandum to the Bill states that:

By preserving and enhancing the role of the Monitor, the Bill aims to give the Australian community confidence that Australia's counter-terrorism and national security laws are operating effectively and accountably, and in a manner consistent with Australia's international obligations, including human rights obligations.
3. I am strongly supportive of improving the oversight functions and resourcing of the office of the INSLM. However, in my opinion, the Bill as currently drafted:
 - contains a number of provisions that would benefit from amendment in order to better achieve their respective policy intentions;
 - contains provisions that will not necessarily result in the improvements sought and/or may have unintended negative consequences; and
 - omits matters that if included could further improve the functioning and resourcing of the office of the INSLM, being the overall objective of the Bill.

I offer the following comments to assist the Committee with its inquiry into the Bill.

Importance of the Office of the INSLM and the Current Legislative and Security Environment

Recent Legislative Reform

4. The INSLM serves an important role in reviewing the operation, effectiveness and implications of Australia's counter-terrorism and national security laws. With the recent reforms to the national security legislative framework and use of never before used counter-terrorism powers, the role of the INSLM is arguably more important than ever before. The 2014 legislative reforms to the counter-terrorism and national security legislation represent the most extensive reforms in this policy area in over a decade. Further reforms are proposed to the counter-terrorism and national security legislation, with the *Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014* currently before the Parliament.

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5. The reforms in 2014 included extending the sunset dates for provisions of the laws that the former INSLM described as “not effective, not appropriate and not necessary”¹ and recommended the repeal of. The 2014 reforms have increased the need for the INSLM to assess Australia’s counter-terrorism and national security laws for consistency with international obligations and impact on individual rights. The increased powers given to agencies through these reforms has also increased the need for the INSLM to perform the important watchdog task of investigating whether the provisions have been used for matters unrelated to terrorism or national security.

Current Security Environment

6. The current security environment highlights the importance of the role of the INSLM in ensuring Australia’s counter-terrorism and national security legislation is appropriate for the security threat environment and is operationally effective. The INSLM conducts reviews in an increasingly complex security threat environment. In September 2014 on the advice of its agencies the Government raised the National Terrorist Threat level to high, meaning a terrorist attack is likely.
7. The opening paragraph of the Explanatory Memorandum to the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014* highlighted that: “Australia faces a serious and ongoing terrorist threat. The escalating terrorist situation in Iraq and Syria poses an increasing threat to the security of all Australians both here and overseas.”
8. In the National Security Statement on 23rd February 2015, the Prime Minister noted that: “the number of serious [counter-terrorism] investigations continues to increase” and “ASIO currently has over 400 high-priority counter-terrorism investigations.” In regards to police counter-terrorism operations, the Prime Minister stated: “one third of all terrorism-related arrests since 2001 [have taken place] within the space of just six months.” The Prime Minister also stated: “at least 110 Australians have travelled overseas to join [Daesh] in Iraq and Syria. At least 20 of them, so far, are dead.”
9. The United Nations Security Council (UNSC) has recognised the threat of foreign fighters as constituting a threat to international peace and security. In September 2014, the UNSC unanimously adopted Resolution 2178, condemning violent extremism and underscoring the need to prevent travel by foreign fighters. The UNSC called on States to cooperate urgently on preventing the international flow of terrorist fighters to and from conflict zones. In Resolution 2178, the UNSC exercised its Chapter VII powers to impose new international obligations on Australia to take action to counter the threat of foreign fighters.
10. 2014 saw individuals inspired by the rhetoric of foreign terrorist groups such as Daesh committing horrendous crimes around the world. Domestically, the Martin Place Siege in December 2014 was the first terrorist attack on Australian soil since 1978.
11. It is against this background that the INSLM carries out her or his work. As the former INSLM stated in his final report: “[t]he INSLM is not aware of any other officer, agency or “level” of government doing what Parliament required to be done by the INSLM Act enacted in 2010.”²

¹ *Independent National Security Legislation Monitor Declassified Annual Report* (20th December 2012), p 4

² *Independent National Security Legislation Monitor Annual Report* (28th March 2014), p 3

Comments on Schedules 1 and 2 of the Bill

Government Response to INSLM Reports

12. I strongly support amending the *Independent National Security Legislation Monitor Act 2010* (Cth) (INSLM Act) to ensure the timely response by the Government to the INSLM's recommendations. However, six months after a report is presented to a House of the Parliament is in my opinion too long, especially given the length of time that will already have elapsed from when the INSLM provides the Prime Minister with the report and the (up to) 15 sitting days after the report is presented before the tabling of that report.
13. This can be an extensive time period. For example, the former INSLM presented his second annual report to the Prime Minister on 20th December 2012 and the report was not tabled in the Parliament until 14th May 2013 (being the 15th sitting day after the report was presented to the Prime Minister). In this instance, if a Government response was required six months after the tabling date this would mean almost a one year wait between the INSLM presenting the report to the Prime Minister and the Government's response.
14. Further, the Government response being limited to a "statement to the Parliament setting out the action that the Government proposes to take in relation to the report" is in my opinion, too narrow a requirement and would not ensure a meaningful Government response. As currently drafted, the proposed amendments would only require the Government to respond to those recommendations that it proposes to take action in response to, meaning that the recommendations with which the Government does not agree will be immune from the requirement for a Government response. The effect of the current drafting seems wholly at odds with the intention of the Bill as it would not require a timely, considered and comprehensive Government response to each of the INSLM's recommendations.
15. I suggest instead the following alternative approach: that the requirement for Government responses to INSLM reports be modelled on the existing guidelines for responding to parliamentary committee reports. The *Guidelines for the Presentation of Documents to the Parliament*³ (Guidelines), issued by the Department of the Prime Minister and Cabinet, set out clear requirements for Government responses to parliamentary committee reports. Departmental officers are familiar with the requirements of the Guidelines and are required to regularly apply them.
16. The Guidelines set out the best practice requirements for Government responses to parliamentary committee reports. These best practice requirements are equally applicable to, and would represent best practice for, Government responses to INSLM reports. In particular, the requirements for a timely response, for consultation on the proposed Government response, and for all recommendations to be addressed with reasons for non-acceptance of specific recommendations given. The following extracts from the Guidelines provide a useful reference for a best practice approach to Government responses to INSLM reports:

5.1 Past practice has been for the Government to respond to parliamentary committee reports within three months of their presentation to Parliament. Exceptions to the requirement for a Government response are set out in paragraphs 5.23 – 5.25. This three-month deadline is

³ Available at:

http://www.dpmc.gov.au/sites/default/files/publications/Guidelines_for_the_Presentation_of_Documents_to_the_Parliament.pdf

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also embodied in a Senate resolution of continuing effect (see Appendix K). Preparation of Government responses

5.2 Following the tabling of a report by a parliamentary committee, the PM&C Tabling Officer notifies the department having main carriage of the subject matter of the report (the relevant department) of the expectation of a Government response and seeking a departmental contact on the matter. Departments must make their own arrangements to obtain copies of parliamentary committee reports directly from the relevant committee or from the committee's website.

5.3 The relevant department should prepare its response as soon as practicable. This includes, where appropriate, coordinating input from other departments with an interest in the report. Input from other departments must be approved by their Minister.

5.4 Responses to parliamentary committee reports may be an in-principle statement of the Government's intentions but must address all the recommendations and, if applicable, indicate reasons for not accepting any specific recommendation. Minority or dissenting reports and recommendations should also be dealt with in the same manner (see paragraph 3 of the Senate resolution of continuing effect at Appendix K).

5.5 Departments should consider whether any recommendations have Commonwealth-State implications which should be raised with the relevant State/Territory Government(s). The views of the States and Territories may be required before a response can be made by the Commonwealth Minister. ...

...

5.7 The layout of a Government response may vary depending on the nature and volume of the recommendations. Options for layout include: quoting each recommendation and then indicating the response, or grouping related recommendations.

17. The timeframe of up to three months allowed under the Guidelines for a Government response to a parliamentary committee report is also an appropriate timeframe for a Government response to an INSLM report. I note the concern raised by Attorney-General's Department in paragraph 15 of its submission to this inquiry that:

It is important for the government to be able to prioritise its legislative agenda, particularly in the context of a changing security environment. Having regard to the complexity of the issues which may be raised within each INSLM report, it may not be appropriate or practicable to prescribe a six monthly reporting timeframe. The changing security environment, including intervening events, may require focus on alternative security issues. A six month deadline would be inconsistent with the flexibility required to respond to emerging challenges.

18. However, the Guidelines are sufficiently flexible to deal with situations where a Government response cannot be provided within the three-month timeframe. The Guidelines state:

5.18 If a final Government response cannot be prepared within the three-month timeframe, the responsible Minister should provide a brief explanation about the delay in the six-monthly reports to the Parliament about outstanding Government responses, indicating when a detailed response will be available (see paragraphs 5.23 - 5.25). 5.19 Subject to approval by Cabinet or the Prime Minister as appropriate, the Minister may provide to the chair of the relevant parliamentary committee an interim response, addressing, for example, those recommendations on which the Government has reached a firm conclusion, and providing advice on when the balance of the Government's response will be available. The department

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should contact the PM&C Tabling Officer promptly to arrange for the tabling of the interim response.

19. A Government response to INSLM reports is needed within three months to deal with cases of what the Attorney-General's Department describes in paragraph 16 of its submission to this inquiry as "pressing gaps" in Australia's counter terrorism legal framework and to deal with urgent issues. This matter of urgency is not hypothetical with the former INSLM describing the recommendations in Chapter V of his final report as "actuated by some urgency pointed up by current experiences in Syria."⁴
20. Due to the nature of the INSLM's functions and the rapidly changing security environment, it is highly likely that the INSLM will be reporting on urgent matters, a point highlighted by the former INSLM who stated that "there should be an express power for the INSLM to report on a matter or matters within the statutory mandate but more urgently or particularly than by the annual report."⁵ In turn, such urgent matters would most probably necessitate a Government response as a matter of urgency in order for that response to be effective.

Government Approach to the Recommendations of the INSLM

21. The need for an express legislative requirement on the Government to respond to INSLM reports is shown by actual experience to date.
22. For the public to have confidence that the INSLM is an effectual oversight mechanism, the Government must be required to provide a timely, considered and comprehensive response to each of the recommendations in the INSLM's annual reports. There has been no such Government response to date for any of the former INSLM's annual reports.
23. To date, the Government has only responded to those of the former INSLM's recommendations it has cherry-picked. That is, the Government has only responded to those recommendations it agrees with either in full or in part and even then it has only provided insubstantial responses to those recommendations. The remainder of the former INSLM's responses go without any official response.
24. I note in paragraph 16 of its submission to this inquiry, the Attorney-General's Department states: "The Department notes all of the INSLM's recommendations have been considered by government and those considered to be the most pressing gaps in Australia's counter terrorism legal framework have been addressed through legislative change." In paragraph 17 of its submission, the Attorney-General's Department continues: "The government has adopted many of the INSLM's recommendations to date, and continues to consider and review the remaining INSLM recommendations."
25. There is simply no reasonable excuse for Government consideration of recommendations made as early as 2012 by the former INSLM to be ongoing, without any kind of formal response in the interim.
26. The intended purposes of the laws reviewed by the INSLM include the prevention, detection and prosecution of terrorism and the protection of Australians and Australia's national security. In addition, there is a high potential for the laws to have a negative impact on individual rights. These purposes are too important and the potential impact on individual rights too high for the Government to ignore the INSLM's recommendations in some cases

⁴ *Independent National Security Legislation Monitor Annual Report* (28th March 2014), p 2

⁵ *Independent National Security Legislation Monitor Annual Report* (28th March 2014), p 3

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for years while agencies continue to apply provisions described by the former INSLM as
“not effective, not appropriate and not necessary.”⁶

27. At the very least, there should be a requirement on the Government to explain to the Parliament why the Government does not agree with the former INSLM’s recommendations regarding disproportionate, inappropriate, unnecessary laws and provisions that the former INSLM found to breach Australia’s international obligations.
28. The same is true for the former INSLM’s recommendations intended to enhance the ability of security and law enforcement agencies to protect Australians from terrorism and national security threats, including through additional powers and authority. Legislation should require the Government to explain why it has chosen not to act to implement improvements that the INSLM found would improve the ability of agencies to counter terrorism.
29. The Government should be required to provide a timely, considered and comprehensive response to the INSLM’s reports. This should be modelled on the best practice approach for Government responses to parliamentary committee reports, as outlined above.

Vacancy of the INSLM office

30. I strongly agree that the role of the INSLM should not be left vacant. Section 5 of the INSLM Act states: “There is to be an Independent National Security Legislation Monitor.” This is a clear demonstration of the Parliament’s intention that the statutory office of the INSLM not be left vacant.
31. In order for the purposes of the INSLM Act to be achieved, it is necessary that the role of INSLM be performed on a continuous and ongoing basis. From April 2014 to December 2014 when the office was left vacant, there was no one performing the INSLM’s statutory functions. It would be preferable to ensure this cannot reoccur.

Full-time Appointment of the INSLM

32. The former INSLM stated in his final report that there should be no possibility of reappointment of the INSLM as:

The nature of the task should not only involve quasi-judicial tenure (during the term of appointment) so as to remove fear of the Executive, but there should as well be no hope of preferment from the Executive.⁷

33. In light of this view, the former INSLM suggested that consideration should be given to extending the term of office of the INSLM to four or five years but noted, “this may well reduce the pool of willing appointees considerably.”⁸
34. The proposal in the Bill to require that the INSLM position be undertaken on a full-time basis raises the same issue highlighted by the INSLM in his final report in relation to a longer period of appointment. Namely, the requirement that a person commit to the position on a full-time basis is highly likely to reduce the pool of willing appointees who are suitability qualified and experienced.
35. In paragraph 13 of its submission to this inquiry, the Attorney-General’s Department submitted that: “[o]ne of the potential consequences of changing the position to full-time is that the pool of candidates that would be available to fill the position will become more

⁶ *Independent National Security Legislation Monitor Declassified Annual Report* (20th December 2012), p 4

⁷ *Independent National Security Legislation Monitor Annual Report* (28th March 2014), p 3

⁸ *Independent National Security Legislation Monitor Annual Report* (28th March 2014), p 3

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limited.” The Attorney-General’s Department assessment is presumably made on the basis of its experience with the INSLM appointment process.

36. Making the position of INSLM full-time, this would effectively require the appointee to give up their existing professional work. This is highly likely to deter prominent members of the legal profession from seeking or accepting appointment, for example, because the person is practising at the Bar, or holds a tenured position at a university. The current United Kingdom Independent Reviewer of Terrorism Legislation⁹, Mr David Anderson QC, has expressed the following opinion against full-time appointment to his reviewer role:

In my opinion the post should not be made full-time: it is the ability to continue practising in an independent profession that has enticed strong candidates to accept the post in the past, and that provides the surest protection against the strong pressures encountered in it, sometimes from unexpected directions. But recent increases in the workload have made it necessary to consider providing for the assistance of a small, security-cleared secretariat.¹⁰

The Office of the INSLM

37. I strongly support the establishment of the Office of the INSLM as a listed entity for the purposes of the finance law (within the meaning of the *Public Governance, Performance and Accountability Act 2013* (Cth)) and as a Statutory Agency for the purposes of the *Public Service Act 1999* (Cth).
38. While there would be an economic cost involved in establishing and maintaining such an agency, this cost would be reasonable and appropriate in the circumstances. This amendment would see the Office of the INSLM operate as a Statutory Agency which is how other Commonwealth Government oversight and accountability bodies operate, including the Office of the Inspector-General of Intelligence and Security (IGIS).
39. As an independent statutory office holder appointed by the Governor-General, the INSLM should hold the position of Agency Head and be the accountable authority of the Office for the purposes of the finance law. The proposed amendments would enhance both the independence and integrity of the INSLM as a public accountability mechanism, and the public perception of the independence and integrity of the INSLM.
40. Important benefits from the proposed amendments would include providing the INSLM with control over financial matters (enabling independence in the expenditure of funds in the fulfilling of his or her statutory functions). The proposed amendments would also provide the INSLM with the ability to determine the appointment of his or her own staff, rather than being provided with staff from the Department of the Prime Minister and Cabinet. In my opinion, both of these are necessary precursors to at least the *perception* that the INSLM is fulfilling his or her role in a way that is truly independent.
41. Like the IGIS, the INSLM should be able to appoint his or her own staff. Staff of independent oversight bodies are generally not employed by a department or agency which that body oversees. The INSLM should be entitled to satisfy him or herself that the person appointed has the requisite qualifications and experience, and to ensure there is no conflict of interest or perceived conflict of interest between the duties the person is required to perform on behalf of the INSLM and any other positions they may hold. It would also be

⁹ The United Kingdom equivalent of the INSLM and the office on which the INSLM is based

¹⁰ D Anderson, “The Independent Review of UK Terrorism Law” (2014) 5(4) *New Journal of European Criminal Law*, pp 432-446 at p 446

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appropriate that the INSLM's staff be appointed on a non-ongoing basis for the term of the INSLM's appointment.

42. As with the appointment of the INSLM on a part-time basis, the appointment of the INSLM's staff on a part-time basis would potentially widen the range of people who would be available to undertake the role. In the United Kingdom, the Independent Reviewer of Terrorism Legislation is provided with secretariat support from civil servants in the Home Office. The Independent Reviewer's Special Adviser is Professor Emeritus Clive Walker who works on a part-time basis for the Independent Reviewer alongside his role at the University of Leeds.

Consideration by the INSLM of Proposed Legislation

43. The INSLM's statutory functions should not be expanded to include pre-enactment review of counter-terrorism and national security legislation. Given the scope of the existing functions of the INSLM, it would be impractical for the INSLM to conduct reviews of existing as well as proposed legislation. It is difficult to see how the INSLM would have the capacity to conduct his or her annual reviews, reviews into matters referred by the Prime Minister and parliamentary committees, as well as conduct pre-enactment review.
44. Sections 3 and 6 of the INSLM Act (the object of the Act and statutory functions of the INSLM) are clearly concerned with the INSLM having a role in relation to the operation, effectiveness and implications of existing legislation.
45. I have not seen anything to suggest that it was ever considered by the Parliament that the INSLM would serve a pre-enactment role in reviewing proposed legislation. Certainly, the reviews that recommended the establishment of the office did not envisage a pre-enactment role for the INSLM. As the Gilbert + Tobin Centre submission to this inquiry notes at page 2:
- 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.
46. Extending the scope of the INSLM's statutory functions to include pre-enactment scrutiny of proposed legislation would represent a significant departure from the established mechanisms of parliamentary review and debate of proposed legislation. Placing responsibility for pre-enactment review of legislation with the INSLM could have the negative consequence of limiting or sidelining parliamentary review and debate of the proposed legislation. Given the gravity and intended purpose of proposed counter-terrorism and national security legislation, and its potential impact on human rights, primary responsibility for review of such proposed legislation should rest with the Parliament, including through its committees.
47. The INSLM serves an important post-enactment review function that is complementary to Parliament's pre-enactment review function. The INSLM's post-enactment statutory reviews are carried out for the purposes of assisting the Prime Minister, Ministers and the Parliament. The INSLM has no power to enforce his or her recommendations and serves in an advisory role, reporting to the Prime Minister and through the Prime Minister, to the Parliament. Ultimately, it is the elected representatives who are authorised to make decisions on legislative reform and who are held to account by their constituencies for their decisions. The role of pre-enactment review is one best preserved for the Parliament including through its committees.

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48. I agree with the Gilbert + Tobin Centre submission to this inquiry (at page 2) that introducing a statutory requirement for the INSLM to investigate proposed legislation would “risk distorting the political debate and parliamentary scrutiny of such measures.” I note in this regard the lessons that can be drawn from the experience of the UK discussed at page 3 of the Gilbert + Tobin Centre submission to this inquiry.
49. Through the use of compulsory information gathering powers, the INSLM is able to collect material and question agency officials at hearings on the operation, effectiveness and implications of Australia’s counter-terrorism and national security legislation. In doing so, the INSLM has access to classified information. The INSLM is also able to hold hearings and receive submissions from a range of individuals, civil society actors and academia. The INSLM is therefore uniquely placed to report on the operation, effectiveness and implications of the legislation. The INSLM is able to collect, analyse and test the information he or she receives and to base recommendations on the empirical evidence available.
50. The INSLM as an oversight mechanism is particularly valuable for its consideration of how the legislation has been operationalised. The value of this approach cannot be translated into pre-enactment review, where such information is not yet available.
51. Parliamentary committees have traditionally conducted pre-enactment review through public consultation processes, with input from a wide variety of stakeholders. In my opinion this should continue to be the norm. There is no reason why the INSLM cannot provide a briefing or submission to parliamentary committees conducting such reviews. Indeed, such a briefing or submission may be exceedingly helpful to such inquiries.
52. Interaction between parliamentary committees and the INSLM is already an occurrence. The former INSLM noted in his final report that during his tenure he had contact with the Parliamentary Joint Committee on Intelligence and Security (PJCIS) and appeared at a Senate Estimates hearing of the Finance and Public Administration Legislation Committee. However, for the reasons discussed above it would not be appropriate or practical to introduce a statutory requirement for the INSLM to examine and report on proposed legislation.

Referral of Matters to the INSLM by the Australian Human Rights Commission and Parliamentary Committees

53. Paragraph 4 of the Explanatory Memorandum to the Bill states that:

This Bill also enhances the independent character of the Monitor by ensuring that he or she can receive references from the Senate Committees on Legal and Constitutional Affairs and by the Australian Human Rights Commission.

54. It is unclear as to how the independence of the INSLM could be enhanced through increasing the control of third parties over the INSLM’s review functions, including his or her work plan and work load. Rather, such third party control is more likely to erode the independence of the INSLM by prescribing the subject matter and timeframe of how the INSLM conducts his or her work and limiting the INSLM’s influence over his or her own work agenda.
55. It is important to note that there is currently no legal impediment to the INSLM from receiving information and suggestions from the Senate Committees on Legal and Constitutional Affairs or the Australian Human Rights Commission (AHRC).

Referral of Matters by the AHRC

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56. There is currently no legal impediment that would prevent the INSLM working closely with the AHRC. For example, the INSLM could receive correspondence from the AHRC on issues of relevance to the INSLM's statutory functions. The INSLM could also receive a submission from the AHRC to the INSLM's inquiries and the AHRC could appear before the INSLM at an inquiry hearing.
57. The INSLM Act currently states that the INSLM may consult with the AHRC so such activities would be aligned with the INSLM's statutory functions. Paragraph 10(2)(ca) of the INSLM Act provides that "when performing functions relating to Australia's counter-terrorism and national security legislation" the INSLM "may consult with the Human Rights Commissioner", as the INSLM "considers necessary."
58. The INSLM's primary purpose is to review the operation, effectiveness and implications of the counter-terrorism and national security legislation and to report annually to the Prime Minister, and through the Prime Minister, to the Parliament. The object of the INSLM Act is described in section 3 of the INSLM Act as "to appoint an [INSLM] who will assist Ministers".
59. The INSLM is therefore intended to assist the Prime Minister, Ministers and the Parliament. It would be a significant change to expand the referral power from the Prime Minister and parliamentary committees, to the AHRC. Such a change is in my opinion both unnecessary as there is no evidence that it would assist the work of the INSLM in any way, and inappropriate as a matter of policy. Referral powers should properly be limited to the Prime Minister and parliamentary committees, and should not be expanded to include a statutory authority.

Referral of Matters by Parliamentary Committees

60. There is currently no legal impediment that would prevent the INSLM from providing a briefing to parliamentary committees, or appearing before parliamentary committees at hearings into proposed legislation. As noted above, interaction between parliamentary committees and the INSLM has already occurred with the former INSLM noting in his final report that during his tenure he had contact with the PJCIS and appeared at a Senate Estimates hearing of the Finance and Public Administration Legislation Committee. Such activities would be aligned with the INSLM's statutory purpose and functions. The INSLM's primary purpose is to review the operation, effectiveness and implications of Australia's counter-terrorism and national security legislation, and to report annually to the Prime Minister, and through the Prime Minister, to the Parliament.
61. The INSLM Act contains referral powers that the Prime Minister and the PJCIS may exercise. Given the PJCIS has this referral power there is no sound policy basis to support not extending the referral power to other parliamentary committees.
62. One argument that is favoured by those opposed to extending the referral power to other parliamentary committees is the idea that the PJCIS is uniquely suited to dealing with national security issues. Another argument is that the PJCIS has been responsible for post-legislative review of counter-terrorism and national security legislation. While the PJCIS does have a history of dealing with national security matters, it does not have the monopoly on doing so. The Senate Legal and Constitutional Affairs Committees have a long history of involvement in the passage of counter-terrorism and national security legislation, including the review of major counter-terrorism and national security bills.
63. In addition to the Senate Legal and Constitutional Affairs Committees, there is a strong argument to be made that the Parliamentary Joint Committee on Human Rights (PJCHR) should also have a referral power, if the power is to be extended to parliamentary committees other than the PJCIS.

64. The statutory functions of the PJCHR under the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) include pre-enactment review under subsection 7(a) “to examine Bills for Acts, and legislative instruments, that come before either House of the Parliament for compatibility with human rights, and to report to both Houses of the Parliament on that issue.” The statutory functions also include post-enactment review under subsection 7(b) “to examine Acts for compatibility with human rights, and to report to both Houses of the Parliament on that issue.” The role of the PJCHR in assessing legislation for compliance with international obligations is aligned with the INSLM’s role in assessing Australia’s counter-terrorism and national security legislation for compliance with international obligations. The PJCHR has examined proposed counter-terrorism legislation including the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014*.
65. As a matter of practicality, the idea of multiple parliamentary committees referring matters to the INSLM has the potential to significantly impact on the INSLM’s ability to carry out his or her statutory mandate, and the requirement to provide annual reports on the carrying out of those duties. If the INSLM received several referrals from different parliamentary committees at the same time it would be impractical for the INSLM to carry out all of these, in addition to any referrals from the Prime Minister and the INSLM’s statutory obligations for annual reviews and reporting.
66. The current situation is sufficiently flexible to enable parliamentary committee input into the work of the INSLM. Parliamentary committees already have the ability to recommend to the Prime Minister that he or she refer a matter to the INSLM. They may also write directly to the INSLM suggesting a topic of review for the INSLM’s consideration. With these options available it is unnecessary for any further referral powers to be included in the INSLM Act. The extension of referral powers would be more likely to hinder the work of the INSLM, than to assist the oversight work of the office.
67. Currently, the INSLM is not required to undertake a review in response to a PJCIS referral. Pursuant to subsection 6(1A) of the INSLM Act if a matter is referred to the INSLM by the PJCIS, the INSLM “*may* perform the function set out in paragraph (1)(a) or (b) in relation to the matter.” [emphasis added]
68. If a new referral power is considered for other parliamentary committees, the INSLM should retain the ability to exercise their discretion so as not to conduct the review if he or she considers that to be the appropriate course of action in the circumstances, for example, due to workload and competing priorities.

Other Matters Not Included in the Bill

Security-cleared Parliamentary Committees

69. It is worth noting that the Australian parliamentary committee system does not require parliamentary committee members to be security-cleared, including Committee Members of the PJCIS. This is recognised in the Bill with the proposed amendments not requiring the INSLM to provide the PJCIS or Senate Legal and Constitutional Affairs Committees with any classified information. This is unlike the United States system, which does require parliamentarians to be security-cleared in order to sit on the national security focused committees, with those parliamentarians being provided with full access to classified information.
70. While potentially outside the scope of the Bill, I propose that there would be considerable merit in exploring the option of security-cleared parliamentary committees in Australia,

modelled on the United States system where members of appropriate congressional committees are security-cleared. These committees include the Permanent Select Committee on Intelligence and the Committees on Armed Services and Homeland Security as well as the Select Committee on Intelligence and the Committees on Armed Services and Homeland Security.

71. The purpose of security-cleared congressional committees has been described as: “the legislature uses such information to fulfil its constitutional responsibilities, particularly overseeing the executive, appropriating funds, and legislating public policy.”¹¹ Accessibility to classified information “is seen as necessary for the legislature to carry out its constitutional responsibilities, especially overseeing the executive and legislating public policy.”¹²
72. Security-cleared parliamentary committees in the Australian Parliament would enable the INSLM to provide classified reports, briefings and submissions to such committees and enhance the capability of those committees to carry out their important parliamentary oversight functions. In particular, it would enable the committees to view the INSLM’s classified annual reports to the Prime Minister (rather than the declassified reports only), and to question departments and agencies on the contents of those classified reports.
73. Such a reform would greatly enhance the parliamentary oversight function of the committees and would be of significant value to those committees who had referral powers to request or require the INSLM review and report on a matter.

Ability for INSLM to Report on Urgent Matters

74. The INSLM is required under paragraph 6(1)(d) of the INSLM Act to consider whether the laws have been used for matters unrelated to terrorism or national security. It is important that the INSLM has flexibility to report on such a matter within his or her statutory mandate more urgently than by annual report. If a law has been used for a matter unrelated to terrorism or national security, it would be both appropriate and expected that the matter be brought to the Prime Minister’s and Parliament’s attention at the earliest opportunity, rather than the INSLM being required to wait until his or her next annual report to report on the matter.
75. Due to the nature of the INSLM’s statutory functions and the rapidly changing security environment, it is highly likely that the INSLM will be reporting on urgent matters, a point highlighted by the former INSLM who stated that “there should be an express power for the INSLM to report on a matter or matters within the statutory mandate but more urgently or particularly than by the annual report.”¹³ In turn, such urgent matters would most probably necessitate a government response as a matter of urgency in order for that response to be effective.
76. An amendment to the INSLM Act to enable the INSLM to report other than by annual report would be both a useful and practical amendment.

¹¹ Congressional Research Service, *Protection of Classified Information by Congress: Practices and Proposals* (2011) Summary, available at: <http://fas.org/sgp/crs/secrecy/RS20748.pdf>

¹² Congressional Research Service, *Protection of Classified Information by Congress: Practices and Proposals* (2011) p

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¹³ *Independent National Security Legislation Monitor Annual Report* (28th March 2014), p 3

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Extension of INSLM Term of Appointment

77. I support the former INSLM’s opinion that there should be a prohibition on reappointment of the INSLM. The former INSLM stated in his final report that:

[T]here should be no possibility of reappointment of the INSLM. The nature of the task should not only involve quasi-judicial tenure (during the term of appointment) so as to remove fear of the Executive, but there should as well be no hope of preferment from the Executive.¹⁴

78. In light of this view, the former INSLM suggested that consideration should be given to extending the term of office of the INSLM to four or five years.¹⁵

79. I suggest subsection 12(1) of the INSLM Act should be amended to increase the permitted term of appointment from a period of three years, to a five-year term. Subsection 12(2) should be repealed and replaced with a prohibition on reappointment. These changes to the term of appointment of the INSLM would promote the independence of the office. It would also assist the INSLM in performing his or her statutory functions as it would enable the INSLM to have a considerable period of time in the role. This would assist the INSLM in the conduct of ongoing, systematic reviews of the national security and counter-terrorism legislation and would facilitate continuity in the role.

80. The longer time period would better reflect the lengthy timeframes involved in counter-terrorism investigations. A five-year term would better enable the INSLM to be involved in reviewing the operation, effectiveness and implications of the counter-terrorism and national security laws as they are being applied from investigation to prosecution stage. Due to the complexity of counter-terrorism investigations, the period from initial investigation through to prosecutions is likely to be for a period greater than three years. This is shown by the timeline set out below for Operation Pendennis (Melbourne).¹⁶

Operation Pendennis (Melbourne)

Ten men were arrested and charged with terrorism offences under Part 5.3 of the *Criminal Code Act 1995* (Cth) in November 2005. A further three men were arrested in March 2006 and charged with similar and related offences. One man pleaded guilty to certain terrorism offences in July 2007, and in February 2008 a jury was empanelled and the prosecution of the remaining twelve men commenced. In September 2008, the jury returned verdicts for all but one of the 27 counts on the indictment. In February 2009, the Supreme Court of Victoria sentenced those defendants found guilty by the jury. Appeals against conviction and sentence were lodged by all of the defendants sentenced. The Victorian Court of Appeal heard the appeals in March 2010 and delivered judgment in October 2010. Applications for special leave to appeal to the High Court of Australia against this judgment were lodged by three of the men. These applications were heard by the High Court in June 2011 and were refused.

¹⁴ *Independent National Security Legislation Monitor Annual Report* (28th March 2014), p 3

¹⁵ *Independent National Security Legislation Monitor Annual Report* (28th March 2014), p 3

¹⁶ For further information, see the case reports prepared by the Commonwealth Director of Public Prosecutions, available at: <http://www.cdpp.gov.au/case-reports/operation-pendennis/>; <http://www.cdpp.gov.au/case-reports/abdul-nacer-benbrika/> and <http://www.cdpp.gov.au/case-reports/abdul-nacer-benbrika-aimen-joud-fadl-sayadi-abdullah-merhi-ahmed-raad-ezzit-raad-amer-haddara/>

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Resourcing the Work of the INSLM

81. On the issue of appropriate it is not only the resourcing of the office of the INSLM that must be considered, but also that of the agencies whose officers' action the INSLM reviews. Those agencies should have appropriate resources dedicated to responding to requests from the INSLM in the conduct of his or her reviews, such as producing material or appearing at hearings in response to the exercise of the INSLM's compulsory information gathering powers. The agencies must also have appropriate resources dedicated to the timely and considered response to the reports (including the recommendations) of the INSLM, and for the development and implementation of reforms the Government makes in response to INSLM recommendations.

Yours sincerely

Teneille Elliott

PhD Candidate, National Security College, The Australian National University