



THE INDEPENDENT NATIONAL SECURITY LEGISLATION MONITOR REPEAL BILL 2014 [PROVISIONS]

NSW COUNCIL FOR CIVIL LIBERTIES SUBMISSION TO THE SENATE LEGAL AND CONSTITUTIONAL AFFAIRS COMMITTEE INQUIRY

The NSW Council for Civil Liberties (NSWCCL) welcomes the opportunity to present its views on the proposed abolition of the Independent National Security Legislation Monitor (INSLM) position to the Senate Legal and Constitutional Affairs Committee inquiry. NSWCCL was surprised and concerned to discover that the INSLM legislation was to be included among the 10,000 plus regulations and laws to be repealed as part of the Government's 'red tape' bonfire in March. We wrote in haste to the Attorney-General and other members of Parliament at the time to argue for the removal of the INSLM legislation from this repeal process.¹

We were relieved to discover that the Selection of Bills Committee had, for good reasons, referred the Bill for consideration to the Legal and Constitutional Affairs Committee thereby creating at least a small window of opportunity for considered discussion as to the appropriate future of this important office.

1. IN SUMMARY

The INSLM is an important statutory position with important functions relating to the intensely sensitive and complex area of counter-terrorism laws, their operation and their compatibility with individual liberties in Australia's democracy. It was established in 2010 with bipartisan agreement across the major political parties and with the support of the Greens. It was seen as fulfilling a gap in the effective monitoring and oversight of these laws and their implementation. It was the considered outcome of years of discussion and debate.

In the short time that it has functioned, the role has contributed greatly to the understanding of Australia's counter-terrorism legislation and has recommended important changes to this legislation.

Its proposed summary abolition has not been publicly discussed nor substantively justified. The formal explanations put forward in the Explanatory Memorandum accompanying the repeal Bill are insubstantial and some are inaccurate. Contrary to the claims in the Memorandum, NSWCCL argues:

- Abolition of the INSLM role

¹ Letters by email from the NSWCCL Secretary to the Attorney-General, the Shadow Attorney-General and other MsP. 24March 2014

- will weaken the comprehensive oversight of relevant counter-terrorism and national security legislation
- will deprive the community of a credible and independent source of information about, and analysis of counter-terrorism laws, their ongoing necessity, their implementation and their compatibility with individual liberties and rights
- Abolition of the INSLM will not reduce bureaucracy, streamline government or remove significant duplication of responsibilities
- Most importantly, the legislated work of the INSLM is not completed and the ongoing role of the INSLM remains important. Its independent advice to Government and Parliament will be of particular relevance over the next few years
- It is extraordinarily inappropriate that such a significant statutory role should have been proposed for repeal as part of a 'red-tape bonfire' without forewarning, substantive rationale or public consultation.

There are compelling reasons for the maintenance of the INSLM role and the NSWCCCL is hopeful the Government will reconsider and withdraw the Bill in the national interest.

2. DETAILED COMMENTS

2.1. The abolition of the INSLM role will weaken the monitoring and oversight of Australia's counter-terrorism laws and their use by intelligence and security agencies.

It was specifically legislated to provide an advisory and monitoring role that was not being delivered by the existing monitoring agencies. Its role and functions are broad and it has explicit statutory independence and access to classified intelligence and security information. It has therefore the capacity to develop soundly informed assessments and advice. It is required to report to Parliament so its reports are public.

The then Attorney-General, Senator McClelland SC gave this explanation during the second reading debate on the Bill:

*'A new independent review mechanism will ensure that Australia's laws underpinning Australia's counterterrorism and national security regime are effective as the threat to Australia's national security interests evolve. Importantly, the impartiality of the monitor, as envisaged in this bill, will strike a necessary balance between the need to prevent terrorist activities from threatening Australia's way of life and the need to protect our individual rights and liberties.'*²

2.2. Abolition of the INSLM will deprive the Government, the Parliament and the community of a significant, credible and independent source of information about, and analysis of the counter-terrorism laws and their operation.

Though frugally resourced, the Independent Monitor has delivered an illuminating body of work, over three annual reports and with a fourth to be tabled during the next parliamentary session. This body of work is greatly appreciated by those interested in our counter-terrorism legislative regime and its operation.

² Attorney-General Senator McLelland SC 2R speech, Hansard 17/3/2010

The Monitor has largely endorsed the appropriateness of the existing legislation and its implementation, but has also made important and soundly based recommendations for change to inappropriate, disproportionate or unnecessary provisions.

The credibility of these reports rests significantly on the powerful combination of the INSLM'S statutory independence, its broad role and functions and its coercive powers to access information from the intelligence and security agencies which is not available to other oversighting agencies or one-off reviews.

2.3. The establishment of the INSLM role in 2010 under the Rudd Labour Government was the outcome of 4 years of discussion, debate and multiple reviews³. It was also supported by both the major parties and the Greens. As the then Attorney-General noted:

*The debate about establishing in Australia an independent reviewer of counterterrorism laws is not new. This bill represents implementation of bipartisan recommendations...'*⁴

Senator Brandis, then shadow Attorney-General, was a vigorous supporter and, with some justification, claimed Coalition credit for the initiative - 'this bill, which for all practical purposes is our own'.⁵ It was also on Senator Brandis' insistence that the legislation specified statutory independence and the parliamentary reporting requirement to ensure the reports were public⁶.

Nothing of significance has changed in the political and counter-terrorist landscape since 2010 to render these considered bipartisan views less relevant now.⁷

It was therefore most surprising that in March the Government planned to abolish the INSLM role under cover of the 'red tape bonfire' without consultation, forewarning or substantial explanation.

There are no significant savings to be made from the abolition of this part time role⁸. There is no identified problem or hindrance to Australia's intelligence activities or national security that will be remedied by its abolition.

There is rather, a great deal to lose in terms of robust, informed analysis and in community confidence.

It is misleading or misguided to treat the INSLM role and legislation as 'red tape' which can be swept away as inconsequential.

³ Security Legislation Review Committee in June 2006, the Parliamentary Joint Committee on Intelligence and Security in December 2006 and September 2007, and the Inquiry by the Hon. John Clarke QC into the Case of Dr Mohamed Haneef November 2008

⁴ Attorney-General Senator McLelland SC 2R speech, Hansard 17/3/2010

⁵ Senator Brandis Shadow AG 2R speech Hansard 2/2/2010

⁶ Classified information is redacted from the Parliamentary report.

⁷ The only addition to the intelligence 'oversighting' bodies has been the creation of the non-statutory position of Independent Reviewer of Adverse Security Assessments in December 2012. This is a specifically focussed review role and has the significant weakness of being without statutory basis for its 'independence' and can be discontinued without reference to Parliament.

⁸ The Explanatory Memorandum cites \$1.36 million over three years.

- 2.4. The most important consideration however, is that the role and functions of the INSLM remain highly relevant and important and will become increasingly so over the next few years.

The Independent Monitor's work is not finished and will not be until the 'extraordinary' counter-terrorism legislation is accepted as being no longer necessary or proportionate and is repealed. This will be a particular issue in 2016 when relevant sunset clauses will again come into play for some of these laws.⁹

Also there are regular pressures for expansion of the ambit of, and powers conferred by security and counter-terrorism legislation. NSWCCCL expects the Government will revisit the proposals for amendments to the national security legislation that were canvassed under the Rudd/Gillard Governments- especially the highly controversial data collection and retention aspects. The community was not given reasonable information as to the scope of the agenda. Nor, it would seem, was the responsible Parliamentary Committee.¹⁰

Post the Snowden revelations about the extent of mass global surveillance of non-suspect persons by intelligence agencies – including those with whom Australia has close sharing relationships – these proposals are likely to be even more controversial when they resurface.

The informed and independent views of the INSLM will be needed as an important and balancing source of advice to the Government and Parliament - and to the wider community - on these issues.

The advice of an expert, independent Monitor at these critical points of evolution in Australia's counter terrorism legislative regime will be of considerable value to Government, parliament and the community and is exactly as the INSLM Act intended.

- 2.5. The Government has indicated that it has reflected on the optimal form of oversight since the INSLM was established :

*'With the benefit of this experience, the Government considers that placing the laws in a constant or continuous state of wholesale review has not proven to be the optimal form of oversight. The Government considers the best way forward is to work through the large number of recommendations made by the Monitor, and to continue engaging with the extensive range of existing independent oversight bodies, including the Inspector-General of Intelligence and Security, Parliamentary Committees, and the Parliament itself.'*¹¹

⁹ The extraordinary ASIO laws were originally to expire in 2006. At that time the Government with the support of the Opposition extended the laws for another 10 years. The sunset clause will activate in mid-2016. There is deep concern that if these laws are not repealed in 2016 they will become a permanent and damaging feature of Australian law.

¹⁰ See Joint Parliamentary Committee on Intelligence and Security Report of the Inquiry into Potential Reforms of Australia's National Security Legislation .24 June 2014

¹¹ Explanatory Memorandum: Independent National Security Legislation Monitor Repeal Bill 2014

NSWCCL agrees it would be a positive development for the Government to give serious consideration to the large number of recommendations of the INSLM – and of course to continue to engage with the other oversight bodies.

The failure of the Rudd/Gillard Governments to implement the reasonable and widely supported recommendations of the Monitor is a failure of government- not the INSLM role.

3. NSWCCL POSITION AND RECOMMENDATIONS

- 3.1. NSWCCL considers the Independent National Security Legislation Monitor roles and functions remain relevant and important and that the ongoing role will be valuable as an independent and informed source of advice to the Government, Parliament and community as Australia's counter-terrorism legislation evolves over the next few years ¹²
- 3.2. NSWCCL recommends that the Government reconsider its position and withdraw the Independent National Security Legislation Monitor Repeal Bill 2014 [Provisions]
- 3.3. The Government should move quickly to appoint an eminent expert person to the now vacant position of Independent National Security Legislation Monitor
- 3.4. NSWCCL supports the Government's proposal to address the existing recommendations of the INSLM and urges it to give serious consideration to their implementation.
- 3.5. If the Government proceeds with the Independent National Security Legislation Monitor Repeal Bill 2014 [Provisions] NSWCCL urges the Parliament to oppose it.

Yours sincerely

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5 May 2014

Contacts in relation to this submission
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¹² NSWCCL did not support the appointment of the INSLM in 2009. We argued for the repeal of the disproportionate and dangerous powers of the post 9/11 laws. The repeal did not, and has not yet occurred. NSWCCL continues to advocate the repeal of these laws directly and through the National ASIO Campaign. In the meantime, the Independent Monitor role has proven its value and should be maintained.

The NSWCCCL was founded in 1963 and is one of Australia’s leading human rights and civil liberties organisations. Its aim is to secure the equal rights of everyone (as long as they don’t infringe the rights and freedoms of others) and oppose any abuse or excessive power by the State against its people. To this end NSWCCCL attempts to influence public debate and government policy on a range of human rights issues. It seeks to secure amendments to laws, or changes in policy, where civil liberties and human rights are not fully respected. It listens to individual complaints and, through volunteer efforts, attempts to help members of the public with civil liberties problems. NSWCCCL prepares submissions to government, conducts court cases defending infringements of civil liberties, engages regularly in public debates, produces publications, and conducts many other activities.