



**Australian Government**

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**Office of the Privacy Commissioner**

# **Inquiry into the National Security Legislation Monitor Bill 2009**

**Submission to the Senate  
Standing Committee on Finance  
and Public Administration**

**July 2009**

## Key Recommendations

1. The Office of the Privacy Commissioner (the 'Office') supports establishing a National Security Legislation Monitor (the 'Monitor') through the *National Security Legislation Monitor Bill 2009* (the 'Bill'). In the Office's opinion, the Monitor's oversight of Australia's counter-terrorism and national security legislation could complement the functions of existing accountability bodies and facilitate a holistic approach to the different public interests associated with this legislation.
2. The Office makes the following recommendations, which are intended to clarify the scope of the Monitor's role in the Explanatory Memorandum to the Bill:
  - i) Consideration could be given to including a non-exhaustive list of the 'rights of individuals' that the Monitor should take into account under clause 6 (1)(b)(i).
  - ii) It could be clarified that a review of whether Australia's counter-terrorism and national security legislation remains necessary under clause 6 (1)(b)(ii) includes considering whether any limitation of individuals' rights to privacy (and other individual rights) is proportional to an identified threat or potential threat of terrorism.
  - iii) It may be useful to specify that the Monitor's powers under clause 8 (a), which require the Monitor to have regard to Australia's obligations under international agreements (as in force from time to time) when performing his or her functions, include assessing whether the counter-terrorism and national security legislation is consistent with Australia's international obligations.
  - iv) Further detail could be provided in relation to the Monitor's functions under clause 10 (2), by explaining that it would be expected that the Monitor would consult and take account of the views of oversight and accountability agencies on matters relevant to their particular jurisdiction.

## Office of the Privacy Commissioner

1. The Office of the Privacy Commissioner ('the Office') is an independent statutory body whose purpose is to promote and protect privacy in Australia. The Office has responsibilities under the *Privacy Act 1988 (Cth)* (the 'Privacy Act'). The Privacy Act contains eleven Information Privacy Principles ('IPPs') which apply to Australian and ACT Government agencies. It also includes ten National Privacy Principles ('NPPs') which generally apply to all businesses with an annual turnover of more than \$3 million (and some small businesses)<sup>1</sup>.
2. The coverage of the Privacy Act is limited to 'personal information'. This is defined in section 6 (1) of the Act as information or an opinion, whether true or not, about an individual whose identity is apparent or can be reasonably ascertained from that information.

## Background

3. The Office welcomes the opportunity to provide comments to the Senate Standing Committee on Public Administration and Finance (the 'Committee') in relation to its inquiry into the *National Security Legislation Monitor Bill 2009* (the 'Bill')<sup>2</sup>. The Office notes that the Committee has been requested to assess the extent to which the recommendations of the Senate Legal and Constitutional Affairs Committee report in relation to the Troeth/Trood Bill of 2008 were taken on board, and the scope of the Reviewer's mandate<sup>3</sup>.
4. The Bill provides for the appointment of a National Security Legislation Monitor (the 'Monitor')<sup>4</sup>. The Monitor's functions include reviewing the operation, effectiveness and implications of Australia's counter-terrorism and national security legislation (and any other Commonwealth law relating to Australia's counter-terrorism and national security legislation), considering whether these laws contain appropriate safeguards for protecting individuals' rights and considering whether they remain necessary<sup>5</sup>. The Monitor also needs to prepare an annual report which is tabled in Parliament in relation to these matters<sup>6</sup>.
5. The Office notes that establishing a Monitor is consistent with recommendation 1 in the *Report of the Security Legislation Review Committee*, chaired by the Hon Simon Sheller AO QC (June 2006), of which Ms Karen Curtis was a member in her capacity as Privacy Commissioner. Recommendation 1 generally provided that the government should establish a legislative-based timetable for continuing

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<sup>1</sup> Information relating to the operation of the Privacy Act can be found on the Office's website at [www.privacy.gov.au](http://www.privacy.gov.au).

<sup>2</sup> See [http://www.aph.gov.au/Senate/committee/fapa\\_ctte/national\\_security\\_leg/index.htm](http://www.aph.gov.au/Senate/committee/fapa_ctte/national_security_leg/index.htm)

<sup>3</sup> Selection of Bills Committee, Report No. 10 of 2009 at Appendix 10.

<sup>4</sup> Clause 5 of the Bill.

<sup>5</sup> Clause 6 (1)(b) of the Bill.

<sup>6</sup> Clause 29 of the Bill.

review of the security legislation by an independent body. The Committee specifically noted an independent reviewer model for further consideration<sup>7</sup>.

6. In the Office's opinion, the Monitor's oversight of Australia's counter-terrorism and national security legislation could complement the functions of existing accountability bodies, which often have more diffuse functions and responsibilities. It could also facilitate a holistic approach to the different public interests associated with terrorism-related legislation, including privacy and other human rights issues, and interests of law enforcement and intelligence agencies.
7. In this submission the Office makes some suggested changes to the Explanatory Memorandum, which are intended to further clarify how the Monitor would balance these different interests. In doing this, the Office draws on its previous public submissions to Committee inquiries in relation to counter- terrorism laws, including:
  - i) *Independent Reviewer of Terrorism Laws Bill 2008 [No. 2]*<sup>8</sup>;
  - ii) Review of security legislation relating to terrorism (2006)<sup>9</sup>;
  - iii) *Anti-Terrorism Bill (No. 2) 2005*<sup>10</sup>;
  - iv) *Anti-Terrorism Bill (No. 2) 2004*<sup>11</sup>; and
  - v) *Security Legislation Amendment (Terrorism) Bill 2002*<sup>12</sup>.

## The Monitor's functions

8. The Office's previous submissions note that counter-terrorism and national security legislation is likely to impact on the privacy of individuals by expanding law enforcement and intelligence agencies' power to collect personal information about individuals and consequently reducing individuals' control over this information<sup>13</sup>.
9. The Office considers that the Monitor's functions set out in the Bill will help to ensure that Australia maintains a safe and secure environment and that this occurs with minimal impact on individuals' personal information. In this regard, the Office makes some suggested changes to the Explanatory Memorandum to further clarify these functions.

### Appropriate safeguards

10. The Office suggests that the Monitor could specifically consider appropriate safeguards for protecting individuals' personal information

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<sup>7</sup> Security Legislation Review Committee, Report of the Security Legislation Review Committee, June 2006, see <http://www.ag.gov.au/www/agd/agd.nsf/Page/>

<sup>8</sup> See [http://www.privacy.gov.au/publications/sub\\_terror\\_0809.html](http://www.privacy.gov.au/publications/sub_terror_0809.html)

<sup>9</sup> See <http://www.privacy.gov.au/publications/seesub.pdf>

<sup>10</sup> See <http://www.privacy.gov.au/publications/antiterrosub.pdf>

<sup>11</sup> See <http://www.privacy.gov.au/publications/antitersub.pdf>

<sup>12</sup> See <http://www.privacy.gov.au/publications/secleg.pdf>

<sup>13</sup> Office of the Privacy Commissioner, Submission to the Security Legislation Review Committee, January 2006, see <http://www.privacy.gov.au/publications/seesub.pdf>

under clause 6 (1)(b)(i) of the Bill. Clause 6 (1)(b)(i) requires the Monitor to consider whether ‘counter-terrorism and national security legislation contains appropriate safeguards for protecting the rights of individuals’.

11. To this end the Explanatory Memorandum could provide a non-exhaustive list of the kinds of rights that the Monitor should take into account under this clause.
12. As the Monitor is required to have regard to Australia’s international obligations elsewhere in the Bill<sup>14</sup>, this non-exhaustive list could be drawn from the rights contained in the *International Covenant on Civil and Political Rights*, which provides at Article 17 that ‘no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks’.

### **Proportionality**

13. The Office welcomes clause 6 (1)(b)(ii) of the Bill which requires the Monitor to consider whether Australia’s counter-terrorism and national security legislation remains necessary. The Office considers that this will facilitate ongoing evaluation of the balance between protecting personal information (and other human rights) and national security considerations.
14. In the Office’s opinion clause 6 (1)(b)(ii) appears to implicitly require the Monitor to evaluate whether any limitation on an individuals’ control of personal information (or limitation of another human right) under the legislation is proportional to an identified threat or potential threat of terrorism. This may minimise the likelihood of ‘function creep’, where legislative measures incrementally and cumulatively expand in scope to have greater affect including on individuals’ rights than was initially envisaged.
15. While this function may be implicit, it may be useful for the Explanatory Memorandum to specify that the Monitor’s considerations under clause 6(1)(b)(ii) include among other things, an assessment of whether any limitation of individuals’ rights to privacy (and other rights) under counter-terrorism and national security legislation is proportional to an identified threat or potential threat of terrorism.

### **Consistency with international obligations**

16. The Office supports clause 8 (a) of the Bill, which provides that the Monitor needs to have regard to Australia’s obligations under international agreements (as in force from time to time) when performing his or her functions.

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<sup>14</sup> Clause 8 (a) of the Bill.

17. According to the Explanatory Memorandum, clause 8 (a) requires the Monitor to have regard to Australia's obligations to enact a strong counter-terrorism framework and to Australia's human rights obligations under certain international instruments, such as the *International Covenant on Civil and Political Rights* (which as noted above includes the right to privacy)<sup>15</sup>.
18. The Office suggests that the Explanatory Memorandum could also clarify that this involves assessing whether Australia's counter-terrorism and national security legislation is consistent with Australia's international obligations. This interpretation of clause 8 (a) would appear to accord with clause 3 (c) of the Bill, which provides that an 'object of this Act is to appoint a National Security Legislation Monitor who will assist Ministers in ensuring that Australia's counter-terrorism and national security legislation is consistent with Australia's international obligations, including human rights obligations'.

## Consultation with agencies

19. The Office welcomes clause 10 (2) of the Bill, which provides that the Monitor may consult with certain oversight and accountability agencies when exercising his or her functions. According to the Explanatory Memorandum, this includes the functions of the Inspector General of Intelligence and Security, the Commonwealth Ombudsman, the Privacy Commissioner, the Australian Commissioner for Law Enforcement Integrity and the Human Rights Commissioner<sup>16</sup>.
20. The Office considers that consulting with oversight and accountability agencies is likely to promote a coordinated inter-agency response to considering counter-terrorism and national security legislation and should ensure that the Monitor's functions complement the functions of existing oversight and accountability agencies.
21. In the Office's opinion the Explanatory Memorandum could provide some further detail in relation to the Monitor's functions under clause 10 (2), by explaining that it would be expected that the Monitor would consult and take account of the views of oversight and accountability agencies on matters relevant to their particular jurisdiction. For example, the Monitor could be expected to consult with the Privacy Commissioner on matters that may significantly affect the handling of individuals' personal information or other aspects of personal privacy.

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<sup>15</sup> Clause 8 of the Explanatory Memorandum.

<sup>16</sup> See <http://parlinfo.aph.gov.au/>