



Australian
Human Rights
Commission

everyone, everywhere, everyday

Inquiry into the National Security Legislation Monitor Bill 2009.

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Australian Human Rights Commission Submission
to the Senate Standing Committee on Finance and
Public Administration

27 July 2009

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1 Introduction

1. The Australian Human Rights Commission (the Commission) makes this submission to the Senate Finance and Public Administration Committee (the Committee) in its Inquiry into *National Security Legislation Monitor Bill 2009* (the Bill).
2. The Explanatory Memorandum states the 'main purpose of the Bill is to ensure the laws operate in an effective and accountable manner, are consistent with international human rights law and help to maintain public confidence in those laws'.¹ This purpose will only be achieved if the Monitor is perceived as truly independent and his or her reports are considered by the Australian Government in a serious and timely manner.

2 Summary and recommendations

3. We welcome the Australian Government's decision to establish a National Security Legislation Monitor (the Monitor), consistent with the recommendations of the major Australian reviews of counter-terrorism laws.² We particularly commend the fact that the Bill specifically requires the Monitor to have regard to Australia's international obligations, including Australia's human rights obligations.³
4. For the Monitor to function effectively and promote public confidence in Australia's counter-terrorism laws it is vital that:
 - The Monitor is both independent and seen to be independent; and
 - The Monitor's reports are considered by the Government in a serious and timely manner.
5. With these objectives in mind, we recommend improving the Bill by:
 - Amending the Bill to state that the object of the Bill is to appoint an **independent** National Security Legislation Monitor;
 - Giving the Monitor the power to report on any review he or she conducts, without the need for a reference from the Prime Minister;

¹ Explanatory Memorandum, National Security Legislation Monitor Bill 2009. These objectives are reflected in clause 3 of the Bill.

² Reports by bi-partisan parliamentary committees and independent reviews of Australia's counter-terrorism laws have all said that Australia needs to establish an independent body to provide a comprehensive and holistic review of the operation of counter-terrorism laws. See *Inquiry by the Hon. John Clarke QC into the case of Dr Mohamed Haneef*, November 2008, Recommendation 4; Parliamentary Joint Committee on Intelligence and Security, *Inquiry into the proscription of 'terrorist organisations' under the Australian Criminal Code*, (2007), Recommendation 7(b); Parliamentary Joint Committee on Intelligence and Security, *Review of Security and Counter-terrorism Legislation*, December 2006, 21; Security Legislation Review Committee ('SLRC'), *Report of the Security Legislation Review Committee* (2006), 201 [18.2].

³ Clauses 3, 6(1) and 8(1).

- Requiring all reports by the Monitor to be tabled in Parliament; and
 - Requiring the Government to respond formally to the reports and recommendations of the Monitor.
6. We also recommend amending clause 10(2) to include a specific reference to the Monitor's ability to consult with the Australian Human Rights Commission.

3 The powers and functions of the Monitor should be consistent with the Monitor's independent status

7. The powers and functions of the Monitor should be consistent with the Monitor's status as an independent monitor of Australia's counter-terrorism legislation.
8. Clause 3 of the Bill should be amended to make it clear that the object of the Bill is to appoint an **independent** National Security Legislation Monitor. The independent status of the Monitor should also be reflected in the title of his or her office.

3.1 The Monitor's functions and powers

9. Clause 6 states the Monitor's functions are:

(a) to review the operation, effectiveness and implications of:

- (i) Australia's counter-terrorism and national security legislation; and
- (ii) any other law of the Commonwealth to the extent that it relates to Australia's counter-terrorism and national security legislation;

(b) to consider whether Australia's counter-terrorism and national security legislation:

- (i) contains appropriate safeguards for protecting the rights of individuals; and
- (ii) remains necessary;

(c) if a matter relating to counter-terrorism or national security is referred to the Monitor by the Prime Minister—to report on the reference.⁴

10. The legislation which falls under the purview of the Monitor appears to include all major counter-terrorism laws.⁵ Importantly, clause 6(1)(a) enables the Monitor to review 'any other law of the Commonwealth to the extent that it relates to Australia's counter-terrorism and national security legislation'.

11. The Monitor has the power to do all things necessary or convenient to be done for or in connection with the performance of the Monitor's functions.⁶

⁴ Clause 6(1).

⁵ Clause 4.

⁶ Clause 6(3).

12. Clause 6(2) states that it is not a function of the Monitor to review the priorities of, and use of resources by, agencies that are involved in implementing Australia's counter-terrorism strategy or to consider any individual complaints about these agencies.⁷

13. Clause 7 of the Bill provides:

- (1) The Prime Minister may refer a matter relating to counter-terrorism or national security to the [Monitor] either at the Monitor's suggestion or on his or her own initiative.
- (2) The Prime Minister may alter the terms of reference.
- (3) The Prime Minister may give the [Monitor] directions about the order in which he or she is to deal with references.

3.2 The Monitor's reporting function should promote greater transparency and accountability about the operation of anti-terrorism laws

14. The reporting function of the Monitor should be strengthened to promote greater accountability and transparency about the operation of Australia's counter-terrorism laws.

15. This Bill limits the Monitor's function of reporting on his or her reviews to references made by the Prime Minister⁸ and providing annual reports to the Prime Minister.⁹ While the Monitor can request a referral from the Prime Minister (cl 7(1)), the Prime Minister is not obliged to make such referral and may alter the terms of reference (cl 7(2)).

16. We recommend that the Monitor's functions include reporting on his or her own initiative following the conduct of review under cl 6(1)(a)-(b). The Monitor's power to provide such a report should extend beyond the Monitor's function to provide an annual report and it should not depend on receiving a reference under clause 7 from the Prime Minister.

17. As we discuss at [19]-[24] of this submission all the Monitor's reports should be tabled in Parliament and require a formal response from the Government.¹⁰

⁷ Clause 6(2). The information gathering powers contained in clauses 21-25 of this Bill appropriately reflect the Commission's earlier submissions to the Standing Committee on Legal and Constitutional Affairs the Inquiry into the Inquiry into the Independent Reviewer of Terrorism Laws Bill 2008 [No.2]. In accordance with the recommendation of the 2008 Senate Inquiry report into the *Independent Reviewer of Terrorism Laws Bill* [No.2] 2008, clause 31 provides that the Monitor is immune from legal action in relation to work done by the Monitor in the performance or purported performance of his or her powers.

⁸ The Monitor is required to report to the Prime Minister on a reference: cl 30(1).

⁹ Clause 29.

¹⁰ It is noted that provision for the deletion of operationally sensitive material in the annual reports is provided for in clause 29(3) of the Bill. A similar provision could apply to all reports by the Monitor (including reports on a reference or in response to an review initiated by the Monitor) that are tabled in Parliament.

18. We further recommend that the Monitor's functions should be explicitly expanded to include making recommendations about any action that should, in the Monitor's view, be taken to ensure:

- the effective operation of Australia's counter-terrorism laws; and
- that the rights of individuals are adequately protected by those laws.

4 The Monitor's reports should be tabled in Parliament and require a formal response

19. The Bill should require that all reports by the Monitor be tabled in Parliament and impose an obligation upon the Government to respond formally in Parliament to the Monitor's reports.

20. The report of the Inquiry into the *Independent Reviewer of Terrorism Laws Bill 2008* [No.2] recommended that, in addition to reports to parliament on inquiries undertaken by the Independent Reviewer, the Bill should require an annual report on the activities of the Independent Reviewer be tabled in parliament.¹¹

21. This Bill addresses this recommendation by requiring that the Monitor provide an annual report to the Prime Minister¹² and that report be tabled in Parliament by the Prime Minister within 15 sitting days of receiving it.¹³

22. The Bill does not require the Prime Minister to table reports made by the Monitor in response to a reference from the Prime Minister.¹⁴ However, the Prime Minister can direct the Monitor to provide an interim report on the Monitor's work on a reference.¹⁵ These arrangements may undermine public confidence in the independence of the Monitor.

23. The Bill does not require the Government to respond to any reports of the Monitor. In this respect, the Bill does not provide the same level of accountability as the *Independent Reviewer of Terrorism Laws Bill 2008* [No.2], which required that a Minister must, as soon as practicable after receiving a report of a review of terrorism laws, table a response to the report in Parliament.¹⁶

24. We recommend:

¹¹ The Standing Committee on Legal and Constitutional Affairs, Report of the Inquiry into the Independent Reviewer of Terrorism Laws Bill 2008 [no.2], October 2008, Recommendation No. 5. This report also noted that 'the absence of any requirement [in that bill] to report on a regular or prescribed basis directly to Parliament drew criticism from a number of submitters'.

¹² Clause 29 requires the Monitor to prepare and give to the Prime Minister an annual report relating to the performance of the Monitor's functions under s 6(1)(a) and (b) of the Bill. Operationally sensitive information or information that is cabinet in confidence can not be contained in the report: cl 29(3).

¹³ Clause 29(5) requires the Prime Minister to present an annual report to Parliament within 15 sitting days after the day or which he or she receives the report.

¹⁴ Clause 30.

¹⁵ Clause 30 (3). See also clause 30(2) which enables the Monitor to give an interim report to the Prime Minister without receiving a direction to do so.

¹⁶ Independent Reviewer of Terrorism Laws Bill 2008 [No.2], cl 11(2)(b).

- Amending cl 29 to require the Prime Minister to table a response to the annual report of the Monitor within a prescribed period.
- Amending cl 30 to require the Prime Minister to table a report by the Monitor in Parliament and to table the Government's formal response to that report in Parliament within a prescribed period.

5 The Monitor's consideration of international obligations would be assisted by consultation with the Commission

25. One of the objectives of the Bill is to ensure that Australia's counter-terrorism and national security legislation is 'consistent with Australia's international obligations including human rights obligations' and 'contains appropriate safeguards for protecting the rights of the individuals'.¹⁷

26. Through our work with Arab and Muslim Australians we are familiar with concerns that counter-terrorism legislation can have a disproportionate impact on the rights of members of particular communities.¹⁸ We believe establishing an independent Monitor with the power to review the impact of counter-terrorism laws on human rights will play an important role in addressing these concerns.

27. The phrase 'human rights obligations' is not specifically defined in the Bill. However, clause 8(1)(a) of the Bill makes it clear that in performing his or her functions the Monitor 'must have regard to Australia's obligations under international agreements (as in force from time to time)'. This gives the Monitor the power to have regard to all the international human rights instruments that Australia has ratified.¹⁹

28. Clause 10(1) of the Bill provides that when performing functions relating to Australia's counter-terrorism and national security legislation, the Monitor must have regard to:

(a) the functions of agencies that have functions relating to, or are involved in the implementation of, that legislation; and

(b) functions relating to that legislation that are conferred on a person who holds any office or appointment under a law of the Commonwealth or of a State or Territory.

29. The Explanatory Memorandum explains that cl 10 means that 'the Monitor must have regard to the functions and role of other oversight and accountability agencies such as [among others] the Human Rights Commissioner'. Subclause 10(2) enables the Monitor to liaise with such oversight and accountability

¹⁷ Clause 3; see also Explanatory Memorandum, National Security Legislation Monitor Bill 2009, 1.

¹⁸ See for example, Human Rights and Equal Opportunity Commission, *Isma □–Listen: National consultations on eliminating prejudice against Arab and Muslim Australians*, (2004).

¹⁹ See for example, the *International Covenant on Civil and Political Rights*, the *Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment*, the *International Convention on the Elimination of All Forms of Racial Discrimination*, the *Optional Protocol on the Convention Against Torture and Other Forms of Cruel, Inhuman and Degrading Treatment or Punishment* and, in the case of juveniles suspected or charged with counter-terrorism offences, the *Convention on the Rights of Child*.

agencies as the Monitor considers necessary to effectively perform his or her functions’.

30. Unlike the *Independent Reviewer of Terrorism Laws Bill 2008 [No.2]*, this Bill does not contain a specific reference to the ability of the Monitor to consult with the Australian Human Rights Commission.²⁰ Instead, the Bill provides that the Monitor may consult with the Inspector General of Intelligence and Security, the Ombudsman and the head of any other relevant agency.²¹
31. The Commission has special expertise on ensuring domestic compliance with Australia’s international human rights obligations. We look forward to working cooperatively and productively with the Monitor on issues relating to the impact of counter-terrorism laws on human rights.
32. To further promote effective cooperation between the Commission and the Monitor we recommend amending clause 10(2) to include a specific reference to the Australian Human Rights Commission.

6 Concluding remarks

33. Subject to the recommendations in this submission, we support the passage of the Bill. We believe the Monitor will assist the Australian Government to identify how to improve the effectiveness of counter-terrorism and national security legislation and identify how to remedy any disproportionate and unnecessary interference with fundamental rights and freedoms caused by the operation of these laws.

²⁰ Clause 9(3) of the *Independent Reviewer of Terrorism Laws Bill 2008 [No.2]*.

²¹ The Bill, cl 10(2).