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

## Senate Committee on Finance and Public Administration Legislation

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# Introduction

The Law Council of Australia is grateful for the opportunity to comment on the *National Security Legislation Monitor Bill 2009* ('the NSLM Bill').

The Law Council has repeatedly called for establishment of an office to undertake regular, independent and comprehensive review of Australia's anti-terrorism laws, and supports the objects of the NSLM Bill in establishing the office of National Security Legislation Monitor ('the NSLM') to undertake this function.

In September 2008 the Law Council made a submission to the Senate Committee on Legal and Constitutional Affair's inquiry into the *Independent Reviewer of Terrorism Laws Bill 2008 (No 2)* ('the 2008 Bill'), a private members Bill introduced in June 2008.

The Law Council is pleased that this Committee intends to assess the extent to which the recommendations of the Senate Committee on Legal and Constitutional Affairs in respect to the 2008 Bill have been addressed by the NSLM Bill.

The Law Council is generally of the view that the NSLM Bill addresses many of the recommendations made by the Senate Committee on Legal and Constitutional Affairs in respect to the 2008 Bill, and many of the matters raised by the Law Council in its submission on that Bill.

In particular, the Law Council is pleased to see that the NSLM Bill contains a clearly defined mandate providing a list of matters against which the NSLM is required to review Australia's anti-terrorism laws. However, as will be discussed in further detail in this submission, there are a number of features of the NSLM Bill that the Law Council's believes warrant careful consideration by this Committee, including:

- the absence of a specific reference to Australia's international human rights obligations in clause 6 outlining the functions of the NSLM;
- the absence of a reference power for any body other than the Prime Minister;
- the absence of a specific requirement that the NSLM exercise his or her coercive information gathering powers in accordance with the principles of natural justice and procedural fairness;
- the absence of detail in the NSLM Bill regarding the structure and resourcing of the NSLM; and
- the ability of the Executive Government to exercise control over the publication of the content of the NSLM's reports.

As a preliminary matter, the Law Council is disappointed that the term 'independent' does not feature in the title of the NSLM Bill or in the title of the Monitor itself. While many features of the NSLM underscore its independent character, the Law Council is of the view that it is of symbolic importance to include the term 'independent' in the title of the office. The experience of the Independent Reviewer of Terrorism Laws in the United Kingdom has shown that public confidence in the independence of this body is vital to its success. The independence of the Australian body charged with reviewing anti-terrorism laws must be evident in both form and substance if it is to successfully perform its function of informing the Australian community of how our anti-terrorism laws are working in practice and suggesting possible areas for reform if necessary. This object would be assisted by including the term 'independent' in its title.

# Background

## Calls for Review and Reform of Australia's Anti-Terrorism Laws

The past eight years have seen prolific legislative activity in an effort to protect the Australian community from the threat of international terrorism. Since 2001 the Commonwealth Parliament has passed over 40 separate pieces of legislation dealing with terrorism and security.

While undoubtedly the threat of international terrorism poses significant complexities and challenges for law makers, many of the legislative measures introduced depart from established principles of the Australian criminal law and have a restrictive impact on individual rights.

For many years, the Law Council has submitted that the exceptional nature of these anti-terrorism measures – and the often disproportionate impact they have on the enjoyment of individual rights - should not become normalised within the Australian criminal justice system and must be subject to regular and comprehensive review.

While valuable in their own right, past reviews of Australia's terrorism laws[1] have failed to provide a comprehensive analysis of the content and workings of Australia's terrorism laws and have excluded key legislative Acts such as the *National Security Information (Criminal and Civil Proceedings) Act* and Part 1C of the *Crimes Act*.

For this reason, the Law Council has repeatedly called for comprehensive, independent evaluation of Australia's terrorism laws, which considers the content and operation of such laws and explores their impact on the practices of law enforcement and intelligence officers, courts and the community more broadly.

This call for review has been shared by a number of independent Committees and by Parliament itself. The Sheller Committee,[2] the Parliamentary Joint Committee on Intelligence and Security ('the PJCIS') and the Clarke Inquiry into the Haneef case[3] have all recommended independent review of Australia's anti-terrorism laws and considered the appointment of an Independent Reviewer or an Independent Review Committee.

[1] For example, the first package of terrorism and security legislation was reviewed by the Security Legislation Review Committee ('the Sheller Committee') and subsequently the Parliamentary Joint Committee on Intelligence and Security ('the PJCIS'). See s4(6) of the *Security Legislation Amendment (Terrorism) Act 2002*; paragraph 29 (1) (ba) of the *Intelligence Services Act 2001*; subsection 4 (9) of *Security Legislation Amendment (Terrorism) Act 2002;* Division 3 Part III of the *Australian Security Intelligence Organisation Act 1979* was reviewed by a Parliamentary Joint Committee in November 2006 and will be subject to further review in 2016, see Parliamentary Joint Committee on ASIO, ASIS and DSD, *ASIO's Questioning and Detention Powers: Review of the operation, effectiveness and implications of Division 3 of Part III of the ASIO Act 1979*, November 2005; Schedule 7 of the *Anti Terrorism Act 2005 (No.2)*(Cth), which revised the law of sedition, was referred to the Australian Law Reform Commission (ALRC) for inquiry in 2006. The ALRC's Report*, Fighting Words: A Review of Sedition Laws in Australia* (ALRC 104) —was delivered to the Attorney-General on 31 July 2006; and Division 102 of the *Criminal Code*, containing the terrorist organisation proscription regime and related offences, was reviewed by the PJCIS in 2007. This report was tabled in December 2006 (PJCIS Report) para [2.48] available at http://www.aph.gov.au/house/committee/pjcis/securityleg/index.htm..

[2] The Attorney-General established the independent Security Legislation Review Committee on 12 October 2005 under the Chairmanship of the Honourable Simon Sheller AO QC (the Sheller Committee). The Sheller Committee was made up of representatives of major stakeholder organisations. It conducted a public inquiry, receiving 29 submissions and taking evidence from 18 witnesses over 5 days of hearings in Melbourne, Sydney, Canberra and Perth.

[3] The Hon. John Clarke QC, *Report of the Inquiry into the Case of Dr Mohamed Haneef*, Volume One, November 2008.

Legislation appointing an Australian Independent Reviewer has also been previously proposed to Parliament.[4]

The Law Council also notes that in April 2009 the United Nations Human Rights Committee (UNHRC) recommended that Australia review its anti-terrorism laws and ensure that these measures are in compliance with the human rights protected under the *International Covenant on Civil and Political Rights (ICCPR)*.[5]

The Sheller Committee Recommendations

In this course of its report on the operation, effectiveness and implications of the package of anti-terrorism legislation introduced during 2002 and 2003,[6] the Sheller Committee noted the importance of undertaking regular review of Australia's anti-terrorism laws. The Sheller Committee observed that given the relatively short time in which the legislation had been in operation, there was a limit to the value of a review in 2006.[7] It noted that in the next few years, when more would be known about the operation of such laws, an independent body would be better placed to fully assess their operation and effectiveness.[8] For this reason, the Sheller Committee recommended that:

> *the government establish a legislative-based timetable for continuing review of the security legislation by an independent body, such as the [Sheller Committee], to take place within the next three years.*[9]

The Committee noted the existence of several possible models to provide ongoing review of terrorism legislation, such as a Public Advocate, a Public Interest Monitor and an Independent Reviewer.[10]

The Sheller Committee recommended that if the Australian Government were to establish a similar body in Australia, it should be:[11]

- attached to the office of the Inspector-General of Intelligence and Security (IGIS), or the office of the Commonwealth Ombudsman; and
- required to provide a report to the Attorney-General every 12 months, which the Attorney-General should be obliged to table in Parliament.

It was recommended that the report of the Independent Reviewer deal with:

- the operation and effectiveness of Part 5.3 of the Criminal Code, and

[4] See *Independent Reviewer of Terrorism Laws Bill 2008,* introduced by Petro Georgiou MP in March 2008, Independent *Reviewer of Terrorism Laws Bill 2008 (No 2),* introduced by Senators Troeth and Humphries in June 2008.
[5] UN Human Rights Committee, *Consideration of reports submitted by States parties under article 40 of the Covenant : International Covenant on Civil and Political Rights : 5th periodic report of States parties : Australia*, 19 February 2008, CCPR/C/AUS/5, available at: http://www.unhcr.org/refworld/docid/48c7b1062.html
[6] *Security Legislation Amendment (Terrorism) Act 2002*; *Suppression of the Financing of Terrorism Act 2002*; *Criminal Code Amendment (Suppression of Terrorist Bombings) Act 2002*; *Border Security Legislation Amendment Act 2002*; *Telecommunications Interception Legislation Amendment Act 2002* and the *Criminal Code Amendment (Terrorism) Act 2003*
[7] As at the date of submissions to the Sheller Committee, twenty-four people had been charged with offences under the amended provisions of the Criminal Code originally enacted in 2002. In only two of these matters had the accused been tried See Sheller Report para [18.1].
[8] Sheller Report para [18.1].
[9] Sheller Report para [18.2].
[10] When considering the possibility of an Independent Reviewer, the Committee referred to the United Kingdom (UK) experience where an Independent Reviewer reports to the Secretary of State on the implications of the operation of UK terrorism laws and any proposals for reform.
[11] Sheller Report para [18.2]

- the implications for the operation and effectiveness of any Government proposals for the amendment of terrorism laws.

The Joint Parliamentary Committee's Recommendations

In December 2006 the PJCIS released its report entitled *Review of Security and Counter Terrorism Legislation* ('the PJCIS Report').[12] Chapter 2 of the PJCIS Report considered the need for ongoing review of terrorism laws by an Independent Reviewer or independent committee.[13] The PJCIS recommended that:[14]

- the Government appoint an independent person of high standing as an Independent Reviewer of terrorism law in Australia;
- the Independent Reviewer be free to set his or her own priorities and have access to all necessary information;
- the Independent Reviewer report annually to the Parliament;
- the *Intelligence Services Act 2001* be amended to require the PJCIS to examine the reports of the Independent Reviewer tabled in the Parliament.

The PJCIS described the existing system of review as 'fragmented, limiting the capacity for independent, ongoing and comprehensive examination of how terrorism laws are operating'.[15] In contrast, the review model favoured by the PJCIS would take 'a holistic approach to terrorism laws with a statutory mandate to report annually to the Parliament'.[16] In this respect the PJCIS preferred a single independent appointee, rather than periodic review by an independent committee.[17]

The PJCIS envisaged that the Independent Reviewer would:[18]

- be someone of high standing who commands respect and is trusted as an impartial and informed source of information and analysis;
- be free to set their own priorities and have access to all relevant information, including security sensitive information where necessary; and
- work cooperatively with agencies and other relevant office holders such as the IGIS and the Commonwealth Ombudsman.

The PJCIS suggested that it would be appropriate for a parliamentary committee to receive and consider any reports of the Independent Reviewer.[19]

[12] The Parliamentary Joint Committee on Intelligence and Security's Review of Security and Counter Terrorism Legislation was tabled in December 2006 (PJCIS Report) available at http://www.aph.gov.au/house/committee/pjcis/securityleg/index.htm.
[13] See PJCIS Report paras [2.42]-[2.62]. The majority of witnesses supported the proposal for further review of terrorism laws, see PJCIS Report para [2.54].
[14] PJCIS Report Recommendation 2 at p.22.
[15] PJCIS Report para [2.53].
[16] See PJCIS Report para [2.56].
[17] At the PJCIS Committee's inquiry, the Commonwealth Attorney General's Department suggested that the parliamentary committee system is more inclusive and effective than an individual reviewer. The Committee acknowledged the important role of the parliamentary committee, but found that a case had been established for independent ongoing oversight of Australia's terrorism laws. See PJCIS Report para [2.59]; see also AGD, *Transcript*, 1 August 2006, p. 8.
[18] PJCIS Report paras [2.57]-[2.58].

Independent Reviewer of Terrorism Laws Private Members Bill

On 23 June 2008 the *Independent Reviewer of Terrorism Laws Bill 2008 (No 2)* ('the 2008 Bill'), a private Senator's bill co-sponsored by Senators Troeth and Humphries, was introduced into the Senate ('the 2008 Bill'). This was the second private members Bill of this nature introduced into Parliament in 2008.[20]

The 2008 Bill sought to establish an Independent Reviewer of Terrorism Laws ('an Independent Reviewer') to review the operation, effectiveness and implications of laws relating to terrorist acts.[21]

The Independent Reviewer established under the 2008 Bill would be:

- appointed by the Governor General, on the recommendation of the Prime Minister, following consultation with the Leader of the Opposition in the House of Representatives;[22]
- appointed on a full-time or part-time basis for a term not exceeding five years, with reappointment possible;[23]
- tasked with the function of reviewing the 'operation effectiveness and implications of laws relating to terrorist acts', either by his or her own motion or by direction from the responsible Minister or the PJCIS[24]
- invested with information gathering powers;[25]
- required to report to the relevant Minister,[26] who would then present this report to each House of Parliament;[27]
- required to provide the relevant Minister with an annual report of his or her activities, which would also be tabled in Parliament[28] and considered by the PJCIS and included in its annual report;[29] and
- required to work cooperatively with existing review bodies to ensure a comprehensive approach and avoid duplication of work.[30]

[19] The Committee noted that this model ensures that the legislature has a clear and unambiguous role in exercising its oversight and scrutiny functions on important matters of public administration, PJCIS Report para [2.61]; see also *Public Accounts and Audit Committee Act 1951(Cth)*

[20] The other Bill was the *Independent Reviewer of Terrorism Laws Bill 2008,* introduced by Petro Georgiou MP in March 2008.

[21] *Independent Reviewer of Terrorism Laws Bill 2008* (Cth) s3.

[22] *Independent Reviewer of Terrorism Laws Bill 2008* (Cth) s6(2) and (3).

[23] *Independent Reviewer of Terrorism Laws Bill 2008* (Cth) s12. A person may resign as Independent Reviewer in writing to the Governor General, see *Independent Reviewer of Terrorism Laws Bill 2008* (Cth) s13. An appointment may be terminated on the grounds of misbehaviour, incapacity, bankruptcy or on other limited grounds provided in section 14 of the June 2008 Bill.

[24] *Independent Reviewer of Terrorism Laws Bill 2008* (Cth) s8.

[25] *Independent Reviewer of Terrorism Laws Bill 2008* (Cth) ss9-10). Where the Independent Reviewer requires access to documents with a national security classification, arrangements must be made with the relevant agencies for the protection of the documents while they remain in the Independent Reviewer's control, see s10(3)-(4) *Independent Reviewer of Terrorism Laws Bill 2008* (Cth).

[26] *Independent Reviewer of Terrorism Laws Bill 2008* (Cth) s11(1).

[27] *Independent Reviewer of Terrorism Laws Bill 2008* (Cth) s11(2).

[28] *Independent Reviewer of Terrorism Laws Bill 2008* (Cth) s11(3).

[29] *Independent Reviewer of Terrorism Laws Bill 2008* (Cth) s11(4).

[30] *Independent Reviewer of Terrorism Laws Bill 2008* (Cth) s9(3).

In a submission to the Senate Committee on Legal and Constitutional Affairs Inquiry into the 2008 Bill, the Law Council expressed its support for the objects of the Bill. However, the Law Council also encouraged the Committee to give further consideration to a number of aspects of the 2008 Bill, including:

- the lack of legislative parameters defining the Independent Reviewer's mandate and functions;
- the fact that the Independent Reviewer reports directly to the Minister rather than to Parliament;
- the ability of the Independent Reviewer to exclude certain parts of his or her report from publication; and
- whether a committee or panel would be preferable to the appointment of a single Independent Reviewer.

When the Senate Committee on Legal and Constitutional Affairs released its report on the 2008 Bill it recommended that the Bill be supported in principle, but that the Bill be amended to: [31]

- comprehensively describe the role and function of the Independent Reviewer, and enumerate the criteria by which legislation should be reviewed;
- detail the legal status of the Independent Reviewer; the legislation intended to fall under its purview; remuneration of the Independent Reviewer; resourcing of the Independent Reviewer; and immunity or otherwise of the Independent Reviewer from civil liability;
- appoint a panel of three people with relevant expertise, with staggered terms of service where possible, rather than a single Independent Reviewer; and
- require the Independent Reviewer to provide an Annual Report on its activities and that this Report be tabled in Parliament.

An amended version of the 2008 Bill, taking into account the Senate Committee's recommendations, passed through the Senate on 13 November 2008 with the combined support of the Opposition and the Greens. The amended Bill has since been introduced into the House of Representatives, but has yet to be debated.

Clarke Inquiry into Haneef Case

The most recent call for the appointment of a body to undertake independent review of Australia's anti-terrorism laws came from the Hon Mr Clarke QC following his Inquiry into the handling of the case of Dr Mohamed Haneef.

On 23 December 2008 the Commonwealth Attorney General publically released the Report of the Inquiry into the Case of Dr Haneef (the Haneef Report). The same day the Commonwealth Government also released its response to the recommendations in the Haneef Report and to a range of recommendations made by past independent reviews into Australia's anti-terrorism laws. [32]

[31] Senate Committee on Legal and Constitutional Affairs, *Inquiry into the Independent Reviewer of Terrorism Law s Bill 2008 (No 2),* October 2008, Recommendations p. ix.
[32] Commonwealth Attorney-General's Department, 'Australian Government response to Clarke Inquiry into the Case of Dr Mohamed Haneef – December 2008', 23 December 2008,

A number of Mr Clarke's key observations confirmed the Law Council's concerns that it is not just the content of Australia's anti-terrorism laws that can lead to an erosion of individual rights, but also the way these laws are understood and applied by law enforcement and intelligence officers.

Among his ten key recommendations for reform, Mr Clarke recommended that consideration be given to the appointment of an independent reviewer of Commonwealth counter-terrorism laws.[33]

The current NSLM Bill is part of the Government's response to this recommendation, and a number of other recommendations contained in three other independent reviews into Australia's anti-terrorism laws.

http://www.ag.gov.au/www/agd/agd.nsf/Page/Publications_AustralianGovernmentresponsetoClarkeInquiryintotheCaseofDrMohamedHaneef-December2008 at 16 June 2009. The other reviews were the Parliamentary Joint Committee on Intelligence and Security's *Review of Security and Counter Terrorism Legislation* (2006); the Parliamentary Joint Committee on Intelligence and Security's *Inquiry into the Proscription of 'terrorist organisations' under the Australian Criminal Code* (2007); and the Australian Law Reform Commission's Report, *Fighting Words: A Review of Sedition Laws in Australia,* (2006).

[33] The Hon. John Clarke QC, *Report of the Inquiry into the Case of Dr Mohamed Haneef*, Volume One, November 2008.

# Role and Functions of National Security Legislation Monitor

## Object and Functions of the NSLM

The object of the NSLM Bill is stated in clause 3 as follows:

> *... to appoint a National Security Legislation Monitor who will assist Ministers in ensuring that Australia's counter-terrorism and national security legislation:*
>
> *(a) is effective in deterring and preventing terrorism and terrorism-related activity which threatens Australia's security; and*
>
> *(b) is effective at responding to terrorism and terrorist related activity; and*
>
> *(c) is consistent with Australia's international obligations; and*
>
> *(d) contains appropriate safeguards for protecting the rights of individuals.*

This object is reflected in the functions of the NSLM, which are set out in subclause 6(1) of the NSLM as follows:

- to review the operation, effectiveness and implications of:
  - Australia's counter-terrorism and national security legislation; and
  - any other law of the Commonwealth to the extent that it relates to Australia's counter-terrorism and national security legislation;
- to consider whether Australia's counter-terrorism and national security legislation:
  - contains appropriate safeguards for protecting the rights of individuals; and
  - remains necessary;
- if a matter relating to counter-terrorism or national security is referred to the Monitor by the Prime Minister—to report on the reference

The term 'counter-terrorism and national security legislation' is defined in the Bill to mean:[34]

- Division 3 of Part III of the *Australian Security Intelligence Organisation Act 1979* (ASIO's questioning and detention powers);
- Part 4 of the *Charter of the United Nations Act 1945* (offences relating to membership of a prohibited organisation);
- Division 3A of Part IAA of the *Crimes Act 1914* (stop, search and questioning powers in relation to a terrorist act);

[34] Proposed s4.

- Sections 15AA and 19AG of the *Crimes Act* (applications for bail in relation to a terrorist offence);
- Part 1C of the *Crimes Act* (the 'dead time' provisions allowing detention of terrorist suspects without charge);
- Chapter 5 of the *Criminal Code* (terrorist act and terrorist organisation offences);
- Part IIIAAA of the *Defence Act 1903*
- The *National Security Information (Civil and Criminal Proceedings) Act 2004*.

Under the Bill, the NSLM is given the power to do all things necessary or convenient to be done for or in connection with the performance of his or her functions.[35] However, subclause 6(2) makes it clear that the functions of the NSLM do *not* include:

- reviewing the priorities of, and use of resources by, agencies that have functions relating to, or are involved in the implementation of, Australia's counter-terrorism and national security legislation; or
- considering any individual complaints about the activities of Commonwealth agencies that have functions relating to, or are involved in the implementation of, Australia's counter-terrorism and national security legislation.

The Law Council supports the object of the Bill as outlined in clause 3 and welcomes the broad mandate of the NSLM to review the full range of Australia's anti-terrorism laws. The Law Council is particularly pleased to see the following matters specifically included in the functions of the NSLM:

- the legislative provisions listed in clause 4 of the Bill, which comprise the most significant legislative provisions dealing with the investigation and prosecution of terrorist activity and include provisions previously not subject to independent review;
- the scope provided for the NSLM to review any other law of the Commonwealth to the extent that it relates to Australia's counter-terrorism and national security legislation;
- the specific requirement for the NSLM to consider whether these provisions contain appropriate safeguards for protecting the rights of individuals and whether they remain necessary; and
- the use of the terms 'operation' and 'effectiveness' in respect to Australia's anti-terrorism legislation, which are consistent with the terms used in the PJCIS term's of reference..

The functions attributed to the NSLM under the NSLM Bill largely address the concerns the Law Council raised in respect of the 2008 Bill relating to the lack of legislative parameters defining the Independent Reviewer's mandate. These concerns were shared by the Senate Committee on Legal and Constitutional Affairs which recommended that the role and function of the Independent Reviewer be clearly described in the legislation.[36]

[35] NSLM Bill proposed s 6(3).
[36] Senate Committee on Legal and Constitutional Affairs, *Inquiry into the Independent Reviewer of Terrorism Law s Bill 2008 (No 2),* October 2008, Recommendation 2.

The Law Council was also concerned that the 2008 Bill failed to include a specific reference to evaluating Australia's anti-terrorism laws for their impact on individual rights.

The Law Council is pleased to note a specific reference to Australia's international human rights obligations in subclause 3(c) of the Bill, but notes that this specific reference is not included in clause 6 of the Bill, which prescribes the NSLM's functions.

The Law Council remains of the view that it is essential that the NSLM be specifically required to

- to consider whether Australia's counter-terrorism and national security legislation complies with Australia's international human rights obligations (including fundamental legal principles such as the right to silence; the right to be informed of the nature of the charge in respect of which a person has been detained; and the right to legal representation during questioning) and

- to consider whether there are any less-restrictive means by which the objectives of the relevant counter-terrorism and national security legislation could be achieved.

These matters were noted as receiving support from a number of submission makers to the Senate Committee on Legal and Constitutional Affairs Inquiry into the 2008 Bill.[37]

The Law Council notes that these matters may generally fall within the scope of clause 6(1) which requires the NSLM to consider whether the laws contain appropriate safeguards for protecting the rights of individuals, particularly when regard is had to clause 8 of the Bill which requires the NSLM to consider Australia's international obligations when undertaking its functions. However, as noted below, neither clause 6 nor clause 8 makes specific reference to human rights principles. The Law Council is of the view that specifying these particular matters in clause 6 would provide a concerted focus on the impact of Australia's anti-terrorism laws on the rights of individuals and help ensure that Australian laws in this area meet international human rights standards.

The Law Council would also support broadening the mandate and functions of the NSLM beyond the consideration of existing legislation to include a review role in respect of proposed or draft legislative provisions relating counter-terrorism or national security. In the past, when proposed changes to Australia's counter-terrorism measures have been introduced they have often proceeded quickly through Parliament with little opportunity for robust scrutiny of their content and operation. Investing the NSLM with the power to review proposed additions or changes to Australia's anti-terrorism laws would enhance existing Parliamentary scrutiny mechanisms and help ensure that such proposed provisions are necessary and effective in countering terrorism, contain appropriate safeguards for protecting the rights of individuals and comply with Australia's international obligations, including our international human rights obligations. This function could be added by amending subclause 6(1)(a) to include a reference to 'proposed additions or changes to any Commonwealth law to the extent that it relates to Australia's counter-terrorism and national security legislation'.

The Law Council further notes that the functions of the NSLM as outlined in clause 6 of the NSLM Bill differ from those attributed to the UK Independent Reviewer of Terrorism Laws in an important respect. Unlike the UK Independent Reviewer, the NSLM has no specific role in respect of the issuing of control orders.

[37] Senate Committee on Legal and Constitutional Affairs, *Inquiry into the Independent Reviewer of Terrorism Law s Bill 2008 (No 2),* October 2008, p. 15.

One of the tasks of the UK Independent Reviewer is to 'replicate exactly the position of the Home Secretary at the initiation of a control order'.[38] The UK Independent Reviewer is given the same information as that provided to the Home Secretary, and draws a conclusion as to whether a control order should have been issued in each case.[39] To date, Lord Carlile has reached the conclusion that in each case, a control order should have been made. However he has, on occasion, disagreed with the conditions imposed by control orders.[40]

The UK Independent Reviewer is also charged with making recommendations as to any necessary reforms to the control order laws. In 2006 Lord Carlile recommended that officials of the control authorities meet regularly to review each case, with a view to revising the necessity of the conditions placed on each person subject to a control order, including the effects of such an order on the person's family.[41] In response the UK Government established the Control Order Review Group, which meets quarterly to assess the conditions of each control order. Lord Carlile has also recommended improvements to the Home Secretary's quarterly reporting to Parliament.

While the control order and preventative detention order regime in Australia differs from that in the UK in some respects, the Law Council is of the view that there is a vital role to be played by an independent body in all aspects of the Australian control orders and preventative detention order regime.[42] The need for a such a body, with access to all material upon which an application for such orders is based, is particularly acute where interim orders can be granted in the absence of the persons who are to be subject to them, or those persons and their lawyers are denied access to all of the material upon which an order is sought.[43]

Like the Sheller Committee,[44] the Law Council encourages this Committee to consider broadening the function of the NSLM to include a specific role in respect to monitoring the

[38] Lord Carlile of Berriew, Independent Reviewer of Terrorism Legislation, *First Report of the Independent Reviewer Pursuant to Section 14(3) of the Prevention of Terrorism Act 2005*, February 2006,http://security.homeoffice.gov.uk/news-publications/publication-search/prevention-terrorism-act-2005/laws-against-terror.pdf?view=Binary, accessed September 2008.

[39] For example, in His Lordship's February 2008 Report Lord Carlile stated that he would have reached the same decision as the Secretary of State in each case in which a control order was made, so far as the actual making of the control order is concerned. Lord Carlile made it clear that the Secretary of State acted appropriately in relation to the exercise of her powers under the Act, however, this does not mean that the Secretary of State was correct in every case. It was noted that court procedures for the review of decisions made by the Minister had led to the quashing of three control orders in 2007. See Lord Carlile of Berriew QC, *Third Report of the Independent Reviewer Pursuant to Section 14(3) of the Prevention of Terrorism Act 2005,* 18 February 2008 available at http://security.homeoffice.gov.uk/news-publications/publication-search/general/report-control-orders-2008?view=Binary accessed September 2008 (the February 2008 Report)..

[40] See for example the February 2008 Report at [454]-[47].

[41] The February 2008 Report at [46].

[42] See Law Council of Australia submission to the Senate Legal and Constitutional Committee's *Inquiry into the Anti-Terrorism, (Non 2) Bill 2005*, submitted 11 November 2005 p. 17. See also Law Council of Australia's submission to the Senate Legal and Constitutional Affair's Committee *Inquiry into the Independent Reviewer of Terrorism Laws Bill (No 2)* (September 2008).

[43] Under the control order regime in Division 104 of the *Criminal Code* there is a limited role of the Queensland Public Interest Monitor, if the person subject to the control order is from Queensland. For example, the Queensland Public Interest Monitor is entitled to receive a copy of the interim control order and a notification if the control order is confirmed, see ss104.12(5), 104.14(4)(b), 104.18(3)(b), 104.31 of the *Criminal Code.* No such role is provided in respect of preventative detention orders made under Division 105, however, s105.49 provides the Division 105 does 'not affect a function or power that the Queensland public interest monitor, or a Queensland deputy public interest monitor, has under a law of Queensland'.

[44] Sheller Report para [18.3].

issue of control orders and preventative detention orders. Alternatively, a separate body, such as a Public Interest Monitor, could be appointed to perform this function.[45]

## Regard to be had to International Obligations and National Arrangements

As noted above, clause 8 of the Bill provides that when performing its functions, the NSLM must have regard to

- Australia's obligations under international agreements (as in force from time to time); and
- arrangements agreed from time to time between the Commonwealth, the States and the Territories to ensure a national approach to countering terrorism.

The Law Council strongly supports the inclusion of the requirement for the NSLM to have regard to Australia's international obligations when performing its functions, but notes the lack of specific reference to Australia's international human rights obligations in clause 8.

The Explanatory Memorandum makes it clear that such obligations would be included in this clause, referring to Australia's obligations under the International Convention on Civil and Political Rights and the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment.[46] The Explanatory Memorandum also points out that this requirement also means that Australia should have regard to international instruments which led Australia to enact a strong counter-terrorism framework such as the 16 United Nations counter-terrorism conventions and protocols and the United Nations Security Council Resolutions 1267 and 1373 concerning the freezing of assets of terrorists.[47]

Guidance has been provided by a number of international and United Nations (UN) bodies as to how to go about meeting these concurrent sets of international obligations. [48] For example, following the terrorist attacks in September 2001, 17 independent experts of the UN Commission on Human Rights called upon States to*:*

> *limit the measures taken to the extent strictly required by the exigencies of the situation. Public policies must strike a fair balance between on the one hand the enjoyment of human rights and fundamental freedoms by all and on the other hand legitimate concerns over national and international security. The fight against*

[45] Under the control order regime in Division 104 of the *Criminal Code* there is a limited role of the Queensland Public Interest Monitor, if the person subject to the control order is from Queensland. For example, the Queensland Public Interest Monitor is entitled to receive a copy of the interim control order and a notification if the control order is confirmed., see ss104.12(5), 104.14(4)(b), 104.18(3)(b), 104.31 of the *Criminal Code.* No such role is provided in respect of preventative detention orders made under Division 105, however, s105.49 provides the Division 105 does 'not affect a function or power that the Queensland public interest monitor, or a Queensland deputy public interest monitor, has under a law of Queensland'.

[46] Explanatory Memorandum to the *National Security Legislation Monitor Bill 2009* p. 5.

[47] Explanatory Memorandum to the *National Security Legislation Monitor Bill 2009* p. 5. Australia a party to: International Convention for the Suppression of the Financing of Terrorism; International Convention for the Suppression of Terrorist Bombings; Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents; International Convention against the Taking of Hostages. For further information on Conventions to which Australia is a party see http://www.austlii.edu.au/au/other/dfat/subjects/.

[48] See for example, United Nations Human Rights Committee, 'Terrorism and human rights' Resolution 2002/24; Joint statement with the Secretary-General of the Council of Europe and the Director of the OSCE Office for Democratic Institutions and Human Rights (29 November 2001); UN High Commissioner for Human Rights, 'Statement of Criteria', UN Doc. /CN.4/2002/18, Annex, 27 February 2002.

*terrorism must not result in violations of human rights as guaranteed under international law.*[49]

To assist States to meet their human rights obligations in the context of the threat of international terrorism, the UN High Commissioner for Human Rights has provided the following statement of criteria to be followed when implementing counter-terrorism measures:

*3. Where, in limited and specific circumstances the limitation of some rights is permitted, the laws authorizing restrictions:*

*(a) should use precise criteria; and*

*(b) may not confer unfettered discretion on those charged with their execution.*

*4. For limitations of rights to be lawful, they must:*

*(a) be prescribed by law;*

*(b) be necessary for public safety or public order;*

*(c) not impair the essence of the right;*

*(d) be interpreted strictly in favour of the rights at issue;*

*(e) be necessary in a democratic society;*

*(f) conform to the principle of proportionality;*

*(g) be appropriate to achieve their protective function, and be the least intrusive instrument amongst those which might achieve that protective function;*

*(h) be compatible with the objects and purposes of human rights treaties;*

*(i) respect the principle of non-discrimination; and*

*(j) not be arbitrarily applied.*[50]

The Law Council would encourage the NSLM to take into account this and other guidance provided by UN human rights bodies when assessing Australia's anti-terrorism laws for compliance with Australia's international obligations. A specific requirement to consider Australia's anti-terrorism measures in light of Australia's international human rights obligations in clauses 6 and 8 of the Bill may assist the NLSM to do so.

Clause 8 of the Bill also requires the NSLM to have regard to national arrangements agreed to from time to time between the Commonwealth, States and Territories, such as the arrangements between each police force in Australia in relation to terrorism matters, and arrangements facilitated through the National Counter-Terrorism Committee.

The Law Council appreciates the need for the NSLM to have regard to these arrangements when undertaking its functions, however, the Law Council is concerned that there may potentially be a conflict between the arrangements made between the

[49] Message by 17 independent experts of the Commission on Human Rights on the occasion of Human Rights Day, 10 December 2001, UN Doc E/CN.4/2002/137, Annex 1.

[50] UN High Commissioner for Human Rights, 'Statement of Criteria', UN Doc. /CN.4/2002/18, Annex, 27 February 2002.

Commonwealth, States and Territories in respect to counter-terrorism and Australia's international obligations in this area, in particular Australia's international human rights obligations.

For example, the initial summit of State and Territory leaders convened by then Prime Minster Howard in October 2001 saw the Commonwealth, States and Territories agree to a 'new framework under which transnational crime and terrorism can be dealt with by law enforcement at a Commonwealth level'[51] and saw the States and Territories refer constitutional power to the Commonwealth to address the threats of transnational crime and terrorism'.[52] This agreement in turn led to the enactment of the *Security Legislation Amendment (Terrorism) Act 2002* ('the *SLAT Act'*) along with a package of other counter-terrorism legislation.[53] The *SLAT Act* included a definition of 'terrorist act' and a range of new terrorist-related offences to be inserted into a new Part 5.3 of the Commonwealth *Criminal Code*. This definition of 'terrorist act' has been found by the UN Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism ('UN Special Rapporteur') to depart from internationally accepted definitions of 'terrorist act' and Australia's international obligations in this area. The UN Special Rapporteur took the view that the definition of 'terrorist act' in section 100.1 of the *Criminal Code* oversteps the Security Council's characterisation of the term by including acts such as causing damage to property or to electronic systems, including actions not defined in the international conventions and protocols relating to terrorism. [54]

In the event of any conflict between Australia's international obligations and arrangements agreed to between the Commonwealth, States and Territories, the NSLM should be required to give priority to Australia's international human rights obligations when evaluating the content, effectiveness and operation of the particular provision in question. In order to ensure that this approach is adopted, the Law Council has suggested that a specific reference to Australia's international human rights obligations be included in clause 6 of the Bill.

## Emphasis on Recently Used Legislation

Clause 9 of the Bill provides that when performing his or her functions the NSLM must:

> *give particular emphasis to provisions of that legislation that have been applied, considered or purportedly applied by employees of agencies that have functions relating to, or are involved in the implementation of, that legislation during that financial year or the immediately preceding financial year.*

The Explanatory Memorandum to the Bill explains that this clause is:

[51] The Hon. John Howard, MP, 'A Safer More Secure Australia', *Media Release*, 30 October 2001.
[52] The Hon. John Howard, MP, 'A Safer More Secure Australia', *Media Release*, 30 October 2001.
[53] The other Bills in the package were the *Suppression of the Financing of Terrorism Bill 2002* (the Terrorist Financing Bill), and the *Border Security Legislation Amendment Bill 2002*. Other components of the anti-terrorism package were the *Criminal Code Amendment (Anti-hoax and Other Measures) Act 2002,* the *Criminal Code Amendment (Suppression of Terrorist Bombings) Bill 2002* and the *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002*.The Government also introduced a *Telecommunications Interception Legislation Amendment Bill 2002* which enables interception warrants to be granted to investigate 'an offence constituted by conduct involving an act or acts or terrorism'.
[54] Report of UN Special Rapporteur 2006 at [16].

*intended to ensure the Monitor reviews the laws when they have been used in a practical scenario. Reviewing laws when they have not been used would be considered an ineffective use of the Monitor's time and resources.* [55]

The Law Council appreciates the need to review those anti-terrorism measures that have been used most recently as a priority. As the Clarke Inquiry into the Haneef Case demonstrates, these provisions are most likely to reveal any shortcomings in the content and operation of the laws and the way that these laws are understood and applied by law enforcement and intelligence agencies. However, the Law Council is also of the view that those counter-terrorism provisions that have not been used frequently, or at all, are also in need of regular and timely review by the NSLM. The effectiveness and necessity of such provisions is called into serious question when such provisions have not been utilised since their enactment some years ago.

## References to National Security Legislation Monitor by Prime Minister

Clause 7 of the Bill provides the Prime Minster with the power to refer a matter relating to counter-terrorism or national security to the NSLM, either at the NSLM's suggestion or on his or her own initiative, and to give the NSLM directions about the order in which he or she is to deal with references.

The Prime Minister is the only body or person, , with the ability to refer a matter to the NSLM. This invests the Executive Government with considerable control over the activities of the NSLM.

This is a distinguishing feature between the NSLM Bill and the 2008 Bill. Under the 2008 Bill, the PJCIS was empowered to refer a matter to the Independent Reviewer for review, as was a relevant Minister. In its submission to the Senate Inquiry into the 2008 Bill, the Law Council supported the inclusion of a role for the PJCIS to refer a matter to the Independent Reviewer for Inquiry, provided the report following such an Inquiry was provided directly to the PJCIS. The Law Council continues to support such a role for the PJCIS under the NSLM Bill.

The PJCIS plays an important oversight role in respect of a number of key agencies responsible for implementing Australia's anti-terrorism laws, such as the Australian Security Intelligence Organisation, the Australian Secret Intelligence Service and the Department of Defence and has a specific review role in respect of key pieces of Australia's anti-terrorism legislation, such as the *Security Legislation Amendment (Terrorism) Act 2002*.[56] Through its work, the PJCIS is well placed to identify any shortcomings or inefficiencies in the content and operation of Australia's anti-terrorism measures and to identify appropriate matters to refer to the NSLM for review. In addition, the bipartisan, bicameral nature of the PJCIS would further enhance the independent character of the work undertaken by the NSLM.

The Law Council recommends that further consideration be given to including a clause within the NSLM Bill empowering the PJCIS to refer a matter relating to counter-terrorism or national security to the NSLM and requiring the NSLM to report back to the PJCIS on that reference.

The Law Council believes that a body other than the Prime Minister or member of the Executive Government should be empowered under the NSLM Bill to refer a matter to the

[55] Explanatory Memorandum to the *National Security Legislation Monitor Bill 2009* p. 5.
[56] For the Committee's functions, see *Intelligence Services Act 2001* (Cth) s29.

NSLM for review. This would enhance the independent role of the NSLM as well as acknowledging the important role Parliament plays in scrutinising Australia's anti-terrorism measures and holding the Executive Government to account for its actions under these laws.

The Law Council is also concerned that the NSLM may not have a clear power to initiate and report on his or her own inquiries. While the EM suggest NSML has power to initiate his or her own investigations,[57] the language of the Bill itself does not make this clear. For example, clause 7 provides that the NSLM can suggest that the Prime Minster refer a matter for inquiry, but it does not empower the NSLM to initiate its own reference. Even if the functions contained in clause 6 are interpreted in a manner broad enough to empower the NSLM to initiate his or her own investigations, the only place the NSLM could report on such investigations would be in his or her Annual Report, which may be prepared up to six months after the period of review. The Law Council submits that it is essential to the independent character of the NSLM that he or she be clearly invested with the power to initiate his or her own inquiries and to report on any findings in a timely manner. Such reports should be made publicly available and may need to be separate from the NSLM's Annual Report, particularly if the inquiry relates to a particularly pressing or time critical matter. For example, if the mandate of the NSLM is broadened to include a role to review proposed legislation, the NSLM should be empowered to initiate his or her own investigation as soon as the proposed provisions are introduced, and be able to report on his or her findings to Parliament expediently so as to be of optimal value to the parliamentary process.

## Consultation with Other Agencies

Clause 10 of the Bill provides that when performing his or her functions the NSLM must have regard to:

- the functions of agencies that have functions relating to, or are involved in the implementation of, that legislation; and
- 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.

The NSLM may also consult with the head of any relevant agency, the Commonwealth Ombudsman and/or the Inspector General of Intelligence and Security.

The inclusion of this provision is consistent with the recommendations of the Sheller Committee and the PJCIS, as well as the Senate Committee on Legal and Constitutional Affair's recommendations in respect to the 2008 Bill, and is supported by the Law Council.

[57] Explanatory Memorandum to the *National Security Legislation Monitor Bill 2009* p. 1.

# Appointment of National Security Legislation Monitor

## Terms of Appointment

The office of NSLM contemplated under the NSLM Bill comprises a single appointee.

Under the Bill, the NSLM is appointed by the Governor General, upon the recommendation of the Prime Minister following consultation with the Leader of the Opposition.[58] The NSLM is appointed on a part-time basis and must only be appointed if the Governor General decides that he or she is suitable for appointment because of his or her qualifications, training or experience.[59]

The period for which the NSLM holds office is specified in the instrument of appointment, but must not exceed three years. [60] The NSLM can be reappointed, but only once. [61]

The Law Council supports the limit placed on the reappointment of the NSLM as a safeguard to ensure the continued independence of the office. However, the Law Council also sees value in ensuring sufficient security of tenure and sufficient time for an appointee to develop his or her role. There is also value in ensuring, where possible, that the appointment of an NSLM spans an electoral cycle, helping to confirm the independent, non-partisan nature of the office of the NSLM. For this reason, the Law Council is concerned that subclause 12(1) appears to permit the appointment of a NSLM for a period of *less than* three years and recommends that the Bill be amended to provide a fixed term of appointment of three years.

Clause 15 of the Bill prohibits the NSLM from engaging in any paid employment that conflicts or may conflict with the proper performance of his or her duties without the Prime Minister's written consent. However, there is no such restriction on the NSLM undertaking paid employment that does not give rise to such a conflict.

The Law Council supports the inclusion of this provision. The ability to engage in outside employment has been identified as a factor contributing to the independent character of the Independent Reviewer of Terrorism Laws in the UK.[62]

The other terms and conditions upon which the NSLM holds office are to be determined in writing by the Governor General.[63]

Clause 19 of the Bill provides the Governor General with a discretion to terminate the appointment of the NSLM for misbehaviour or physical or mental incapacity. Clause 19 further provides that the Governor General must dismiss the NSLM in certain situations, including: bankruptcy, failing to disclose conflicts of interest in contravention of clause 16, engaging in unauthorised outside employment in contravention of clause 15, and/or unauthorised absence from office.

Clause 20 of the Bill allows the Prime Minister to appoint an Acting NSLM in circumstances where there is a vacancy in the Office of the NSLM or during any periods

[58] NSLM Bill proposed s11(1) and (2).
[59] NSLM Bill proposed s11(3).
[60] NSLM Bill proposed s12(1).
[61] NSLM Bill proposed s12(2).
[62] On Wednesday 17 June 2009 Lord Carlile met with officers from the Law Council of Australia to discuss his role as UK Independent Reviewer of Terrorism Laws.
[63] NSLM Bill s17.

where the NSLM is absent from duty or Australia, or unable to perform his or her duties. The Acting Monitor may only be appointed for a maximum of 12 months.

## Resources and Structure of Office of NSLM

Ultimately, the success of the NSLM is likely to be dependent upon the individual appointee and the resources he or she has at his or her disposal. A key component of the success of the UK Independent Reviewer is his ability to access all relevant information, publish accessible, readable reports and effectively engage in the public debate on terrorism issues. This demands a sufficient secretariat staff, with appropriate expertise and resources to ensure the NSLM is able to obtain all relevant information and to conduct public hearings when appropriate. In light of the significance of resources and structure to the success of the NSLM, the Law Council is concerned by the absence of detail relating to these matters in the Bill.

In its report on the 2008 Bill the Senate Committee on Legal and Constitutional Affairs observed:

> *Having regard to the administrative arrangements to support the [Independent Reviewer], the committee was again struck by the absence in the Bill of the details relating to the corporate structure of the office of the [Independent Reviewer], whether it constituted a Statutory Agency, under what legislation it would employ staff, and how it would be resourced.*[64]

The Law Council notes similar absences of detail in the NSLM Bill.

The NSLM Bill does not include any reference to the resources to be made available to the NSLM, outside of clause 13 pertaining to remuneration and allowances. For example, there is no reference in the Bill to the staff to be allocated to the NSLM, whether the office of NSLM will be located in an existing Government Department or how it would be resourced.

The Law Council is aware that $336,000 was allocated in the 2009-10 Federal Budget for the establishment of NSLM in 2009-10 (to be followed by ongoing funding over the next four years), however it is unclear how this translates into staff for the office. It is also unclear whether this funding is intended to cover the conduct of hearings by the NSLM and the performance of his or her other functions. All that can be ascertained about the structure of the NSLM from the Bill is that it will comprise a single part-time appointee with a broad and demanding mandate to review Australia's anti-terrorism laws.

The Law Council recommends that consideration be given to including specific provisions within the NSLM Bill outlining matters such as: the structure and location of the office of the NSLM, whether the NSLM is to be a statutory body; the minimum staff available to the NSLM and the source of the NSLM's funding.

The Law Council further recommends that the NSLM be required to include in his or her Annual Report a reference to: the resources available to the NSLM to perform his or her functions; whether these resources are adequate; and whether further resources are required.

[64] Senate Committee on Legal and Constitutional Affairs, *Inquiry into the Independent Reviewer of Terrorism Law s Bill 2008 (No 2),* October 2008, p. 20.

# Powers of National Security Legislation Monitor

Under the NSLM Bill, the NSLM is invested with the power to:

- hold public hearings, and conduct hearings in private in certain circumstances, and to regulate the conduct of such hearings in a manner he or she sees fit;[65]
    - a hearing must be held in public unless the NSLM exercises his or her discretion and directs that a hearing, or part of a hearing, be held in private or, for any time during which a person is giving evidence that discloses operationally sensitive information. [66]
- summons a person to attend a hearing and give evidence or produce documents or things; [67]
- require a witness to take an oath or affirmation prior to giving evidence;[68]
- request production of a document or thing; [69] and
    - If documents provided to the NSLM carry a national security classification or contain operationally sensitive information, the NSLM must make arrangements acceptable to the head of the agency he or she is requesting the information from, for the security of this information.[70]
- retain documents or things produced to him or her pursuant to a request made under clause 22 or 24.
    - The NSLM may retain possession of a document or thing for as long as necessary for the purposes of the investigation for which the document or thing was requested. However, at all times while the NSLM retains such a document or thing, he or she must allow persons who would otherwise be entitled to inspect or view the document or thing to inspect or view the document or thing at the times that the person would ordinarily be able to do so.[71]

The Law Council supports the inclusion of strong information gathering powers in the Bill to ensure that the NSLM has access to all relevant material and information. The Law Council also welcomes the commitment in subclause 21(2) to holding hearings in public wherever possible.

The Law Council also supports the degree of flexibility provided to the NSLM to conduct hearings largely in the manner he or she sees fit. This is important to ensure the efficiency and effectiveness of the office. However, given the coercive information gathering powers invested in the NLSM, this flexibility must be balanced by appropriate protections for the rights of individuals.

[65] NSLM Bill proposed s21.
[66] NSLM Bill proposed s21(2).
[67] NSLM Bill proposed s22.
[68] NSLM Bill proposed s23.
[69] NSLM Bill proposed s24.
[70] NSLM Bill proposed s28.
[71] This clause is similar to section 18 of the *Inspector General of Intelligence and Security Act 1986*, sections 28 and 29 of the *Australian Crime Commission Act 2002*, sections 9 and 13 of the *Ombudsman Act 1976*, sections 19 and 20 of the *Inspector-General of Taxation Act 2003* and sections 77 and 102 of the *Law Enforcement Integrity Commissioner Act 2006*.

For this reason, the Law Council recommends that some reference to the principles of natural justice and procedural fairness be included in Part 3 of the Bill. This would ensure, for example, that important common law protections such as the right to silence and client legal privilege are preserved under this regime. It would also ensure a degree of protection for the rights of witnesses regardless of which powers or procedures apply in a particular review. For example, natural justice principles would require the NSLM to record reasons prior to issuing a summons for a person to attend a hearing and produce a particular document or thing. Procedural fairness would require the NSLM to give a person reasonable opportunity to refute or respond to any proposed adverse findings or allegations of wrong doing.

The Law Council is of the view that requiring the NSLM to observe principles of natural justice and procedural fairness, while retaining the discretion of the NSLM to conduct hearings as he or she sees fit, would achieve the appropriate balance between flexibility and efficiency and the protection of the rights of witnesses.

This could be achieved by inserting a general requirement in Part 3 of the Bill requiring the NSLM to observe the principles of natural justice and procedural fairness when exercising his or her powers under that Part, or alternatively, specific protections could be included in clauses 21 to 25. For example, clauses 22 and 24 could be amended to include a requirement that the NSLM record written reasons prior to issuing a summons to appear to give evidence or a notice to produce a document or thing.

## Offences

The NSLM Bill contains the following criminal offences for non-compliance with the information gathering powers invested in the NSLM:

- failure to attend a hearing;[72]
- failure to swear an oath, make an affirmation or answer a question;[73]
- failure to produce a document or thing;[74] and
- failure to provide information[75]

Each of these offences attracts a maximum penalty of imprisonment for six months or 30 penalty units or both.

It is a defence to these offences if the person has a 'reasonable excuse'.[76]

Subclause 25(6) of the NSLM Bill provides that the fear of self incrimination or exposure to penalty will be a reasonable excuse to the offences of failing to answer a question, failing to produce a document or thing or failing to provide information.

The Law Council also notes that in addition to the specific offences listed in clause 25, non-compliance with a request of the NSLM also attracts the offences in Part III of the *Crimes Act 1914* (Cth). This is a consequence of the power of the NSLM under subclause 23(1) to compel a witness to take an oath or affirmation, which characterises the hearings held by the NSLM under the Bill as 'judicial proceedings' under Part III of the *Crimes Act 1914* and attracts the offence provisions in that Part. These offences include giving false

[72] NSLM Bill proposed s25(1).
[73] NSLM Bill proposed s25(2).
[74] NSLM Bill proposed s25(3).
[75] NSLM Bill proposed s25(4).
[76] NSLM Bill proposed s25(5).

testimony, fabricating evidence, intimidation of witnesses, corruption of witnesses, deceiving witnesses and destroying evidence.

Clause 26 of the Bill makes it clear that a person is not excused from answering a question or providing information or documents or things when requested under clause 22 or 24, on the grounds that answering the question, or producing the information or documents or things would breach a 'secrecy provision'.[77]

The Explanatory Memorandum explains that this provision is 'designed to encourage people to assist the Monitor in the conduct of inquiries as fully as possible'.[78]

The Law Council generally supports the inclusion of offence provisions for non-compliance with the NSLM's information gathering powers, provided these powers are exercised in accordance with the principles of natural justice and procedural fairness, and that sufficient safeguards are provided to protect the rights of individual witnesses.

The Law Council is pleased that the NSLM Bill makes an attempt to protect the privilege against self incrimination by including it within the definition of 'reasonable excuse'. However, the Law Council notes that this approach differs from that taken in a number of similar contexts. For example, the *Royal Commissions Act 1902* (Cth) provides a more direct protection for the privilege against self-incrimination. Section 6DD provides:

> *(1) The following are not admissible in evidence against a natural person in any civil or criminal proceedings in any court of the Commonwealth, of a State or of a Territory:*
>
> > *(a) a statement or disclosure made by the person in the course of giving evidence before a Commission;*
> >
> > *(b) the production of a document or other thing by the person pursuant to a summons, requirement or notice under section 2 or subsection 6AA(3).*
>
> *(2) Subsection (1) does not apply to the admissibility of evidence in proceedings for an offence against this Act.*

In recognition that freedom from self incrimination is a fundamental human right,[79] the Law Council submits that it is appropriate that the privilege against self incrimination be protected in a separate provision in addition to forming part of an available defence to offence provisions.

For this reason, the Law Council recommends that a specific provision be included in the NSLM Bill that provides that any statement or disclosure made or document or thing produced in accordance with the exercise of the NSLM's powers in Part 3 is not admissible in evidence against the person in any civil or criminal proceedings in any court of the Commonwealth, of a State or of a Territory.

[77] 'Secrecy provision' is defined in clause 4 of the Bill as (a) a provision of a law of the Commonwealth, of a State or of a Territory, being a provision that purports to prohibit; or (b) anything done, under a provision of a law of the Commonwealth, of a State or of a Territory, to prohibit; the communication, divulging or publication of information, the production of, or the publication of the contents of, a document, or the production of a thing.
[78] Explanatory Memorandum to the *National Security Legislation Monitor Bill 2009,* p. 11.
[79] For example, Article 14(3)(g) of the *International Covenant on Civil and Political Rights* provides that in the determination of any criminal charge, everyone shall be entitled to the right not to be compelled to testify against him or herself or to confess to guilt.

# Reporting Requirements

There are two key reporting requirements under the NSLM Bill: the provision of an annual report and a report on a reference by the Prime Minister.

## Annual Report

Pursuant to clause 29, the NSLM must prepare an Annual Report at the end of each financial year relating to the performance of his or her functions under the Bill and give this to the Prime Minister. The Prime Minister must then present the Annual Report to each House of Parliament within 15 sitting days after the date on which he or she receives the Report.

Before presenting the Report to Parliament, the Prime Minster must be satisfied that it does not contain any of the information listed in subclause 29(3) of the Bill. This subclause provides that the Annual Report must not contain:

- any operationally sensitive information;
- any information that would or might prejudice Australia's national security or the conduct of Australia's foreign relations or the performance by a law enforcement or security agency of its functions;
- any information that, if included in the report, would or might endanger a person's safety;
- any information obtained from a document prepared for the purposes of a meeting of the Cabinet, or of a Committee of the Cabinet, of the Commonwealth or of a State or Territory; or
- any information that would disclose the deliberations or decisions of: the Cabinet, or of a Committee of the Cabinet, of the Commonwealth or of a State; or Territory.

Subclause 29(4) also requires the NSLM to obtain the advice of the responsible Minister or Ministers concerned as to whether any part of the Annual Report contains this type of information.

Clause 29(7) of the Bill provides that if the NSLM excludes information from his or her Annual report, the NSLM must prepare and give to the Prime Minister a supplementary report setting out that information.

The Law Council supports the requirement for the NSLM to prepare an Annual Report and notes this is an improvement on the 2008 Bill.[80]

However, the Law Council is concerned by the breadth of material to be excluded from the Annual Report and the broad definitions of such excluded material in clause 29 of the Bill, which includes, for example, 'information that might prejudice Australia's foreign relations'.

The Law Council is also concerned by the requirement in subclause 29(4) that the NSLM seek the advice of the responsible Minister or Ministers, including State or Territory Ministers, as to whether any part of the Annual Report contains this type of information. This gives rise to the risk of executive 'vetting' of the NSLM's Annual Report. The Prime

[80] Senate Committee on Legal and Constitutional Affairs, *Inquiry into the Independent Reviewer of Terrorism Law s Bill 2008 (No 2),* October 2008, Recommendation 5.

Minister is also given the power to exclude certain material from the Annual report under subclause 29(5).

These provisions appear to detract from the central value of an independent reviewer of terrorism laws: namely the provision of independent, accessible information to the public regarding the practical operation of terrorism measures.

It is clear that in the course of his or her review the NSLM is likely to come into contact with, or request the production of, documents or material that is of a confidential or classified nature and that could pose a risk to national security if published. However, the Law Council is of the view that the NSLM should be required to reflect this information in his or her report in a manner that can be made available to the public in its entirety. This appears to be the approach taken in the UK, where the Independent Reviewer's representation of statistical and other information regarding the operation and effectiveness of terrorism laws has been presented in a manner that does not threaten national security and can be made widely available.[81]

The ability of the Executive Government to determine what information should be excluded from the NSLM's Annual Report also has the potential to undermine the independent character of the office.

The NSLM Bill prescribes a particular procedure for the appointment of a NSLM, based on bipartisan support and criteria of relevant experience and expertise. Once this appointment is in place, the NSLM should be entitled to exercise his or her judgement as to the nature of material that is appropriate to be presented to the public. While some limits on the nature of material that is made publicly available are clearly necessary, such limits should be kept to a minimum and their application determined by the NSLM, rather than the Executive Government.

This is critical to ensuring that the NSLM remains free to highlight any shortcomings in the content and operation of Australia's anti-terrorism laws, and equally important, to highlight any problems in the manner these provisions have been understood or applied by the Executive arm of government. The ability for the NSLM to perform this latter function could be considerably undermined if he or she is effectively required to have the Annual Report 'cleared' by the Minister responsible for the particular agency or Department subject to criticism in the Report.

The need to limit executive control over the public content of the report of the Independent Reviewer was also identified by the Senate Committee on Legal and Constitutional Affairs in its report on the 2008 Bill, which observed that:[82]

> *information should be certified for deletion only where that is reasonably and objectively found to be warranted. Both the [independent reviewer] and the relevant minister should remain mindful of the underlying objectives of this Bill to increase transparency in relation to terrorism laws. This objective may be substantially undermined by the injudicious use of provisions which allow for the suppression of material which might help inform debate.*

[81] For a list of all of Independent Reviewer Lord Carlile's reports see http://security.homeoffice.gov.uk/legislation/independent-review-legislation/?version=7

[82] Senate Committee on Legal and Constitutional Affairs, *Inquiry into the Independent Reviewer of Terrorism Law s Bill 2008 (No 2),* October 2008, p. 20.

## Report on Reference from the Prime Minister

Where a matter has been referred to the NSLM by the Prime Minister under clause 7, the NSLM must provide a report to the Prime Minister on that reference.[83] The NSLM may also be required to provide an interim report on the reference if requested by the Prime Minister.

The Law Council is concerned by the absence of the requirement in the NSLM Bill that these report be tabled in Parliament or otherwise be made publicly available. This means that the Prime Minister retains full control over what matters the NSLM inquires into and whether the public is able to access the NSLM's findings. It leaves to the Prime Minister's discretion whether a Government response to the NSLM's is warranted and the Parliament and the public can be denied the opportunity to evaluate whether the Government's response to any findings made by the NSLM is appropriate.

As noted above in respect to references to the NSLM, the Law Council is of the view that a body other than the Prime Minister or a member of the Executive Government (such as a Parliamentary Committee) should have the power to refer a matter to the NSLM for inquiry. The NSLM itself should also have a clear power to initiate and report on its own inquiries under the Bill. As Professor Clive Walker argues, an Independent Reviewer of terrorism laws should not have to 'await the pleasure of the government as to the terms on which the [terrorism] debate takes place'.[84]

[83] NSLM Bill proposed s30.
[84] C. Walker, 'The United Kingdom's Anti-terrorism Laws' in Andrew Lynch, Edwina MacDonald and George Williams (eds) *Law and Liberty in the War on Terror*, The Federation Press, Sydney, October 2007, p. 189.

# Conclusion

The Law Council is firmly of the view that regular, comprehensive and independent review of Australia's anti-terrorism laws is urgently needed.

The establishment of the office of NSLM is an important first step towards performing this function and for this reason the Law Council supports the objects and the majority of the content of the NSLM Bill.

The Law Council is pleased to observe that a number of the concerns it raised in respect of the 2008 Bill have been addressed in the provisions of the NSLM Bill. However, the Law Council believes that the role of the NSLM could be enhanced by:

- including the term 'independent' in its title;
- including a specific reference to Australia's international human rights obligations in clause 6 and 8 of the Bill;
- empowering a body other than the Prime Minister to refer matters to the NLSM for review;
- ensuring that the principles of natural justice and procedural fairness are observed when the NSLM is exercising his or her coercive information gathering powers; and
- ensuring, to the greatest extent possible, that the content of the NSLM's reports is made publicly available.

Ultimately, the success of the NSLM is likely to be heavily influenced by the individual appointee and the resources he or she has at his or her disposal. Any appointee must also be able to engage with the public and the media and take a neutral position on all relevant issues. The Law Council will reserve its final judgment on the effectiveness of the NSLM until these details are publicly known.

The Law Council is also firmly of the view that the appointment ofthe NSLM should not been seen as a substitute or alternative to the enactment of legislative safeguards to ensure individual rights are protected within Australian terrorism legislation.

Whilst beneficial as a post-facto analysis of areas in need of reform, review mechanisms cannot provide the type of protection necessary to guard against unjustified executive intrusion into the lives of individuals by the misuse or overuse of the powers provided under Australia's terrorism laws.

The Law Council is of the view that while independent review of the operation and effectiveness of these provisions is vital – so too is legislative action to ensure that in the meantime a person's rights to liberty and to a fair trial are protected.

In this regard, the Law Council looks forward to the timely implementation of the other aspects of the Government's response to the Clarke Inquiry into the Haneef Case and the other independent reviews in Australia's anti-terrorism laws, which include:

(a) reviewing the provisions of Part 1C of the *Crimes Act,* and improving training for officers as to their statutory obligations under these provisions;

(b) reviewing the criteria for listing terrorist organisations and amending the terrorist organisation offences in Division 102 of the *Criminal Code*;

(c) amending the treason offences in section 80.1 of the *Criminal Code* ; and

(d) removing the reference to 'sedition' in Commonwealth and State and Territory laws, and amending the 'sedition' offences in Division 80 of the *Criminal Code*;

If implemented, these reforms could go some way to restoring fundamental human rights and rule of law principles within Australia's anti-terrorism laws.

## Attachment A: Profile of the Law Council of Australia

The Law Council of Australia is the peak national representative body of the Australian legal profession. The Law Council was established in 1933. It is the federal organisation representing approximately 50,000 Australian lawyers, through their representative bar associations and law societies (the "constituent bodies" of the Law Council).

The constituent bodies of the Law Council are, in alphabetical order:

- Australian Capital Territory Bar Association
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society of the Australian Capital Territory
- Law Society of the Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar Association
- The Victorian Bar Inc
- Western Australian Bar Association
- LLFG Limited (a corporation with large law firm members)

The Law Council speaks for the Australian legal profession on the legal aspects of national and international issues, on federal law and on the operation of federal courts and tribunals. It works for the improvement of the law and of the administration of justice.

The Law Council is the most inclusive, on both geographical and professional bases, of all Australian legal professional organisations.