



The improved oversight and resourcing bill:
strengthening a vital safeguard

Submission to the Senate Legal and Constitutional Affairs
Committee inquiry on the Independent National Security
Legislation Monitor (Improved Oversight and Resourcing) Bill
2014

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About the Human Rights Law Centre

The Human Rights Law Centre is an independent, non-profit, non-government organisation which protects and promotes human rights.

We contribute to the protection of human dignity, the alleviation of disadvantage, and the attainment of equality through a strategic combination of research, advocacy, litigation and education.

The HRLC is a registered charity and has been endorsed by the Australian Taxation Office as a public benefit institution. All donations are tax deductible.

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1. Executive summary

1. The Human Rights Law Centre (**HRLC**) welcomes the opportunity to make this submission to the Senate Legal and Constitutional Affairs Committee's (**Committee**) inquiry on the Independent National Security Legislation Monitor (Improved Oversight and Resourcing) Bill 2014 (**Bill**). The Bill proposes to amend the *Independent National Security Legislation Monitor Act 2010* (Cth) (**Act**).
2. As the HRLC explained in its [submission](#) to the Committee on the Independent National Security Legislation Monitor Repeal Bill 2014, the INSLM provides a much-needed check on the extraordinary powers granted to government agencies under Australia's national security and counter terrorism laws (**counter terrorism laws**).
3. The serious human rights risks posed by the powers granted to police and other security and intelligence agencies under counter terrorism laws require comprehensive and dedicated oversight and accountability provided by an ongoing, fully informed, expert and independent reviewer.
4. The Australian Government has itself recognised, in its report to the United Nations Committee against Torture, the importance of the INSLM in providing greater accountability and transparency of counter terrorism laws.¹
5. The HRLC strongly supports the Bill's aims to preserve and enhance the essential function of the Independent National Security Legislation Monitor (**INSLM**) through important changes such as:
 - (a) extending the INSLM's mandate to reviewing proposed, as well as existing, counter terrorism laws;
 - (b) ensuring the adequate resourcing of the INSLM as a full-time position that is not allowed to remain vacant and is supported by other staff;
 - (c) strengthening the independence of the INSLM by enabling the Senate Committees on Legal and Constitutional Affairs and the Australian Human Rights Commission to refer matters to the INSLM for inquiry; and

¹ See the Joint Standing Committee on Treaties, *Report 125: Review into Treaties tabled on 7 and 28 February 2012: including OPCAT: Recommendation 5: Government Response*, p 43, available at <http://www.ag.gov.au/RightsAndProtections/HumanRights/TreatyBodyReporting/Pages/default.aspx> (accessed 21 January 2015).

- (d) requiring the Government to consider and respond to recommendations made by the INSLM within six months of the INSLM's reports being tabled in Parliament.
6. Whilst the HRLC supports the Bill, it also considers that the following amendments to the INSLM's role and functions would further strengthen the work of the INSLM:
- (a) giving the INSLM a discretion to report on matters within the statutory mandate more urgently or particularly than by the annual report; and
 - (a) reinforcing the independence of the INSLM by removing the possibility of reappointment of an INSLM and instead increasing the term of appointment of the INSLM from three to four or five years.
7. Finally, the role of the INSLM is underutilised and undermined by the Government's failure to act on the INSLM's previous recommendations. The HRLC urges the Committee to recommend that the Government implement the recommendations of the former INSLM in the reviews published in his series of annual reports as soon as possible.

Recommendation 1:

That the Bill be passed

Recommendation 2:

That the role of the INSLM be further strengthened by providing:

- (a) express power for the INSLM to report on matters within the statutory mandate more urgently or particularly than by the annual report; and
- (b) that the actual and perceived independence of the INSLM be increased by prohibiting any possibility of reappointment whilst extending the term of appointment to four or five years.

Recommendation 3:

That the Government implement the recommendations already made by the former INSLM in his four previous annual reports.

2. The Bill strengthens and enhances the INSLM's role

8. For the INSLM to fulfil the purpose for which it was established, namely to review the operation, effectiveness and implications of counter terrorism laws, it is essential that:
 - (a) the INSLM's mandate is sufficiently broad to encompass the review of proposed, as well as existing, counter terrorism and related laws;
 - (b) the INSLM has full access to government material and discussions with security and intelligence personnel;
 - (c) the appointed INSLM has appropriate legal expertise and the ability to review counter terrorism laws comprehensively and holistically alongside the existing criminal law;
 - (d) the role is ongoing, given the at-times rapidly changing legislative landscape in the area of counter terrorism laws and the changing nature of the threat of terrorism;
 - (e) the INSLM is adequately resourced;
 - (f) the INSLM is, and appears to be, independent; and
 - (g) the Government is accountable for counter terrorism laws and required to respond publicly to recommendations by the INSLM.
9. The Bill ensures that the INSLM is empowered to review proposed, as well as existing, counter terrorism laws. At present, the INSLM is only empowered to review laws once they have been enacted. This is a missed opportunity for Parliament to access the INSLM's expert, independent advice during the development of legislation. As the independent, ongoing, and expert review body charged by the Australian Government with reviewing counter terrorism laws, the INSLM can make a valuable contribution which is likely to improve proposed legislation and reduce the need for subsequent changes and further consideration by Parliament.
10. The Bill also ensures the adequate resourcing of the INSLM by ensuring that the position is full time, is not allowed to remain vacant, and is supported by staff. This is an important amendment. The position of INSLM has been vacant since April 2014, despite the Government's announcement in December 2014 that it intended to recommend that the Governor General appoint the Hon Roger Gyles AO QC to the position.
11. The Bill also provides that the INSLM can receive references from the Committees on Legal and Constitutional Affairs and the Australian Human Rights Commission, in addition to the Prime Minister and the Parliamentary Joint Committee on Intelligence and Security. The

amendment will strengthen the independence of the INSLM and provides Parliament with another means of access to the INSLM's independent and expert advice.

12. The Act does not currently require the Government to respond to recommendations in the INSLM's annual reports. The Bill would increase the accountability of Government by requiring the Prime Minister to make a statement to Parliament setting out the action that the Government proposes to take in relation to the report. This statement must be made within six months of the report being presented to a house of Parliament.

Recommendation 1:

That the Bill be passed.

3. Scope for further enhancements

13. While the HRLC commends the Bill, there are two additional ways to better secure the oversight and independence of the INSLM, based on recommendations made by previous INSLM, Bret Walker SC:
 - (a) **That the INSLM be given an express power to prepare responsive and urgent reports on matters within its statutory mandate.**² Neither the Act nor the Bill empower the INSLM, on his or her own initiative, to report more urgently or particularly than by the annual report. Giving the INSLM a discretion to do so would allow for more timely and more pertinent reporting at times when Australia's counter terrorism laws are frequently changing and the overall counter terrorism framework is becoming increasingly complex.
 - (b) **That the actual and perceived independence of the INSLM be increased by prohibiting any possibility of reappointment whilst extending the term of appointment to four or five years.** Currently, INSLM's are appointed for a three year term and can be reappointed once.³ As Bret Walker SC noted, the nature of the INSLM's task requires that there be no hope for preferment from the Executive. Therefore there should not be a possibility of reappointment. The INSLM's task also

² Independent National Security Monitor, *Annual Report*, 28 March 2014, p 2, available at http://www.dpmc.gov.au/sites/default/files/publications/INSLM_Annual_Report_20140328.pdf [accessed 21 January 2015].

³ Section 12 of the Act.

requires that there be no fear of the Executive. Accordingly, consideration should be given to lengthening the term of appointment.⁴

Recommendation 2:

That the role of the INSLM be further strengthened by providing:

- (a) express power for the INSLM to report on matters within the statutory mandate more urgently or particularly than by the annual report; and
- (b) that the actual and perceived independence of the INSLM be increased by prohibiting any possibility of reappointment whilst extending the term of appointment to four or five years

4. Ensuring implementation of INSLM's recommendations

14. With the proliferation of counter terrorism laws in recent years, the INSLM plays an essential role in determining whether laws contain appropriate safeguards for protecting the rights of individuals and whether they remain proportionate to terrorism or national security threats.⁵
15. However, the findings and recommendations contained in the four reports prepared by the previous INSLM, Brett Walker SC, have been largely ignored by Government.
16. The HRLC remains concerned that the recommendations by the former INSLM have not been implemented and reiterates its previous recommendation that the Government implement the recommendations by the former INSLM in the reviews published in his series of annual reports.

Recommendation 7:

That the Government implement the recommendations by the former INSLM in the reviews published in his four previous annual reports.

⁴ Independent National Security Monitor, *Annual Report*, 28 March 2014, pp 2-3, available at http://www.dpmc.gov.au/sites/default/files/publications/INSLM_Annual_Report_20140328.pdf [accessed 21 January 2015].

⁵ Section 6(1)(b) of the Act.