



Australia's National Security Legislation Monitor:
Necessary accountability for extraordinary powers
Submission to the Senate Legal and Constitutional Affairs
Committee review of the Act to repeal the *Independent National
Security Legislation Monitor Act 2010*

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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. Introduction and Executive Summary

1. The HRLC welcomes the invitation from the Senate Legal and Constitutional Affairs Committee (**the Committee**) to make a submission on the Independent National Security Legislation Monitor Repeal Bill 2014 (**the Bill**). The Bill aims to repeal the *Independent National Security Legislation Monitor Act 2010* (**the Act**) and abolish the Office of the Independent National Security Legislation Monitor (**the NSL monitor**).
2. The HRLC strongly opposes the abolition of the NSL monitor.
3. The NSL monitor has provided a much-needed check on the extraordinary powers granted to government agencies under Australia's national security and counter terrorism legislation (**counter-terrorism laws**). The serious human rights impact of the powers granted to police and other security and intelligence agencies under counter-terrorism laws requires the comprehensive and dedicated oversight and accountability provided by an ongoing, fully informed, expert independent reviewer.
4. Through the requirement for the NSL monitor to consider the human rights compliance of counter terrorism laws as well as whether the laws are necessary, reasonable and proportionate to the threat of terrorism, the monitor effectively promotes the safety of the individual and the community from harm caused both by terrorism and by excessive and abusive government power.
5. Prior to the NSL monitor's establishment, a range of parliamentary committees and other expert bodies consistently called for a permanent mechanism to be established to provide independent review of counter-terrorism laws by an independent body. The Human Rights Law Centre (**the HRLC**) also advocated strongly for the establishment of the NSL monitor at that time, including in submissions to the Committee's earlier inquiries.
6. Since the NSL monitor was established in 2010, the HRLC has provided submissions to the NSL monitor's reviews on the extent to which the laws subject to review are consistent with Australia's international human rights law obligations.
7. The NSL monitor's reviews have benefited from full access to government material and discussions with security and intelligence personnel. No other oversight mechanism currently has this access to the necessary government information to conduct fully informed reviews of counter-terrorism laws.
8. The NSL monitor's reports to date have been thorough, considered, expert and judicious. They offer concrete recommendations for amendment of counter terrorism laws to ensure that they are necessary, reasonable and proportionate.

9. The at-times rapidly changing legislative scheme in the area of counter-terrorism laws and the changing nature of the threat of terrorism demand ongoing review of the proportionality of the government response.
10. The NSL monitor's reviews provide an important roadmap for repealing or amending existing law to ensure it is necessary, reasonable and proportionate to the risks and more compatible with human rights. Instead of abolishing the NSL monitor, the Government should support the ongoing work of the monitor's office and leverage the considerable work done to date by implementing his recommendations.

Recommendation 1:

The Committee should recommend that Independent National Security Legislation Monitor Repeal Bill 2014 should not be passed and the Office of the National Security Legislation Monitor should not be abolished.

Recommendation 2:

The Committee should recommend that the Government implement the recommendations by the National Security Legislation monitor in the reviews published in his series of annual reports.

2. Exceptional oversight of extraordinary powers

11. Since the events of 11 September 2001, Australia's counter-terrorism laws have proliferated. The particular nature of terrorism has resulted in a special, and in many ways unique, legislative regime.¹
12. Some of the laws have granted extraordinary powers to government officials that have potentially very serious consequences for the human rights of people against whom the laws are used. For example, counter terrorism laws allow for virtual incommunicado detention under ASIO questioning and detention warrants that the NSL monitor described as involving 'drastic interference with personal liberty and freedom.'²
13. Protecting Australia from threats to national security and protecting and promoting human rights are complementary goals that are each fundamentally concerned with protecting the community and individuals from harm. It is important that, in establishing a regime that seeks to ensure the security of individuals, the State does not legislate or exercise powers in a manner that unnecessarily or disproportionately infringes upon fundamental human rights.³
14. Any laws that engage and potentially limit human rights must be closely monitored to ensure that they are exercised in a manner that is consistent with the accepted international human rights law principles of proportionality, necessity and reasonableness.
15. The NSL monitor is appropriately mandated to review the "operation, effectiveness and implications" of counter terrorism laws to assess whether the laws contain appropriate safeguards for protecting the rights of individuals, remain proportionate to any threat of

¹ *Lodhi v R* [2006] NSWCCA 121, 61 (Spigelman CJ).

² Independent National Security Monitor, *Declassified Annual Report*, 20 December 2012, page 83, available at http://www.dpmc.gov.au/inslm/docs/INSLM_Annual_Report_20121220.pdf [accessed on 29 April 2014].

³ These are Australia's legal obligations under the international human rights treaties including the International Covenant on Civil and Political Rights. In its most recent review of Australia's compliance with that treaty, UN Human Rights Committee expressed concern that 'some provisions of the *Anti-Terrorism Act (No 2) 2005* and other counter-terrorism measures adopted by the State party appear to be incompatible with the Covenant rights, including with non-derogable provisions. The Committee is particularly concerned at: a) the vagueness of the definition of terrorist act; b) the reversal of the burden of proof in certain cases contrary to the right to be presumed innocent; c) the fact that "exceptional circumstances", to rebut the presumption of bail relating to terrorism offences, are not defined in the *Crimes Act*, and; d) the expanded powers of the Australian Security Intelligence Organization (ASIO), including so far unused powers to detain persons without access to a lawyer and in conditions of secrecy for up to seven-day renewable periods. (art. 2, 9 and 14)'. The Committee recommended that '**The State party should ensure that its counter-terrorism legislation and practices are in full conformity with the Covenant**': see Human Rights Committee, *Concluding Observations on Australia*, UN Doc CCPR/C/AUS/CO/5, para 11.

terrorism or threat to national security or both, and remain necessary.⁴ The NSL monitor must have regard to, among other things, Australia's international human rights obligations.⁵

16. The NSL monitor provides essential oversight of, and accountability for, the extraordinary powers granted to government officials under counter terrorism laws to infringe human rights.
17. Through his independent and informed consideration of the necessity, proportionality and reasonableness of counter terrorism laws, the NSL monitor has provided critical advice to government on how to protect the community from harm.

3. Access and expertise are essential

18. Counter terrorism legislation is complex and has a close connection to the operation of the criminal law. Access to information is also a real hurdle in any administrative or judicial oversight of counter terrorism laws.
19. The NSL monitor has been successful in his role because of his legal expertise, his access to government information and his ability to comprehensively and holistically review counter terrorism laws and their operation alongside existing criminal law. There is no other body with these attributes that are required to address the challenges of overseeing the operation of counter terrorism laws.
20. The NSL monitor's consideration of three particular issues illustrates the breadth and depth of the monitor's investigations and the benefit of his expertise and access to government information. The monitor's advice has at times been to repeal some of the counter terrorism laws, whilst at other times he has supported the laws or provided recommendations as to how to improve their operation and efficiency.

3.1 Control orders

21. Counter terrorism laws provide for control orders to be made against people, including against people who are acquitted at a criminal trial. The NSL monitor expressed his concern that 'because COs do not require the established safeguards of a criminal trial according to law and because they may be very restrictive in their effect on a person's way of life – personally, socially and occupationally – it is critical that these provisions be scrutinised.'⁶ When examining the court's power to make control orders, the NSL monitor:

⁴ *Independent National Security Legislation Monitor Act 2010* (Cth), section 6.

⁵ *Independent National Security Legislation Monitor Act 2010* (Cth), section 8.

⁶ Independent National Security Monitor, *Declassified Annual Report*, 20 December 2012, page 10, available at http://www.dpmc.gov.au/inslm/docs/INSLM_Annual_Report_20121220.pdf [accessed on 29 April 2014].

- (a) reviewed the files for every operation where the AFP gave consideration to applying for a control order;
 - (b) took evidence directly from AFP officers in relation to control orders;
 - (c) considered international law and practice; and
 - (d) undertook an extensive comparison of control order provisions with the laws of arrest, questioning, charging, remanding or bailing and prosecution of terrorist suspects.⁷
22. Based on all of this evidence, research and analysis he found that properly funded and resourced surveillance and investigations efforts were more effective than control orders in addressing suspected terrorist offences.⁸ However, the NSL monitor's recommendation was not to abolish control orders altogether, but to authorise them only against people convicted of terrorist offences who have not been rehabilitated and continue to be dangerous.⁹
- ### 3.2 ASIO questioning powers
23. Upon review, the NSL monitor advised that ASIO questioning warrants were a necessary and proportionate part of the suite of intelligence gathering tools used to respond to terrorism. The NSL monitor reviewed all the questioning warrants that had been issued, including transcripts of questioning and the mandatory ASIO reports that analyse the assistance that was obtained by the questioning.
24. On balance, the NSL monitor found that the efficacy of the questioning warrant provisions and their worth as an intelligence collection tool had been established.¹⁰ The NSL monitor found that "no crucial evidence used in a prosecution was obtained, or obtained only, from the use of questioning warrants."¹¹ Nonetheless, the NSL monitor's review also found that the actual experience of questioning warrants "does not show any abuse in the nature of too many persons uninvolved in terrorist offences being compelled to answer too many questions."

⁷ Independent National Security Monitor, *Declassified Annual Report*, 20 December 2012, Chapter II, available at http://www.dpmc.gov.au/inslm/docs/INSLM_Annual_Report_20121220.pdf [accessed on 29 April 2014].

⁸ Independent National Security Monitor, *Declassified Annual Report*, 20 December 2012, page 15, available at http://www.dpmc.gov.au/inslm/docs/INSLM_Annual_Report_20121220.pdf [accessed on 29 April 2014].

⁹ Independent National Security Monitor, *Declassified Annual Report*, 20 December 2012, Recommendation II/4, page 40, available at http://www.dpmc.gov.au/inslm/docs/INSLM_Annual_Report_20121220.pdf [accessed on 29 April 2014].

¹⁰ Independent National Security Monitor, *Declassified Annual Report*, 20 December 2012, page 60, available at http://www.dpmc.gov.au/inslm/docs/INSLM_Annual_Report_20121220.pdf [accessed on 29 April 2014].

¹¹ Independent National Security Monitor, *Declassified Annual Report*, 20 December 2012, page 59, available at http://www.dpmc.gov.au/inslm/docs/INSLM_Annual_Report_20121220.pdf [accessed on 29 April 2014].

3.3 ASIO detention and questioning powers

25. By contrast, the NSL monitor also reviewed ASIO's power to detain a person attending for questioning and recommended that those powers be abolished.
26. In coming to his decision, the monitor was able to access information to confirm that no questioning and detention warrants had been considered, sought or issued since 2003. This tended to suggest that detention powers were not necessary as less restrictive alternatives exist to achieve the same purpose.¹² The monitor also asked agencies and departments to provide evidence as to why these warrants were justified but reported that no scenario, hypothetical or real, was provided to the review that would show the need for a questioning and detention warrant.¹³ The NSL monitor considered that the questioning and detention warrants either violated, or were dangerously close to doing so, the right to freedom from arbitrary detention under article 9(1) of the International Covenant on Civil and Political Rights.
27. Ultimately, the NSL monitor found that questioning and detention warrants are "not a justifiable further intrusion on personal liberty" and recommended that they be abolished.¹⁴
28. Given the number of counter terrorism laws that have proliferated since 'September 11' and the extraordinary powers granted to government officials to severely restrict the human rights of people, it is critical that the NSL monitor is retained to provide expert advice on, and act as an effective check on, the impact and use of those powers.

4. Ad hoc oversight mechanisms are insufficient

29. The government asserts that it is abolishing the monitor as part of its "strong commitment to reduce bureaucracy and streamline government."¹⁵ The Explanatory Memorandum to the Bill states that Australia has a range of oversight bodies such as Parliamentary Committees that will ensure comprehensive oversight of counter terrorism laws.¹⁶
30. In the past, some parliamentary committees have provided oversight and accountability in the area of national security. However, those committees were at the forefront of calls for the

¹² Independent National Security Monitor, *Declassified Annual Report*, 20 December 2012, page 87, available at http://www.dpmc.gov.au/inslm/docs/INSLM_Annual_Report_20121220.pdf [accessed on 29 April 2014].

¹³ Independent National Security Monitor, *Declassified Annual Report*, 20 December 2012, page 88, available at http://www.dpmc.gov.au/inslm/docs/INSLM_Annual_Report_20121220.pdf [accessed on 29 April 2014].

¹⁴ Independent National Security Monitor, *Declassified Annual Report*, 20 December 2012, page 87, available at http://www.dpmc.gov.au/inslm/docs/INSLM_Annual_Report_20121220.pdf [accessed on 29 April 2014].

¹⁵ Josh Frydenberg MP, Parliamentary Secretary to the Prime Minister, Second Reading Speech, 19 March 2014

¹⁶ Josh Frydenberg MP, Parliamentary Secretary to the Prime Minister, Second Reading Speech, 19 March 2014

establishment of the NSL monitor because of their own perceived inability to provide proper or comprehensive accountability.

31. In two separate reports in 2006 and 2007, the Parliamentary Joint Committee on Intelligence and Security (**PJCIS**) recommended that a permanent mechanism be established with a statutory mandate to report annually to parliament.¹⁷ In doing so, the PJCIS stated concerns that the review of counter terrorism laws had been “sporadic and fragmented with a focus on specific pieces of legislation rather than the terrorism regime as a whole.”¹⁸ It said that an independent reviewer was necessary to provide comprehensive evaluation, an integrated approach and to ensure ongoing monitoring and refinement of the law where necessary.¹⁹
32. In 2005, the Attorney General established the independent Security Legislation Review Committee (**Sheller Committee**), under the chairmanship of the Honourable Simon Sheller AO QC, to review the raft of security and counter terrorism legislation passed by Parliament since 2002.²⁰ The Sheller Committee was comprised of (among others) the Inspector General of Intelligence and Security, the Privacy Commissioner, the Human Rights Commissioner, and the Commonwealth Ombudsman.
33. The Sheller Committee’s report recommended an ongoing independent mechanism be established to provide oversight on counter terrorism laws:

¹⁷ Parliamentary Joint Committee on Intelligence and Security, *Review of Security and Counter Terrorism Legislation*, December 2006, p 22, available at http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=pjcis/securityleg/report/prelims.htm; Parliamentary Joint Committee on Intelligence and Security, *Inquiry into the proscription of ‘terrorist organisations’ under the Australian Criminal Code*, September 2007, p 53, available at http://www.aph.gov.au/parliamentary_business/committees/house_of_representatives_committees?url=pjcis/proscription/report/report.pdf (accessed 23 April 2014).

¹⁸ Parliamentary Joint Committee on Intelligence and Security, *Review of Security and Counter Terrorism Legislation*, December 2006, paragraph 2.62, available at http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=pjcis/securityleg/report/prelims.htm [accessed 29 April 2014].

¹⁹ Parliamentary Joint Committee on Intelligence and Security, *Review of Security and Counter Terrorism Legislation*, December 2006, paragraph 2.62, available at http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=pjcis/securityleg/report/prelims.htm [accessed 29 April 2014].

²⁰ Security Legislation Review Committee, *Report of the Security Legislation Review Committee* (2006), available at <http://www.ag.gov.au/NationalSecurity/CounterterrorismLaw/Documents/Report%20of%20the%20Security%20Legislation%20Review%20Committee.pdf>, [accessed on 29 April 2014].

It is important that the ongoing operation of the provisions, including the views taken of particular provisions by the courts, be closely monitored and that Australian Governments have an independent source of expert commentary on the legislation.²¹

34. In 2008, the Clarke review of the aborted terrorism investigation of Dr Mohamed Haneef also called for an office of independent review to be established.²² In doing so, the Clarke review noted the problems it had encountered in obtaining access to information.²³

5. The NSL monitor's work is ongoing

35. The government asserts that the end of the NSL monitor's term brings to an end his thorough review of counter terrorism laws.²⁴ Whilst the NSL monitor has undertaken a thorough review of many of the critical aspects of the counter terrorism regime, it is not appropriate to abolish his office.
36. As stated above, the ongoing nature of the work of an independent reviewer of counter terrorism laws is critical in providing appropriate oversight.²⁵
37. The NSL monitor was established as a permanent office to continually assess the appropriateness of counter terrorism legislation – whether laws remain proportionate to any threat of terrorism or threat to national security and whether they remain necessary.²⁶ The assessment of proportionality and necessity can necessarily change from week to week and year to year depending on how the counter terrorism laws or the level of threat from terrorism change.

²¹ Security Legislation Review Committee, *Report of the Security Legislation Review Committee* (2006), page 6, available at <http://www.ag.gov.au/NationalSecurity/CounterterrorismLaw/Documents/Report%20of%20the%20Security%20Legislation%20Review%20Committee.pdf> [accessed on 29 April 2014].

²² Report of the Inquiry into the Case of Dr Mohamed Haneef, November 2008, Recommendation 4, available at [http://pandora.nla.gov.au/pan/84427/20090121-0022/www.haneefcaseinquiry.gov.au/www/inquiry/rwpattach.nsf/VAP/\(3A6790B96C927794AF1031D9395C5C20\)_Volume+1+FINAL.pdf/\\$file/Volume+1+FINAL.pdf](http://pandora.nla.gov.au/pan/84427/20090121-0022/www.haneefcaseinquiry.gov.au/www/inquiry/rwpattach.nsf/VAP/(3A6790B96C927794AF1031D9395C5C20)_Volume+1+FINAL.pdf/$file/Volume+1+FINAL.pdf) [accessed on 29 April 2014].

²³ "Timely and comprehensive production of material immediately became a problem across the board and continued to be so throughout the Inquiry": Report of the Inquiry into the Case of Dr Mohamed Haneef, page 4 available at [http://pandora.nla.gov.au/pan/84427/20090121-0022/www.haneefcaseinquiry.gov.au/www/inquiry/rwpattach.nsf/VAP/\(3A6790B96C927794AF1031D9395C5C20\)_Volume+1+FINAL.pdf/\\$file/Volume+1+FINAL.pdf](http://pandora.nla.gov.au/pan/84427/20090121-0022/www.haneefcaseinquiry.gov.au/www/inquiry/rwpattach.nsf/VAP/(3A6790B96C927794AF1031D9395C5C20)_Volume+1+FINAL.pdf/$file/Volume+1+FINAL.pdf) [accessed on 29 April 2014].

²⁴ Josh Frydenberg MP, Parliamentary Secretary to the Prime Minister, Second Reading Speech, 19 March 2014.

²⁵ See for example, Security Legislation Review Committee, *Report of the Security Legislation Review Committee* (2006), page 6, available at <http://www.ag.gov.au/NationalSecurity/CounterterrorismLaw/Documents/Report%20of%20the%20Security%20Legislation%20Review%20Committee.pdf>, [accessed on 29 April 2014].

²⁶ *Independent National Security Legislation Monitor Act 2010* (Cth), section 6.

38. Finally, although the NSL monitor has reviewed many of the counter terrorism laws, it has not reviewed them all.²⁷ Nor has the government implemented the important recommendations made by the monitor in his annual reports.
39. Instead of abolishing the NSL monitor, the government should support the ongoing work of the monitor's office and leverage his expertise and knowledge in implementing his recommendations.

²⁷ See discussion in the Gilbert + Tobin Centre of Public Law's submission to the Committee.