

## THE INDEPENDENT NATIONAL SECURITY LEGISLATION MONITOR'S FIRST TERM: AN APPRAISAL

JESSIE BLACKBOURN\*

### I INTRODUCTION

The enactment of a vast number of new and increasingly innovative anti-terrorism laws has been a feature of the legislative landscape in Australia in the years since the terrorist attacks on the United States of America ('US') on September 11, 2001. The exceptional nature of these laws, as well as their continuing existence on the statute books, led to the creation of a number of ad hoc post-enactment reviews, culminating in the establishment of the new scrutiny office of the Independent National Security Legislation Monitor ('Independent Monitor') in 2010.<sup>1</sup> The inaugural Independent Monitor, Mr Bret Walker SC, was appointed for three years in April 2011 and left office in April 2014 without seeking a second term.<sup>2</sup> During that time, he presented four annual reports to two Prime Ministers, providing a total of 82 recommendations on improvements to Australia's counter-terrorism regime,<sup>3</sup> but received no response from either the Labor or Coalition Governments to those reports.<sup>4</sup> The Commonwealth Parliament has been busy in the field of anti-terrorism lawmaking; five new laws have been enacted since Walker left office in April 2014,<sup>5</sup> and another Bill has

---

\* Research Fellow, Centre for Socio-Legal Studies, University of Oxford. I would like to thank Professor Andrew Lynch for providing helpful comments on an earlier draft of this article and the two anonymous referees. Email: jessie.blackbourn@csls.ox.ac.uk.

1 *Independent National Security Legislation Monitor Act 2010* (Cth).

2 Wayne Swan, 'Appointment of the Independent National Security Legislation Monitor' (Media Release, No 36, 21 April 2011) <<http://ministers.treasury.gov.au/DisplayDocs.aspx?doc=pressreleases/2011/036.htm&pageID=003&min=wms&Year=&DocType=0>>; Independent National Security Legislation Monitor, *About the INSLM* <<http://www.inslm.gov.au/>>.

3 Bret Walker, 'Independent National Security Legislation Monitor Annual Report' (Report, 16 December 2011) ('*Annual Report 2011*'); Bret Walker, 'Independent National Security Legislation Monitor Declassified Annual Report' (Report, 20 December 2012) ('*Declassified Annual Report 2012*'); Bret Walker, 'Independent National Security Legislation Monitor Annual Report' (Report, 7 November 2013) ('*Annual Report 2013*'); Bret Walker, 'Independent National Security Legislation Monitor Annual Report' (Report, 28 March 2014) ('*Annual Report 2014*').

4 Walker, *Annual Report 2014*, above n 3, 2.

5 *National Security Legislation Amendment Act (No 1) 2014* (Cth); *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* (Cth); *Counter-Terrorism Legislation Amendment Act (No 1) 2014* (Cth); *Telecommunications (Interception and Access) Amendment (Data Retention) Act 2015* (Cth); *Australian Citizenship Amendment (Allegiance to Australia) Act 2015* (Cth).

been introduced into Parliament.<sup>6</sup> A number of these laws have purported to implement the recommendations made by Walker as Independent Monitor.<sup>7</sup> Now is therefore an ideal time to provide an appraisal of the first term of the office of the Independent Monitor. This article does just that. It evaluates the extent to which the first Independent Monitor's recommendations have been implemented in order to assess whether the office has fulfilled its core function: reviewing the laws to ensure that Australia's national security and anti-terrorism legislation is effective at deterring, preventing and responding to terrorism, is consistent with Australia's international obligations, and contains appropriate safeguards.<sup>8</sup> Whilst Walker eventually had some of his recommendations adopted by the government – those which sought to expand the counter-terrorism regime – he had less success in persuading legislators to wind back the anti-terrorism laws, or introduce new safeguards. Despite this, the article argues that there are three reasons for retaining the office of the Independent Monitor: the content and scale of Australia's anti-terrorism laws; a persistent deficiency in the provision of other forms of pre-legislative scrutiny and post-enactment review; and the office's capacity to provide some accountability in a context in which transparency is not always viable. The article concludes by assessing the reforms which could improve the functioning of the office to ensure that the government engages meaningfully with subsequent Independent Monitors.

## II ESTABLISHING THE INDEPENDENT NATIONAL SECURITY LEGISLATION MONITOR

At the time of the terrorist attacks on the US on September 11, 2001, Australia had no federal anti-terrorism laws on the statute books.<sup>9</sup> A period of intense anti-terrorism lawmaking followed, with Williams noting that: 'From 11 September 2001 to the fall of the Howard Liberal-National Coalition Government at the federal election held on 24 November 2007, the federal Parliament enacted 48 ... laws, an average of 7.7 pieces of legislation each year'.<sup>10</sup> This has led one eminent scholar to refer to the speed and frequency of Australia's post-9/11 legislative agenda as 'hyper-legislation'.<sup>11</sup> Two core features of this period of hyper-legislating highlighted the need for some form of independent scrutiny: the content of the anti-terrorism laws and the absence of an existing effective mechanism to provide holistic post-enactment review.

---

6 Counter-Terrorism Legislation Amendment Bill (No 1) 2015 (Cth).

7 See Attorney-General's Department (Cth), 'Attachment B – Responses to Recommendations in the Independent National Security Legislation Monitor's Annual Reports' in Attorney-General's Department (Cth), Submission No 8 to Parliamentary Joint Committee on Intelligence and Security, *Inquiry into the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014*, October 2014; Commonwealth, *Parliamentary Debates*, House of Representatives, 16 June 2015, 6329 (Tony Abbott, Prime Minister).

8 *Independent National Security Legislation Monitor Act 2010* (Cth) s 3.

9 George Williams, 'A Decade of Australian Anti-Terror Laws' (2011) 35 *Melbourne University Law Review* 1136, 1139–40.

10 *Ibid* 1144–5.

11 Kent Roach, *The 9/11 Effect: Comparative Counter-Terrorism* (Cambridge University Press, 2011) 309.

The anti-terrorism laws enacted in Australia after the September 11 attacks represent some of the most restrictive measures available to governments in the fight against terrorism. For example, the establishment of preparatory terrorism offences in the *Criminal Code Act 1995* (Cth) ('*Criminal Code*') criminalises acts done 'in preparation for' or 'connected with preparation for' a terrorist act.<sup>12</sup> According to Burton et al, this 'criminalise[s] conduct well in advance of that which would be captured by the inchoate offences (thus creating "pre-inchoate liability")'<sup>13</sup> and might even give rise to what might be referred to as 'pre-pre-inchoate liability',<sup>14</sup> whereby the traditional inchoate offences of attempt, conspiracy and assistance may also attach to the preparatory terrorism offences.<sup>15</sup> These extensions of inchoate liability are paired with severe maximum penalties. The Australian *Criminal Code* now extends life imprisonment to a person whose only criminal behaviour involves a 'conspiracy to do an act in preparation for [or planning] a terrorist act'.<sup>16</sup> The Australian system of control orders meets the description offered by Ashworth and Zedner as 'hybrid civil-criminal';<sup>17</sup> it uses civil measures imposing restrictions and obligations on a terrorist suspect by the executive which attract criminal penalty for breach.<sup>18</sup> As Lynch, McGarrity and Williams observe: 'It is not necessary for a person to have been found guilty of, or even be suspected of committing, a crime for their liberty to be curtailed. This is more than a breach of the old "innocent until proven guilty" maxim: it positively ignores the notion of guilt altogether'.<sup>19</sup> Furthermore, Australia's system of preventative detention orders and the Australian Security Intelligence Organisation's ('ASIO') special powers to detain and question non-suspects (discussed in Part III of this article) are unique in the Western world.<sup>20</sup> The exceptional nature of the anti-terrorism laws was compounded by the particular pressures which arise when legislating against terrorism. Australia's anti-terrorism laws have tended to be enacted in haste, either in response to recent terrorist threats or attacks, or to United Nations Security Council resolutions.<sup>21</sup> Pre-legislative parliamentary scrutiny was seriously truncated, and very few of the laws enacted after September 11 were subject to post-enactment review by

---

12 *Criminal Code Act 1995* (Cth) sch 1 div 101.

13 Gilbert + Tobin Centre of Public Law, Submission to Council of Australian Governments, *Review of Counter-Terrorism Legislation*, 21 September 2012, 10.

14 Ibid; Tamara Tulich, 'A View Inside the Preventive State: Reflections on a Decade of Anti-Terror Law' (2012) 21 *Griffith Law Review* 209.

15 Gilbert + Tobin Centre of Public Law, above n 13, 10.

16 Nicola McGarrity, "'Let the Punishment Match the Offence": Determining Sentences for Australian Terrorists' (2013) 2(1) *International Journal for Crime and Justice* 18, 32. See also *Criminal Code Act 1995* (Cth) sch 1 ss 11.5, 101.6.

17 Andrew Ashworth and Lucia Zedner, *Preventive Justice* (Oxford University Press, 2014) 184.

18 *Criminal Code Act 1995* (Cth) sch 1 s 104.27.

19 Andrew Lynch, Nicola McGarrity and George Williams, *Inside Australia's Anti-Terrorism Laws and Trials* (NewSouth, 2015) 171–2.

20 Lisa Burton, Nicola McGarrity and George Williams, 'The Extraordinary Questioning and Detention Powers of the Australian Security Intelligence Organisation' (2012) 36 *Melbourne University Law Review* 415, 447, citing Department of Parliamentary Services (Cth), *Bills Digest*, No 114 of 2005–06, 5 May 2006, 2; Svetlana Tyulkina and George Williams, 'Preventative Detention Orders in Australia' (2015) 38 *University of New South Wales Law Journal* 738, 738.

21 Lynch, McGarrity and Williams, above n 19, 1–12.

existing constitutional mechanisms. The main parliamentary committee dedicated to examining the anti-terrorism laws is the Parliamentary Joint Committee on Intelligence and Security ('PJCIS'). The committee cannot initiate its own inquiries; it must wait for a matter to be referred to it by the responsible minister or a resolution of either House of Parliament.<sup>22</sup> Only three reviews into the anti-terrorism laws were referred to the committee prior to the establishment of the office of Independent Monitor. In 2005, the Parliamentary Joint Committee on ASIO, ASIS and DSD (which was the precursor committee to the PJCIS)<sup>23</sup> reported on the questioning and detention powers granted to ASIO in the *Australian Security Intelligence Organisation Act 1979* (Cth).<sup>24</sup> In 2006, the PJCIS reported on the first four anti-terrorism laws enacted in Australia after the 9/11 attacks,<sup>25</sup> and in 2007, the committee conducted an inquiry into the terrorist organisation listing provisions of the *Australian Security Intelligence Organisation Act 1979* (Cth).<sup>26</sup> This represents less than 10 per cent of the anti-terrorism laws enacted in Australia since 2002.

A number of ad hoc review committees were established to supplement the meagre provision of post-enactment scrutiny of Australia's anti-terrorism laws by parliamentary committees. These included the Security Legislation Review Committee, which like the PJCIS, reported on the first tranche of anti-terrorism laws enacted in Australia after the 9/11 attacks.<sup>27</sup> It also included the Clarke Inquiry, which reported on the botched arrest and detention by the Australian Federal Police ('AFP') of Dr Mohamed Haneef for terrorism offences;<sup>28</sup> and the Counter-Terrorism Review Committee of the Council of Australian Governments ('COAG'), which was tasked to review all of the federal and state anti-terrorism laws enacted between 2002 and 2006.<sup>29</sup> Even with these additional ad hoc reviews, the vast majority of Australia's anti-terrorism laws were not subject to post-enactment scrutiny.<sup>30</sup> This created a need for an office of independent review.

The office of the Independent Monitor was formally established by the *Independent National Security Legislation Monitor Act 2010* (Cth). This,

---

22 *Intelligence Services Act 2001* (Cth) s 29(1)(b).

23 The PJCIS was preceded by the Parliamentary Joint Committee on ASIO, ASIS and DSD, which operated from 2004 to 2005. ASIS refers to the Australian Secret Intelligence Service and DSD refers to the Defence Signals Directorate.

24 Parliamentary Joint Committee on ASIO, ASIS and DSD, Parliament of Australia, *ASIO's Questioning and Detention Powers – Review of the Operation, Effectiveness and Implications of Division 3 of Part III in the Australian Security Intelligence Organisation Act 1979* (2005).

25 Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Review of Security and Counter Terrorism Legislation* (2006).

26 Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Inquiry into the Proscription of 'Terrorist Organisations' under the Australian Criminal Code* (2007).

27 Security Legislation Review Committee, *Report of the Security Legislation Review Committee* (2006).

28 M J Clarke, 'Report of the Inquiry into the Case of Dr Mohamed Haneef' (Report, November 2008) vol 1.

29 Council of Australian Governments, 'Terms of Reference – Council of Australian Governments' (COAG) Review of Counter-Terrorism Legislation' (2012) 2 <<https://www.ag.gov.au/Consultations/Documents/COAGCTReview/Terms%20of%20Reference.pdf>>.

30 See Jessie Blackburn, 'Power without Responsibility?' in Daniel Baldino (ed), *Spooked: The Truth about Intelligence in Australia* (NewSouth, 2013) 264, 268–9.

however, was not the first attempt by the Commonwealth Parliament to establish such an office. In 2008, a private member's Bill, the Independent Reviewer of Terrorism Laws Bill (No 2) 2008 (Cth), was introduced into the Parliament with the remit: 'to ensure that [Commonwealth] laws relating to terrorism are effective, are consistent with fundamental legal principles and human rights obligations, and do not have undesirable impacts'.<sup>31</sup> It emerged out of the findings of three earlier reviews of Australia's anti-terrorism laws, which proposed the establishment of an office of independent review for Australia, similar to that which already existed in the United Kingdom ('UK'), but adapted to the particular circumstances of the Australian political system.<sup>32</sup> An office of independent review would, according to the author of the Report of the Inquiry into the Case of Dr Mohamed Haneef, ensure 'that the system is balanced between the need to endeavour to prevent terrorism and the need to protect an individual's rights and liberties'.<sup>33</sup> The Independent Reviewer of Terrorism Laws Bill (No 2) 2008 (Cth) failed to receive the government's backing and so withered. However, a year later, the government introduced its own Bill into Parliament, the National Security Legislation Monitor Bill 2009 (Cth),<sup>34</sup> in order to place an office of independent review on a statutory footing. The Bill's second reading speech outlined that the government's aims in establishing an office of National Security Legislation Monitor was:

to ensure that the laws which Australia has enacted or enhanced since 11 September 2001 to specifically address the threat of terrorism or security related concerns operate in an effective and accountable manner and secondly, that these laws are consistent with Australia's international obligations, including our human rights obligations.<sup>35</sup>

The function of the Independent Monitor would be to 'review the operation, effectiveness and implications of counter-terrorism and national security legislation on an ongoing basis' and to consider whether 'the laws contain appropriate safeguards for protecting individuals' rights'.<sup>36</sup> The *Independent National Security Legislation Monitor Act 2010* (Cth) established the office of Independent National Security Legislation Monitor and vested in it a wide array of powers to ensure that the aims and functions of the office could be fulfilled. The aim was to overcome the problems experienced by earlier reviews. As such, the office is permanent<sup>37</sup> and the Independent Monitor has a broad remit to review, on his or her own initiative, all of the national security and anti-terrorism

---

31 Commonwealth, *Parliamentary Debates*, Senate, 13 November 2008, 29 (Judith Troeth).

32 Parliamentary Joint Committee on Intelligence and Security, *Review of Security and Counter Terrorism Legislation*, above n 25, 20–1; Security Legislation Review Committee, above n 27, 201–3; Clarke, above n 28, 255–6.

33 Clarke, above n 28, 255.

34 The Bill as introduced did not contain the word 'Independent'; this was subsequently added during the committee stage of the Bill: Commonwealth, *Parliamentary Debates*, Senate, 3 February 2010, 224 (Joseph Ludwig).

35 Commonwealth, *Parliamentary Debates*, Senate, 25 June 2009, 4260 (Penny Wong).

36 *Ibid.*

37 The government attempted to abolish the office of Independent Monitor in early 2014, but under pressure from the Labor Party eventually withdrew its plan: see Independent National Security Legislation Monitor Repeal Bill 2014 (Cth).

laws, as well as any other laws considered relevant to the inquiry.<sup>38</sup> The Independent Monitor ‘must give particular emphasis to provisions of [the counter-terrorism and national security] legislation that have been applied, considered or purportedly applied ... during that financial year or the immediately preceding financial year’, thus the office is capable of reviewing the same laws more than once.<sup>39</sup> The office has also been granted coercive powers to access information. For example, the Independent Monitor may hold a hearing and summon a person to attend;<sup>40</sup> witnesses at a hearing may be required to take an oath or affirmation.<sup>41</sup> The Independent Monitor may ‘request, by written notice, a person: (a) to give the Monitor the information referred to in the notice; or (b) to produce to the Monitor the documents or things referred to in the notice’.<sup>42</sup> Penalties apply for failing to produce a document or thing or failing to provide the information requested.<sup>43</sup> These features of the office make the Independent Monitor a formidable post-enactment review mechanism. The objects of the Act, in establishing an office of Independent Monitor and granting it these powers, was to

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 in responding to terrorism and terrorism-related activity; and
- (c) is consistent with Australia’s international obligations, including:
  - (i) human rights obligations; and
  - (ii) counter-terrorism obligations; and
  - (iii) international security obligations; and
- (d) contains appropriate safeguards for protecting the rights of individuals.<sup>44</sup>

The Act envisages a two-part process to the review. First, the Independent Monitor must evaluate whether the anti-terrorism and national security laws are effective at deterring, preventing and responding to terrorism, whether they are consistent with Australia’s international obligations, and contain appropriate safeguards for protecting individuals’ rights. Secondly, the government must make use of the Independent Monitor’s reports to assist it in the enactment of appropriate laws, or amendment or repeal of laws which do not meet these standards. Failure to engage with, and respond to, the Independent Monitor’s reviews indicates that the office is not functioning as prescribed in the Act, because to fulfil its core function, it must, where relevant, actually have an impact on the content of national security and anti-terrorism laws. If it does not, then the Independent Monitor cannot be deemed to be holding the government to account. This article uses this two-part test to evaluate the extent to which the

---

38 *Independent National Security Legislation Monitor Act 2010* (Cth) s 6(1).

39 *Independent National Security Legislation Monitor Act 2010* (Cth) s 9.

40 *Independent National Security Legislation Monitor Act 2010* (Cth) ss 21–2.

41 *Independent National Security Legislation Monitor Act 2010* (Cth) s 23.

42 *Independent National Security Legislation Monitor Act 2010* (Cth) s 24(1).

43 *Independent National Security Legislation Monitor Act 2010* (Cth) ss 25(3)–(4).

44 *Independent National Security Legislation Monitor Act 2010* (Cth) s 3.

core function of the office was fulfilled during the inaugural Independent Monitor's first term.

### III EVALUATING THE INDEPENDENT NATIONAL SECURITY LEGISLATION MONITOR

During his three year term in office as the inaugural Independent Monitor, Walker reviewed all of the laws listed for scrutiny in the *Independent National Security Legislation Monitor Act 2010* (Cth)<sup>45</sup> and presented four reports; two each to former Prime Ministers Julia Gillard and Tony Abbott.<sup>46</sup> The reports made a total of 82 recommendations relating to a variety of Australia's anti-terrorism laws, including: the control order and preventative detention regimes;<sup>47</sup> ASIO's special powers regime;<sup>48</sup> the legal definition of terrorism in the *Criminal Code*, Australia's numerous terrorist financing regimes, the use of national security information;<sup>49</sup> measures relating to Australians in armed conflicts abroad;<sup>50</sup> police powers to investigate terrorism; the collection of intelligence, the use of foreign evidence in domestic terrorism trials and the post-conviction monitoring of terrorism convicts;<sup>51</sup> measures relating to passport cancellation and citizenship issues;<sup>52</sup> proscription;<sup>53</sup> and ASIO's authorised intelligence operations scheme.<sup>54</sup> This article focuses on the implementation of the Independent Monitor's recommendations in four of these areas: control orders; preventative detention orders; ASIO's special powers regime; and passport cancellation and citizenship issues.<sup>55</sup>

#### A Control Orders

Australia's system of control orders was inserted into the *Criminal Code* in late 2005 as part of a suite of new anti-terrorism measures introduced in response to the London bombings earlier that year.<sup>56</sup> The legislation was initially enacted

---

45 The fact that Walker had managed to review all of the laws was offered as a reason for repealing the office of Independent Monitor: see Jessie Blackbourn and Nicola McGarrity, 'The Independent Security Monitor's Unfinished Work', *Inside Story* (online), 3 April 2014 <<http://inside.org.au/the-independent-security-monitors-unfinished-work/>>.

46 Walker, *Annual Report 2011*, above n 3; Walker, *Declassified Annual Report 2012*, above n 3; Walker, *Annual Report 2013*, above n 3; Walker, *Annual Report 2014*, above n 3.

47 Walker, *Declassified Annual Report 2012*, above n 3, 126–7.

48 Ibid 127–8.

49 Walker, *Annual Report 2013*, above n 3, 162.

50 Walker, *Annual Report 2014*, above n 3, 76–7.

51 Ibid 79.

52 Ibid.

53 Ibid.

54 Ibid 79–80.

55 To date, the government has responded to only 20 of the Independent Monitor's 82 recommendations. The majority of these relate to recommendations made in the Independent Monitor's 2012 and 2014 reports, hence the focus on the abovementioned measures.

56 *Criminal Code Act 1995* (Cth) sch 1 div 104, as inserted by *Anti-Terrorism Act (No 2) 2005* (Cth) sch 4 item 24.

for a 10 year period, but was extended in late 2014.<sup>57</sup> The purpose of the control order powers was to ‘protect the public from a terrorist act’;<sup>58</sup> the measures are thus aimed at the prevention of terrorism.<sup>59</sup> They aim to achieve this goal by imposing restrictions, obligations, responsibilities and duties on a person where to do so would ‘substantially assist in preventing a terrorist act’ or where a person has ‘provided training to, received training from or participated in training with a listed terrorist organisation’.<sup>60</sup> Walker examined the system of control orders in his second annual report, presented to the Prime Minister in December 2012.<sup>61</sup> At that time, only two control orders had been issued.<sup>62</sup> Walker’s examination of the control order regime was thorough: he ‘reviewed the files for every operation where the AFP gave consideration to applying for a [control order], including the two [control orders] that were applied for and issued’.<sup>63</sup> Having done so, he ‘found no evidence that Australia was made appreciably safer by the existence of the two [control orders] issued. It follows that neither [control order] was reasonably necessary for the protection of the public from a terrorist act’.<sup>64</sup> Walker also evaluated the control order powers against Australia’s other anti-terrorism measures and general criminal law provisions. He concluded that there was ‘no ground to believe that [control orders] have any demonstrated efficacy as a preventive mechanism’.<sup>65</sup> He proposed instead that terrorist suspects could be dealt with using the ordinary powers of investigation, arrest, charge and prosecution, as well as surveillance.<sup>66</sup>

Having thoroughly evaluated whether Australia’s control order powers were effective in preventing terrorism, Walker proposed that in the first instance, the regime should be repealed.<sup>67</sup> He considered that a system of control order-type powers would be justifiable for use only where a person had been released following a custodial sentence for terrorist crimes but was still considered dangerous.<sup>68</sup> In the alternative event that this recommendation was not implemented, Walker recommended three additional safeguards to strengthen the regime.<sup>69</sup> Two of these proposed shifting the onus during hearings to confirm an interim control order: first, he recommended that the onus should be on the

---

57 The control order powers will now cease to have effect on 7 September 2018: *Criminal Code Act 1995* (Cth) sch 1 s 104.32, as amended by *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* (Cth) sch 1 items 86–7.

58 Lynch, McGarrity and Williams, above n 19, 171.

59 See Tamara Tulich, ‘Prevention and Pre-emption in Australia’s Domestic Anti-Terrorism Legislation’ (2012) 1(1) *International Journal for Crime and Justice* 52, 55.

60 *Criminal Code Act 1995* (Cth) sch 1 s 104.2(2).

61 Walker, *Declassified Annual Report 2012*, above n 3, 6–44.

62 Lynch, McGarrity and Williams, above n 19, 181–4. Since Walker’s resignation, a further four control orders have been issued: see Jessie Blackburn and Tamara Tulich, ‘Control Orders for Kids Won’t Make Us Any Safer’, *The Conversation* (online), 16 October 2015 <<https://theconversation.com/control-orders-for-kids-wont-make-us-any-safer-49074>>.

63 Walker, *Declassified Annual Report 2012*, above n 3, 12.

64 *Ibid* 14.

65 *Ibid* 38.

66 *Ibid* 43.

67 *Ibid* 44.

68 *Ibid* 37, 44.

69 Jessie Blackburn, ‘Anti-Terrorism Law Reform: Now or Never?’ (2014) 25 *Public Law Review* 3, 5.



authorities to show that grounds for making a control order existed at the time the order was made; and secondly, he proposed that the onus should be on the AFP to show that a control order should continue in force.<sup>70</sup> The final safeguard Walker recommended related to the making of an interim control order on an urgent basis – that is, in the absence of the person against whom the order is being made. Walker recommended that in this situation, a prerequisite for making an urgent interim control order should ‘include satisfaction that proceeding ex parte is reasonably necessary in order to avoid an unacceptable risk of a terrorist offence being committed were the respondent to be notified before a [control order] is granted’.<sup>71</sup>

The Labor Government did not respond to the Independent Monitor's recommendations on control orders, including the proposal that the regime should be repealed, nor did the Coalition after it was elected into government in 2013. By the time the government sought to amend the control order regime in 2014, two years after the Independent Monitor issued his report, the terrorist threat had evolved and the Independent Monitor's report was out of date. Thus, the government has introduced new legislation to extend and expand the control order powers. The *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* (Cth) extended the sunset clause on control orders. The measures will now not lapse until 7 September 2018.<sup>72</sup> This is an improvement on the government's initial plan. On the introduction of the Bill, the government tried to extend the sunset clause by a further 10 years.<sup>73</sup> However, this was replaced by the shorter period following an inquiry by the PJCIS.<sup>74</sup> The government justified its reasons for extending the control order regime on the grounds ‘of the enduring nature of the terrorist threat and the importance of providing law enforcement agencies with the necessary tools to respond proactively to the evolving nature of the threat presented by those wishing to undertake terrorist acts against Australia’.<sup>75</sup> In defence of this position, which was contrary to the Independent Monitor's recommendation, the government highlighted that: ‘This implements the Government's response to the COAG Review which recommended the retention of the control order regime with additional safeguards’.<sup>76</sup> The COAG Counter-Terrorism Review, which was completed in early 2013 shortly after the Independent Monitor's 2012 review of control orders, did indeed conclude that the control order regime should be retained, however, as with the Independent Monitor's 2012 report, it was based on out of date information. The COAG Counter-Terrorism Review was therefore no more appropriate to justify the changes the government wished to make to the

---

70 Walker, *Declassified Annual Report 2012*, above n 3, 126 (Recommendations II/1 and II/3).

71 *Ibid* (Recommendation II/2) (emphasis in original).

72 *Criminal Code Act 1995* (Cth) sch 1 s 104.32, as amended by *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* (Cth) sch 1 items 86–7.

73 Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (Cth) sch 1 items 86–7.

74 Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Advisory Report on the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014* (2014) 79.

75 Explanatory Memorandum, Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (Cth) [150].

76 *Ibid*.

control order regime than the recommendations of the Independent Monitor's 2012 report, but it better suited the government's legislative ambitions.

Despite extending the sunset clause on the control order regime, the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* (Cth) implemented none of the additional safeguards proposed by the Independent Monitor.<sup>77</sup> It did however expand the regime by extending the use of control orders to persons who had been 'engaged in a hostile activity in a foreign country' and to persons who had been convicted of terrorism-related offences.<sup>78</sup> The inclusion of this second category of persons, those convicted of terrorism-related offences, to some extent implemented the Independent Monitor's recommendation that control orders might be effective as a post-sentence mechanism for dealing with those who had failed to rehabilitate; but Walker had recommended that a post-sentence control order scheme should *replace*, not substantially *supplement*, the existing powers. This subtle but important difference was glossed over by Attorney-General Brandis, who misrepresented the Independent Monitor's position during the debate on the legislation in Parliament:

Further enhancements included in the Bill will see the control order regime tailored to address the issue of returning foreign fighters and address the recommendation of the Independent National Security Legislation Monitor to extend the regime to those convicted of terrorism offences where it would substantially assist in preventing a terrorist attack.<sup>79</sup>

Further amendments to the control order regime have been proposed in the Counter-Terrorism Legislation Amendment Bill (No 1) 2015 (Cth), which if enacted would enable control orders to be used against children as young as 14 and would permit secret evidence to be admissible in control order proceedings. These amendments have been proposed in response to an increase in the number of young people suspected by ASIO and the AFP of involvement in terrorism-related activity in connection with the conflicts in Syria and Iraq.<sup>80</sup> In direct contradiction of Walker's recommendation to repeal control orders in 2012, the government has proceeded to update, amend and extend the regime. This is, in part, due to the length of time which lapsed between when the Independent Monitor submitted his report to the Prime Minister and when the government acted on the need to amend the control order regime. Timeliness of response is therefore a key issue in ensuring that the core function of the office of the Independent Monitor is fulfilled.

---

77 The legislation did, however, implement a number of the COAG Counter-Terrorism Review Committee's recommended safeguards: see Explanatory Memorandum, above n 75; Attorney-General's Department, 'Attachment A – Responses to Recommendations in the COAG Review of Counter-Terrorism Legislation' in Attorney-General's Department, Submission No 8 to Parliamentary Joint Committee on Intelligence and Security, *Inquiry into the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014*, October 2014, 12.

78 *Criminal Code Act 1995* (Cth) sch 1 s 104.2(2)(b), as amended by *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* (Cth) sch 1 item 71.

79 Commonwealth, *Parliamentary Debates*, Senate, 24 September 2014, 7000 (George Brandis).

80 See Blackbourn and Tulich, above n 62.

By examining whether the control order powers were an effective means of preventing terrorism, and concluding that they were not, Walker fulfilled the first stage of the review process in his second annual report. He provided a detailed evaluation of the control order regime against the criteria laid out in the legislation. Having done so, he determined that in their existing form, control orders were not an effective means of countering terrorism and should be replaced with a system of post-sentence orders. In its expansion of the control order regime in 2014, and its recent attempt at expansion in 2015, the government not only rejected the Independent Monitor's primary recommendation, it also misrepresented his alternative proposals. In doing so, the government did not fulfil its part of the review process; it did not use the Independent Monitor's reports as the basis for amending the anti-terrorism laws to ensure that they were, in fact, effective at preventing terrorism.

## B Preventative Detention Orders

Australia's preventative detention regime was reviewed by the Independent Monitor in the same report as the control order powers. Preventative detention orders have been described by the Independent Monitor as an 'innovation' in counter-terrorism law-making.<sup>81</sup> Tyulkina and Williams state that they

permit a person to be detained, without arrest or charge, by the Australian Federal Police ('AFP') for up to 48 hours. While in detention, the person's contact with the outside world, including family members, is strictly limited. The orders can be issued to prevent an imminent terrorist act from occurring or to preserve evidence relating to a recent terrorist act.<sup>82</sup>

Under state and territory legislation, the maximum length of detention under a preventative detention order is 14 days.<sup>83</sup> It is a criminal offence, punishable by five years' imprisonment, to disclose information about a preventative detention order.<sup>84</sup>

In its submission to the Independent Monitor's review, the AFP described the preventative detention regime as:

[P]reventative measures, aimed at protecting the public from potentially catastrophic harm by removing a person (or persons) from the prospect of supporting or participating in a terrorist attack. Preventative detention orders can also prevent persons from destroying evidence following a terrorist incident; evidence which may be crucial to ensuring that the perpetrators are brought to justice.<sup>85</sup>

In his report, Walker evaluated whether the preventative detention regime was an appropriate and effective tool for the prevention of terrorism. He concluded that it was neither.<sup>86</sup> Moreover, Walker compared the preventative detention provisions to powers which already existed under the *Criminal*

---

81 Walker, *Declassified Annual Report 2012*, above n 3, 45.

82 Tyulkina and Williams, above n 20, 738.

83 *Ibid.*

84 *Criminal Code Act 1995* (Cth) sch 1 s 105.41(1).

85 Walker, *Declassified Annual Report 2012*, above n 3, 46, quoting Australian Federal Police, Submission to Independent National Security Monitor, 19 July 2012, 31.

86 *Ibid.* 47, 55–6, 62, 64–5.

Code, particularly those of arrest. Walker concluded that the preventative detention order provisions ‘yield very little if anything that adds to the capacity of ordinary arrest powers’.<sup>87</sup> His review ‘showed no evidence of, or argument based on realistic scenarios about, cases where the AFP would be powerless under ordinary laws but would be beneficially empowered under the [preventative detention order] provisions’.<sup>88</sup> Having fulfilled his part in the review process, Walker recommended the repeal of the preventative detention order regime.<sup>89</sup> By extending the life of the preventative detention order powers to 7 September 2018, the government has, in effect, rejected that proposal.<sup>90</sup> It has not, however, entirely failed to respond to the Independent Monitor’s recommendations.

In the case that the government rejected his recommendation to repeal the preventative detention regime, Walker proposed three additional amendments, two of which were implemented in part by the government via the enactment of the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* (Cth).<sup>91</sup> The first of these related to the threshold test applied by the AFP applicant and issuing authority when issuing a preventative detention order. Walker proposed that the threshold should be increased from ‘reasonable grounds to suspect’ to ‘suspects on reasonable grounds’.<sup>92</sup> The *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* (Cth) implemented an increased threshold for the AFP applicant, but not the issuing authority.<sup>93</sup> The government justified this on the grounds that it was ‘consistent with provisions in other Commonwealth legislation authorising the issuing of warrants, which require the applicant to suspect the relevant matters on reasonable grounds and the issuing authority to be satisfied as to the existence of reasonable grounds for the applicant’s suspicion’.<sup>94</sup> The second of the Independent Monitor’s proposed amendments implemented by the government<sup>95</sup> had the opposite effect; it lowered the threshold used when issuing a preventative detention order for the purpose of the preservation of evidence from ‘necessity’ to ‘reasonable necessity’.<sup>96</sup> The Independent Monitor proposed that this threshold should be lowered because he

---

87 Ibid 62.

88 Ibid 64.

89 Ibid 127 (Recommendation III/4).

90 *Criminal Code Act 1995* (Cth) sch 1 s 105.53, as amended by *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* (Cth) sch 1 items 107–8.

91 Walker, *Declassified Annual Report 2012*, above n 3, 126–7 (Recommendations III/1 and III/3). The government ignored Walker’s recommendation that the existing imminence test for issuing a preventative detention order should be replaced so that the AFP applicant and the issuing authority must both be satisfied that ‘there is a sufficient possibility of the terrorist act occurring sufficiently soon so as to justify the restraints imposed by the [preventative detention order]’: at 126–7 (Recommendation III/2).

92 Walker, *Declassified Annual Report 2012*, above n 3, 49–51, 126 (Recommendation III/1).

93 *Criminal Code Act 1995* (Cth) sch 1 s 105.4(4), as amended by *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* (Cth) sch 1 item 88.

94 Attorney-General’s Department (Cth), ‘Attachment B’, above n 7, 1.

95 *Criminal Code Act 1995* (Cth) sch 1 s 105.4(6)(b), as amended by *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* (Cth) sch 1 item 89.

96 Walker, *Declassified Annual Report 2012*, above n 3, 127 (Recommendation III/3).

considered that the higher test of necessity 'would be extremely difficult to meet' and thus make it impractical as a tool for preventing terrorism.<sup>97</sup>

Despite rejecting the Independent Monitor's recommendation that the preventative detention powers should be repealed in their entirety, the government did implement, though only in part, two of the three proposals which Walker recommended to improve the effectiveness of the preventative detention order regime.<sup>98</sup> His report therefore went some way to fulfil the core function of the office by assisting ministers to ensure that Australia's counter-terrorism laws are effective.

### C ASIO's Special Powers Regime

In 2003, as part of the response to the September 11 attacks on the US, the *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003* (Cth) was enacted, conferring new powers on ASIO by establishing a special powers regime.<sup>99</sup> This regime contained two parts: questioning warrants; and questioning and detention warrants. A questioning warrant authorises ASIO 'to "request" a person to "give information" or "produce records or things that are or may be relevant to intelligence that is important in relation to a terrorism offence"'.<sup>100</sup> A questioning and detention warrant allows ASIO to detain a person for the purposes of questioning them about intelligence 'that is important in relation to a terrorism offence'.<sup>101</sup> The questioning aspect of the powers is coercive; failure to attend for questioning or refusal to answer a question is a criminal offence, punishable by five years imprisonment.<sup>102</sup> A questioning warrant may only be issued if the minister is satisfied 'that there are reasonable grounds for believing that issuing the warrant to be requested will substantially assist the collection of intelligence that is important in relation to a terrorism offence'.<sup>103</sup> Questioning warrants and questioning and detention warrants can be used both as a preventive tool and as a means of responding to terrorism. In his second annual report, presented to the Prime Minister in December 2012, Walker fulfilled his part in the review process and evaluated both schemes in terms of their effectiveness at responding to terrorism and terrorism-related activity and whether they contained appropriate safeguards to protect the rights of individuals.

Walker considered that ASIO's questioning warrant powers were effective as 'an intelligence collection tool' and should be retained.<sup>104</sup> He even stated that 'the safeguards ... are impressive'.<sup>105</sup> His recommendations aimed simply to amend

---

97 Ibid 52.

98 Attorney-General's Department (Cth), 'Attachment B', above n 7, 1–2.

99 Burton, McGarrity and Williams, above n 20, 416.

100 Ibid 436.

101 Ibid 436–7.

102 *Australian Security Intelligence Organisation Act 1979* (Cth) s 34L.

103 *Australian Security Intelligence Organisation Act 1979* (Cth) s 34D(4)(a) (questioning warrant), s 34F(4)(a) (questioning and detention warrant).

104 Walker, *Declassified Annual Report 2012*, above n 3, 70.

105 Ibid 71.

some of those safeguards in order to improve the operation and efficacy of the questioning warrant powers as well as to ensure that the rights of individuals were protected.<sup>106</sup> To date, only three of the Independent Monitor's nine recommendations have been implemented. Two of these aimed to improve the efficacy of the measures by lowering the existing safeguards. Walker recommended removing the 'last resort requirement' by which ASIO could only apply for a questioning warrant once they had exhausted all other methods of intelligence collection. Walker called this safeguard 'excessive', highlighting that it raised practical difficulties 'which could seriously spoil the prospects of obtaining useful intelligence under a [questioning warrant]'.<sup>107</sup> This recommendation was implemented as part of the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* (Cth).<sup>108</sup> The Independent Monitor also recommended adding to the offence of 'failing to produce a record or thing' under a questioning warrant to include the offence of 'wilful destruction of a record or thing as well as tampering with a record or thing with the intent to prevent it from being produced'.<sup>109</sup> This recommendation was also implemented in the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* (Cth).<sup>110</sup>

Only one of the Independent Monitor's recommendations which aimed to improve the efficacy of the questioning warrant regime has not yet been implemented. Walker proposed that the powers should be amended to 'permit arrest if the police officer serving the warrant believes on reasonable grounds' that the person 'intends not to comply with the warrant'.<sup>111</sup> In contrast, of the six recommendations which recommended improving the safeguards in the questioning warrant regime, only one has been implemented so far. The *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* (Cth) removed the power for an ASIO officer to cause the death of a person attempting to escape being taken into custody under a questioning warrant where 'the officer believes on reasonable grounds that the person cannot be taken into custody in any other manner'.<sup>112</sup> The other five safeguards proposed by the Independent Monitor have not been implemented. These include: raising the threshold for certain actions; reducing the length of imprisonment for those who contravene the secrecy obligations of questioning warrants; preventing a person charged with a criminal offence from being questioned under a warrant until after the end of their trial; and providing ASIO officers additional guidance to ensure that their preparation of reports on the use of questioning powers include a full assessment of the

---

106 Ibid 70.

107 Ibid 71.

108 *Australian Security Intelligence Organisation Act 1979* (Cth) s 34D(4)(b), as amended by *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* (Cth) sch 1 item 28.

109 Walker, *Declassified Annual Report 2012*, above n 3, 128 (Recommendation IV/6).

110 *Australian Security Intelligence Organisation Act 1979* (Cth) s 34L(10), as amended by *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* (Cth) sch 1 item 30.

111 Walker, *Declassified Annual Report 2012*, above n 3, 128 (Recommendation V/2).

112 Ibid 127 (Recommendation IV/3), implemented by *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* (Cth) sch 1 item 32.

intelligence value of the information obtained under a questioning warrant.<sup>113</sup> The government has been keen to implement the Independent Monitor's recommendations which would make the laws more effective, but has been reluctant to introduce further safeguards into the existing laws.

In contrast to the questioning warrant scheme, which the Independent Monitor considered to be an effective tool for countering terrorism, Walker could find no redeeming features of the questioning and detention warrant powers. He stated: 'No scenario, hypothetical or real, was shown that would require the use of a [questioning and detention warrant] where no other alternatives existed to achieve the same purpose'.<sup>114</sup> He thus proposed the repeal of ASIO's special powers to detain and question non-suspects contained within part III division 3 of the *Australian Security Intelligence Organisation Act 1979* (Cth).<sup>115</sup> The government did not respond to this part of the Independent Monitor's report and so did not fulfil its role in the review process; instead, it extended the life of the questioning and detention warrant powers to 7 September 2018.<sup>116</sup> At no point during the debate on the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (Cth) did the government mention that the Independent Monitor had proposed the repeal of the questioning and detention warrant scheme. Attorney-General Brandis simply included the scheme in the list of measures due to expire which the legislation would preserve. He stated:

In the current heightened threat environment, it is vital our law enforcement and security agencies have effective mechanisms to manage emerging threats. The Bill will provide for the continuation and enhancement of a number of key counter terrorism measures including ... ASIO questioning and detention powers so that these powers will continue to be available to relevant authorities.<sup>117</sup>

The Independent Monitor's evaluation that the questioning and detention measures were not effective in responding to terrorism and terrorism-related activity did not, in this instance, ensure that only the effective counter-terrorism powers remained in use. However, as with control orders and preventative detention orders, the length of time which lapsed between the Independent Monitor submitting his report to the Prime Minister and the government acting on that report by making amendments to ASIO's special powers regime, is important in explaining why the government may not have repealed the questioning and detention warrant scheme; the terrorist threat had changed. However, unlike control orders, which have been used in the intervening period, ASIO's powers to detain for questioning have never been used, calling into

---

113 Walker, *Declassified Annual Report 2012*, above n 3, 127–8 (Recommendations IV/1, IV/2, IV/4, IV/5, IV/7, and IV/8). None of these recommendations have been implemented in the recently enacted anti-terrorism and national security laws or the proposed Bill.

114 *Ibid* 105.

115 *Ibid* 106.

116 *Australian Security Intelligence Organisation Act 1979* (Cth) s 34ZZ, as amended by *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* (Cth) sch 1 item 33. As with the control order and preventative detention order regimes, the government had initially wanted to extend the sunset clause for 10 years, but amended this to two on the recommendation of the PJCIS.

117 Commonwealth, *Parliamentary Debates*, Senate, 24 September 2014, 7000 (George Brandis).

question Attorney-General Brandis's suggestion that they are an effective mechanism.

### D Passport and Citizenship Measures

In March 2014, shortly before his term in office came to an end, Walker presented his fourth report to the Prime Minister. It contained 31 recommendations for amendments to Australia's anti-terrorism laws, most of which concerned the changing threat profile raised by the conflicts in Syria and Iraq.<sup>118</sup> Six of the Independent Monitor's recommendations pertained to passport issues and three concerned the question of citizenship. The government did not formally respond to Walker's fourth report, but instead used the submission by the Attorney-General's Department to the PJCIS inquiry into the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (Cth) to outline how it was implementing some of his recommendations.

The *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* (Cth) partially implemented three of the Independent Monitor's six recommendations relating to passport issues.<sup>119</sup> These expanded the circumstances in which both Australian and foreign passports can be suspended.<sup>120</sup> The Independent Monitor recommended these measures 'to strengthen ASIO's ability to prevent Australians from travelling in circumstances where the person would be likely to engage in conduct that might prejudice the security of Australia or a foreign country'.<sup>121</sup> Walker noted: 'The prevention of Australians engaging in such activity is obviously of high worth from a counter-terrorism perspective'.<sup>122</sup> Walker's recommendations aimed to ensure that Australia's anti-terrorism laws were effective at preventing terrorism. However, the measures contained within the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* (Cth) exceed the recommendations of the Independent Monitor. For example, the Independent Monitor proposed that: 'The [*Australian Security Intelligence Organisation Act 1979* (Cth)] and [*Australian Passports Act 2005* (Cth)] should be amended to enable ASIO, by its Director-General to make a request for an interim passport suspension where ASIO is considering issuing an adverse security assessment'.<sup>123</sup> Walker also proposed that: 'The *Foreign Passports (Law Enforcement and Security) Act 2005* should be amended so as to include a power to suspend the capacity to use a foreign passport for the purposes of departing Australia in circumstances similar to those that would permit the interim suspension of an Australian passport'.<sup>124</sup> In effect, the Independent Monitor recommended that an Australian or foreign passport should be able to be suspended *only* if ASIO was considering issuing an adverse

---

118 For a list of these recommendations, see Walker, *Annual Report 2014*, above n 3, 76–80.

119 *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* (Cth) sch 1 items 11–23, 24–5, 26, 34, 127–31.

120 Walker, *Annual Report 2014*, above n 3, 78 (Recommendations V/3, V/4 and V/5).

121 *Ibid* 46.

122 *Ibid*.

123 *Ibid* 48 (Recommendation V/4).

124 *Ibid* 48–9 (Recommendation V/5).



security assessment.<sup>125</sup> Instead, the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* (Cth) granted the Minister for Foreign Affairs power to suspend a person's Australian or foreign travel documents for 14 days if ASIO 'suspects on reasonable grounds both that the person may leave Australia to engage in conduct that might prejudice the security of Australia or a foreign country' and that the person's documents should be suspended 'to prevent the person from engaging in the conduct'.<sup>126</sup> Despite implementing some of the recommendations which the Independent Monitor targeted at improving the efficacy of the anti-terrorism laws, the government has simply ignored others which sought to achieve the same effect. For example, the government did not respond at all to Walker's recommendation to expand the list of offences on which a determination to cancel a passport is based.<sup>127</sup> The reports of the Independent Monitor have thus gone some way to ensuring that Australia's counter-terrorism and national security laws are effective at preventing terrorism, but the government has not taken on board all of Walker's suggestions which aimed to achieve that effect.

The government courted considerable controversy in its implementation of Walker's recommendations regarding citizenship issues, not least with the former Independent Monitor himself, who claimed that the government misrepresented his proposals.<sup>128</sup> In Parliament on 16 June 2015, then Prime Minister Tony Abbott referred to recommendations in the Independent Monitor's fourth report in defence of his decision to introduce an executive power to revoke the Australian citizenship of dual nationals. He stated that allowing ministers discretion to strip citizenship was 'precisely what was recommended by the Independent National Security Monitor'.<sup>129</sup> He continued: 'We are acting upon the recommendation of Bret Walker SC'.<sup>130</sup> Walker rejected the assertion that his report recommends granting unfettered discretionary powers to ministers to strip dual nationals of their Australian citizenship:

I am impatient with and I condemn those who persist in reading pages of my report as if they say the government can exercise ministerial discretion after dispensing with a criminal trial. I said the minister should have discretion over the revocation of citizenship after a criminal trial ... and it reflects very poorly that those quoting me can't read beyond the few lines they are citing.

I assume they have been given speaking notes to that effect, but my report does not provide a justification for what they intend to do ... it is not what I said, nor

---

125 An adverse security assessment is an assessment conducted by ASIO that concludes that a person might pose a security risk to Australia. For more information, see Australian Government, *ASIO's Security Assessment Function* (Information Brief, 29 January 2013) <<https://www.asio.gov.au/img/files/Security-Assessment-Function.pdf>>.

126 Attorney-General's Department (Cth), 'Attachment B', above n 7, 11–12.

127 Walker, *Annual Report 2014*, above n 3, 39–42.

128 Lenore Taylor, 'Government Misquoting My Report to Defend Revoking Citizenship, Says Bret Walker', *The Guardian* (online), 16 June 2015 <[http://www.theguardian.com/australia-news/2015/jun/16/government-misquoting-my-report-to-defend-revoking-citizenship-says-bret-walker?CMP=share\\_btn\\_tw](http://www.theguardian.com/australia-news/2015/jun/16/government-misquoting-my-report-to-defend-revoking-citizenship-says-bret-walker?CMP=share_btn_tw)>.

129 Commonwealth, *Parliamentary Debates*, House of Representatives, 16 June 2015, 6329 (Tony Abbott).

130 *Ibid.*

what I think now, and anyone who claims otherwise is wrong. In fact I am saying the opposite.<sup>131</sup>

Walker demanded an apology, but instead, in a press conference on 23 June 2015, Abbott again stated that Walker had recommended enabling the minister to strip citizenship of dual nationals:

If I may say so, with respect to distinguished Senior Counsel, he's changed his mind. That's what's happened. For all sorts of reasons, he's changed his mind and I don't want to speculate on what those reasons might be because it was a very, very clear and unambiguous recommendation in his report back in March, I think, of last year, that there should be the capacity for the Minister on national interest grounds to strip terrorists who are dual nationals of their citizenship.<sup>132</sup>

Abbott's interpretation of Walker's recommendation certainly stands up to a close reading of the Independent Monitor's fourth report. The recommendation states simply that: 'Consideration should be given to the introduction of a power for the Minister for Immigration to revoke the citizenship of Australians, where to do so would not render them stateless, where the Minister is satisfied that the person has engaged in acts prejudicial to Australia's security and it is not in Australia's interests for the person to remain in Australia'.<sup>133</sup> The discussion immediately preceding the recommendation makes no mention of a requirement for a prior conviction as a prerequisite for stripping a person of their citizenship.<sup>134</sup> It is only in the previous subsection that the Independent Monitor refers to conviction as one of the 'other bases for non-approval of citizenship applications and revocations'.<sup>135</sup> If Walker intended the recommendation for stripping a person of their citizenship to be one that required a prior conviction, then the use of unambiguous language stating this might have prevented Abbott from being able to use the text of the recommendation in a way that was seemingly unintended.

Regardless of the disagreement between the former Prime Minister and the former Independent Monitor, the current government has pushed ahead with the plan to strip Australian citizenship from dual nationals in certain circumstances. The *Australian Citizenship Amendment (Allegiance to Australia) Act 2015* (Cth) provides that a person renounces their Australian citizenship by:

- (a) engaging in international terrorist activities using explosive or lethal devices;
- (b) engaging in a terrorist act;
- (c) providing or receiving training connected with preparation for, engagement in, or assistance in a terrorist act;
- (d) directing the activities of a terrorist organisation;
- (e) recruiting for a terrorist organisation;
- (f) financing terrorism;
- (g) financing a terrorist;

---

131 Taylor, above n 128.

132 Tony Abbott, 'Legislation to Strip Terrorists of Citizenship; Crocodile Hunting in the Northern Territory; Q&A Appearance of Zaky Mallah' (Joint Press Conference, 23 June 2015) <<http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressrel%2F3969092%22>>.

133 Walker, *Annual Report 2014*, above n 3, 57, 78 (Recommendation V/9).

134 Ibid 55–7.

135 Ibid 54.

(h) engaging in foreign incursions and recruitment.<sup>136</sup>

A person will also lose their Australian citizenship if, while outside Australia, they serve in 'the armed forces of a country at war with Australia'<sup>137</sup> or fight for a declared terrorist organisation.<sup>138</sup> In these cases, revocation of citizenship is immediate and permanent,<sup>139</sup> but the minister may exempt a person from having their Australian citizenship stripped.<sup>140</sup> The final grounds for revoking citizenship is where a person has been convicted of one of a range of terrorism-related offences.<sup>141</sup> As enacted, these measures are self-executing – that is, the Act itself strips the citizenship of dual nationals, and the minister's only responsibility is to give notice of it. Whilst the Act therefore does not of itself provide powers to the executive to revoke the Australian citizenship of dual citizens, as proposed by Walker, the outcome is effectively the same.

#### **IV RETAINING AND REFORMING THE INDEPENDENT MONITOR**

The above analysis of the inaugural Independent Monitor's first term reveals a mixed record about the effectiveness of the office. The Labor Government did not respond either in writing or in action to the two reports provided to it by Walker, and his recommendations have been cherry-picked by the Abbott and Turnbull Governments. Walker provided the type of review required by the terms of the *Independent National Security Legislation Monitor Act 2010* (Cth); he reviewed the operation, effectiveness and implications of the national security and anti-terrorism laws and considered whether they contained appropriate safeguards and remained necessary. The government has been less forthcoming in playing its part in the review process: using the Independent Monitor's reports to ensure that Australia's national security laws were effective. Where the government did implement the Independent Monitor's recommendations, it typically did so where those recommendations proposed expanding the scope of Australia's counter-terrorism regime, rather than those which sought to introduce greater safeguards or wind back those laws deemed ineffective at deterring or preventing terrorism. Despite this mixed record, the office of Independent Monitor is not yet redundant. There are three main reasons why it should be retained.

First, the period of hyper-legislating which characterised the years immediately following the September 11 terrorist attacks, highlighted at the start of this article as one of the reasons for creating the office of Independent Monitor in 2011, has not abated. The enactment of five new anti-terrorism laws since late 2014 suggests that this trend is likely to continue. The exceptional nature of these

---

136 *Australian Citizenship Act 2007* (Cth) s 33AA(2).

137 *Australian Citizenship Act 2007* (Cth) s 35(1)(b)(i).

138 *Australian Citizenship Act 2007* (Cth) s 35(1)(b)(ii).

139 *Australian Citizenship Act 2007* (Cth) ss 33AA(9), 35(2).

140 *Australian Citizenship Act 2007* (Cth) ss 33AA(14), 35(9).

141 *Australian Citizenship Act 2007* (Cth) s 35A.

most recent measures, such as stripping a person of their citizenship, coupled with the potential for extending the control order regime to children under 16, demonstrates the continuing need for post-enactment review of Australia's anti-terrorism and national security laws by an independent authority.

Secondly, there has been no significant improvement in parliamentary oversight since the office of Independent Monitor was established, either in terms of pre-legislative scrutiny or post-enactment review. Anti-terrorism laws are frequently subject to truncated timetables for parliamentary debate and this leaves little time for considered pre-enactment scrutiny, either by Parliament or its committees. The example of the Counter-Terrorism Legislation Amendment Bill (No 1) 2014 illustrates this point. The Bill was introduced into the Senate on 29 October 2014. That same day, the Attorney-General referred the Bill to the PJCIS for review.<sup>142</sup> A day later, the PJCIS issued a call for submissions, which were due by 10 November. However, '[d]ue to the short timeframes' involved, parties interested in making a submission were asked to notify the committee of their intention to submit by 4 November.<sup>143</sup> Public hearings were held in Canberra on 13 November and the PJCIS tabled its report on 20 November.<sup>144</sup> The committee completed its inquiry in just 22 days. The Parliament itself had an even shorter timeframe for scrutiny; the Bill was passed by both houses on 2 December 2014 after just four days of debate.<sup>145</sup> Pre-legislative scrutiny of anti-terrorism Bills by Parliament and its committees has been severely limited by truncated timetables and what appears to be the ever-increasing need for new anti-terrorism legislation. The absence of any meaningful pre-legislative scrutiny by Parliament is compounded by the lack of post-enactment review, caused by extensions to sunset clauses which delay parliamentary committees from executing their reporting obligations. For example, the PJCIS was initially required to review the operation, effectiveness and implications of ASIO's special powers regime by 22 January 2016.<sup>146</sup> The enactment of the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* (Cth) extended that review deadline to 7 March 2018.<sup>147</sup>

Finally, the Independent Monitor provides some accountability where, due to the sensitive nature of counter-terrorism operations, transparency is not possible. For example, in 2012, the Independent Monitor presented two reports to the Prime Minister: one was classified, to be seen only by the Prime Minister; and one was declassified and suitable to be laid before the Parliament.<sup>148</sup> This was necessary because the Independent Monitor had accessed classified material

---

142 Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Advisory Report on the Counter-Terrorism Legislation Amendment Bill (No 1) 2014* (2014) 2.

143 Parliamentary Joint Committee on Intelligence and Security, 'New Inquiry into Counter-Terrorism Legislation Amendment Bill (No 1) 2014' (Media Release, 30 October 2014).

144 Parliamentary Joint Committee on Intelligence and Security, *Advisory Report on the Counter-Terrorism Legislation Amendment Bill (No 1) 2014*, above n 142, 2.

145 Parliament of Australia, *Counter-Terrorism Legislation Amendment Bill (No 1) 2014* <<http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fbillhome%2Fs982%22>>.

146 *Intelligence Services Act 2001* (Cth) s 29.

147 *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* (Cth) sch 1 item 133.

148 Walker, *Declassified Annual Report 2012*, above n 3, iii.

regarding the use of control orders, preventative detention orders and ASIO's special powers regime. The material constituted 'operationally sensitive information', the disclosure of which might 'prejudice the performance by a law enforcement or security agency of its functions'.<sup>149</sup> A safeguard built into the *Independent National Security Legislation Monitor Act 2010* (Cth) ensures that material will only be redacted from the Independent Monitor's reports by the Independent Monitor if he or she considers that the report contains information that cannot be disclosed.<sup>150</sup> The Act provides a list of types of national security information to assist the Independent Monitor to determine whether material may be publicly disclosed, or must be contained within the classified report submitted only to the Prime Minister. For example, the Independent Monitor may not publicly disclose:

- (a) any operationally sensitive information; or
- (b) any information that would or might prejudice:
  - (i) Australia's national security or the conduct of Australia's foreign relations; or
  - (ii) the performance by a law enforcement or security agency of its functions; or
- (c) any information that, if included in the report, would or might endanger a person's safety.<sup>151</sup>

This list acts only as a guide. The Independent Monitor retains responsibility for determining what information should be included in a classified, declassified or unclassified report. In his 2012 declassified report, Walker disclosed the maximum information possible about the material which was redacted. For example, having examined the files for every questioning warrant issued under ASIO's special powers regime, the Independent Monitor stated:

The grounds for seeking the [questioning warrants] were considered, the transcripts of the questioning were read and the mandatory reports on the assistance obtained from the questioning were scrutinized ... More detail of this exhaustive examination of every actual use of [questioning warrants] is to be found in classified Appendix CB, which should not be contained in the declassified Annual Report because it is operationally sensitive information and

---

149 Ibid 12–13.

150 *Independent National Security Legislation Monitor Act 2010* (Cth) s 29(2A).

151 *Independent National Security Legislation Monitor Act 2014* (Cth) s 29(3). There are two other types of information which the Independent Monitor may not disclose: First,

any information obtained from a document prepared for the purposes of a meeting of:

- (i) the Cabinet, or of a Committee of the Cabinet, of the Commonwealth or of a State; or
- (ii) the Australian Capital Territory Executive or of a committee of that Executive; or
- (iii) the Executive Council of the Northern Territory or of a committee of that Executive Council;

and secondly,

any information that would disclose the deliberations or decisions of:

- (i) the Cabinet, or of a Committee of the Cabinet, of the Commonwealth or of a State; or
- (ii) the Australian Capital Territory Executive or of a committee of that Executive; or
- (iii) the Executive Council of the Northern Territory or of a committee of that Executive Council.

At s 29(3)(d)–(e).

information that might prejudice the performance by a law enforcement or security agency of its functions.<sup>152</sup>

By describing the type of information included in the declassified report, Walker made the process of non-disclosure as transparent as possible. The Independent Monitor has also been able to release material into the public domain which was not previously known. For example, prior to the publication of his 2012 declassified report, there was no public knowledge regarding the number of control orders that the AFP had considered applying for, only those that had been issued. Whilst some of the material – such as names and operational details – was not disclosed, the publication of aspects of this new material has added to the public understanding of the operation of Australia's anti-terrorism laws.

For these reasons, the office of the Independent Monitor remains a useful and important mechanism for providing post-enactment scrutiny of Australia's national security and anti-terrorism laws. However, there is still room for improvement, most notably in ensuring that the government is not able to cherry-pick those recommendations of which it approves, whilst simply ignoring the rest. There are three key reforms which could ensure that the office of the Independent Monitor is able to fulfil its core function and prevent the recommendations of the current and future Independent Monitors from being sidelined, cherry-picked, misrepresented or ignored by the government. First, despite the highly regulated reporting requirements for the Independent Monitor in the *Independent National Security Legislation Monitor Act 2014* (Cth),<sup>153</sup> there are no reciprocal obligations on the government to respond to the Independent Monitor's recommendations. The only requirement under the Act is for the Prime Minister to lay a copy of the Independent Monitor's report in Parliament within 15 sitting days of receipt.<sup>154</sup> In practice, the government waited until the penultimate or final day on which to table Walker's reports in Parliament. It has done so without comment. The absence of any formal response to his reports was noted by Walker, who wrote in his third annual report that 'there has been no apparent response to any of the twenty-one recommendations made on 20<sup>th</sup> December 2012 by the INSLM [Independent National Security Legislation Monitor]'.<sup>155</sup> His fourth and final report published six months later emphasised that little had changed:

Observations concerning governmental non-response to the INSLM's Second Annual Report ... were made in the INSLM's Third Annual Report delivered on 7<sup>th</sup> November 2013. They may be updated today by the statement that nothing has happened since then in public.<sup>156</sup>

In December 2014, Senator Penny Wright of the Australian Greens introduced a private senator's Bill into the Parliament to try to resolve

---

152 Walker, *Declassified Annual Report 2012*, above n 3, 68.

153 *Independent National Security Legislation Monitor Act 2010* (Cth) ss 29–30.

154 *Independent National Security Legislation Monitor Act 2010* (Cth) ss 29(5), 30(6).

155 Walker, *Annual Report 2013*, above n 3, 6.

156 Walker, *Annual Report 2014*, above n 3, 2.

this issue.<sup>157</sup> Her Bill proposed amending the *Independent National Security Legislation Monitor Act 2010* (Cth) to include a requirement for the Prime Minister to 'make a statement to the Parliament setting out the action that the Government proposes to take in relation to the report' within six months after the report is tabled in the Parliament.<sup>158</sup> This proposal was rejected by the Senate Standing Committee on Legal and Constitutional Affairs following its inquiry into the Bill.<sup>159</sup> There is, however, some merit in such a proposal.

In its submission to the Committee's inquiry, the Gilbert + Tobin Centre of Public Law welcomed the Bill's proposal to require the government to respond promptly and formally to the Independent Monitor's reports.<sup>160</sup> However, it also sounded a cautionary note:

At the present time, the absence of any meaningful response to the vast majority of the Monitor's recommendations has been lamented. But it would be little, in fact no, improvement if the government published merely token responses to the Monitor's recommendations. For the Monitor's office to fulfil the purposes for which it was created by the Parliament, the government of the day must actually engage with the reports it receives.<sup>161</sup>

This same problem has been experienced by the office of Independent Reviewer of Terrorism Legislation ('Independent Reviewer') in the UK, which is broadly comparable to the Australian office of Independent Monitor.<sup>162</sup> The UK government has provided a formal response to each and every one of the Independent Reviewer's reports, despite the absence of a legislative requirement to do so.<sup>163</sup> However, they have at times been perfunctory, with the UK government stating simply that it 'notes' the recommendation, or is keeping it 'under review'.<sup>164</sup> Furthermore, the UK government's response has often been

157 Independent National Security Legislation Monitor (Improved Oversight and Resourcing) Bill 2014 (Cth).

158 Independent National Security Legislation Monitor (Improved Oversight and Resourcing) Bill 2014 (Cth) sch 1 items 19–20.

159 Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Independent National Security Legislation Monitor (Improved Oversight and Resourcing) Bill 2014* (2015) 24 (Recommendation 1).

160 Gilbert + Tobin Centre of Public Law, Submission No 3 to Senate Legal and Constitutional Legislation Affairs Committee, *Inquiry into the Independent National Security Legislation Monitor (Improved Oversight and Resourcing) Bill 2014*, 28 January 2015, 7.

161 Ibid.

162 See Jessie Blackburn, 'Independent Reviewers as Alternative: An Empirical Study from Australia and the UK' in Fergal F Davis and Fiona de Londras (eds), *Critical Debates on Counter-Terrorist Judicial Review* (Cambridge University Press, 2014) 161–82.

163 See Independent Reviewer of Terrorism Legislation, *Reports* <<https://terrorismlegislationreviewer.independent.gov.uk/category/reports/>>. There is no statutory obligation on the UK government to respond to the Independent Reviewer's reports. Unlike the Independent Monitor, which is established and regulated by the *Independent National Security Legislation Monitor Act 2010* (Cth), more than one piece of legislation governs the Independent Reviewer in the UK. The main provisions for independent review are included in *Terrorism Act 2006* (UK) c 11, s 36 and *Counter-Terrorism and Security Act 2015* (UK) c 6, ss 44–5.

164 See, eg, Secretary of State for the Home Department (UK), *The Government Response to the Report by David Anderson QC on Terrorism Prevention and Investigation Measures in 2012*, Cm 8614 (2013).

published long after the Independent Reviewer has submitted the report.<sup>165</sup> In the fast-paced world of terrorism and counter-terrorism legislation, these long delays can render the original report obsolete. This was evident in the government's response to the Independent Monitor's 2012 report on control orders, preventative detention orders and ASIO's special powers regime. By the time the government responded to the Independent Monitor's recommendations, the nature of the terrorist threat had changed and those recommendations were, to some extent, out of date.

A legislative requirement obliging the government to table a timely response to the Independent Monitor in the Parliament, as well as setting out the minimum satisfactory content within that response, would improve the current situation, though this must not be allowed to become just another tick-box exercise. The government would not be bound either to accept or implement the Independent Monitor's recommendations. However, a legislative requirement to table a response within a certain period of time, stating how it was going to respond to those recommendations, would at least oblige the government to demonstrate that it had read and digested the Independent Monitor's advice.

Secondly, there should be a legislative obligation to appoint a new Independent Monitor within a certain period of time following either the resignation or termination of appointment of the Independent Monitor.<sup>166</sup> In her private senator's Bill, Senator Wright proposed that this period should be three months.<sup>167</sup> The appointment and termination procedures of the office of the Independent Monitor are regulated by statute. The Independent Monitor is appointed by the Governor-General<sup>168</sup> for a term not exceeding three years<sup>169</sup> and can be reappointed only once.<sup>170</sup> The Act provides for the Prime Minister to be able to appoint an acting Independent National Security Legislation Monitor if the position becomes vacant (through resignation or termination for example), or if Independent Monitor is 'absent from duty or from Australia' or is 'unable to perform the duties of the office'.<sup>171</sup> There is a presumption within the *Independent National Security Legislation Monitor Act 2010* (Cth) that the office will be filled; it states that '[t]here is to be an Independent National Security

---

165 For example, the Independent Reviewer submitted a report on the operation of the UK's *Terrorism Act 2000* (UK) c 11 to the Home Secretary on 22 July 2014. The Home Secretary responded some eight months later, on 12 March 2015: see Independent Reviewer of Terrorism Legislation, *The Terrorism Acts in 2013* (July 2014) <<https://terrorismlegislationreviewer.independent.gov.uk/the-terrorism-acts-in-2013-july-2014/>>.

166 The office of Independent Monitor lay vacant from 20 April 2014, when Walker's term of office came to an end, for nearly eight months. On 7 December 2014, Roger Gyles QC was appointed 'acting' Independent Monitor by Prime Minister Abbott, pending formal appointment by the Governor-General as required by s 11 of the *Independent National Security Legislation Monitor Act 2010* (Cth). That appointment was only confirmed on 20 August 2015, more than eight months after Gyles had assumed the office: see Independent National Security Legislation Monitor, above n 2.

167 Independent National Security Legislation Monitor (Improved Oversight and Resourcing) Bill 2014 (Cth) sch 1 item 15.

168 *Independent National Security Legislation Monitor Act 2010* (Cth) s 11.

169 *Independent National Security Legislation Monitor Act 2010* (Cth) s 12(1).

170 *Independent National Security Legislation Monitor Act 2010* (Cth) s 12(2).

171 *Independent National Security Legislation Monitor Act 2010* (Cth) s 20(1).



Legislation Monitor'.<sup>172</sup> However, following the end of Walker's term in office in April 2014, it took Abbott nearly eight months to appoint an acting Independent Monitor in his place.<sup>173</sup> During those eight months, three new anti-terrorism laws were introduced into Parliament. The explanatory memorandum to the Independent National Security Legislation Monitor (Improved Oversight and Resourcing) Bill 2014 (Cth) states that 'it is deeply regrettable that the office of Monitor should remain vacant at a time of the most significant legislative reform in this area for almost a decade'.<sup>174</sup>

A legislative obligation to appoint a new Independent Monitor within three months would prevent any repeat of the long delay between the end of Walker's three year term in April 2014 and the appointment of Roger Gyles QC as acting Independent Monitor in December 2014. However, the Public Law and Policy Research Unit at the University of Adelaide highlighted one major flaw with Senator Wright's proposed amendment to the *Independent National Security Legislation Monitor Act 2010* (Cth): 'If the proposed amendment was passed and the government chose to ignore the requirement to make an appointment within three calendar months, it raises the questions as to who might have sufficient legal standing to bring an action to compel the government to make an appointment to the office of the INSLM'.<sup>175</sup> The means to overcome this flaw would be the inclusion of an element of coercion within the *Independent National Security Legislation Monitor Act 2010* (Cth), either granting a category of persons standing to challenge any failure to appoint a new Independent Monitor, or by penalising the government for failing to do so. This is unlikely to be accepted by the Parliament. Therefore any reform to the appointment process within the *Independent National Security Legislation Monitor Act 2010* (Cth) must be accompanied by a commitment to the process of post-enactment review by Australia's political parties. Given the absence of engagement with the Independent Monitor by the Labor Government when it was in power, and the attempt by the Coalition Government to abolish the office in its entirety in early 2014, this, perhaps, will be the hardest reform to achieve.

The final reform which would help the Independent Monitor to assist ministers in ensuring that Australia's national security and anti-terrorism laws are effective at preventing, deterring and responding to terrorism, are consistent with international obligations, and contain appropriate safeguards to protect the rights of individuals, involves amending the legislation to enable the Independent Monitor to report on urgent matters, outside of the existing schedule of annual review. The *Independent National Security Legislation Monitor Act 2010* (Cth) requires the Independent Monitor to report once annually to the Prime Minister 'as soon as practicable after 30 June in each financial year and, in any event,

---

172 *Independent National Security Legislation Monitor Act 2010* (Cth) s 5.

173 See Independent National Security Legislation Monitor, above n 2.

174 Explanatory Memorandum, Independent National Security Legislation Monitor (Improved Oversight and Resourcing) Bill 2014 (Cth) 16 [101].

175 Public Law & Policy Research Unit, University of Adelaide, Submission No 1 to Senate Legal and Constitutional Affairs Committee, *Inquiry into the Independent National Security Legislation Monitor (Improved Oversight and Resourcing) Bill 2014* (2015) 4.

by the following 31 December'.<sup>176</sup> The Independent Monitor may only provide additional reports where a matter has been referred to the office by either the Prime Minister or the PJCIS.<sup>177</sup> The recent pace with which the Commonwealth Parliament has enacted five new anti-terrorism laws shows just how changeable the situation regarding terrorism and counter-terrorism is in Australia. The Independent Monitor must be able to respond quickly to a changing legislative framework in order to ensure that new laws are subject to review. Amending the *Independent National Security Legislation Monitor Act 2010* (Cth) to enable the Independent Monitor to report outside of the current scheme would provide an additional layer of oversight. It is an uncontroversial measure that was supported by the inaugural Independent Monitor, Mr Bret Walker SC.<sup>178</sup> However, the Independent Monitor's current sole focus on *post*-enactment scrutiny should be retained. Senator Wright's Independent National Security Legislation Monitor (Improved Oversight and Resourcing) Bill 2014 proposed extending the functions of the Independent Monitor to review of parliamentary Bills as well as Acts. This proposal was supported by the majority of submissions to the Senate inquiry into the Bill on the grounds that it would improve the process of pre-legislative scrutiny.<sup>179</sup> Changing the function of the office of Independent Monitor to include pre-legislative scrutiny runs the risk of blurring the line between post-enactment scrutiny and pre-legislative approval. It would be extremely difficult for the Independent Monitor to criticise a measure in an enacted law that had previously been approved by the office in pre-legislative scrutiny. For the same reason, it would offer little incentive to the government to engage with the Independent Monitor's post-enactment review recommendations. Whilst the Independent Monitor should be given broader discretion to initiate reviews on his or her own initiative, outside of the strict schedule laid out in the *Independent National Security Legislation Monitor Act 2010* (Cth), for the reasons outlined above, the role of the office should not be amended to include pre-legislative scrutiny of parliamentary Bills.

## VI CONCLUSION

The inaugural Independent Monitor, Mr Bret Walker SC, fulfilled his part in the review process required by the *Independent National Security Legislation Monitor Act 2010* (Cth): he evaluated the anti-terrorism and national security laws in accordance with the criteria set for the office. Whilst the government has made some minor use of the Independent Monitor's reports to assist it in the enactment, amendment and repeal of laws which did not meet these standards, for the most part it has only done so where the Independent Monitor's reports

---

176 *Independent National Security Legislation Monitor Act 2010* (Cth) s 29(2).

177 *Independent National Security Legislation Monitor Act 2010* (Cth) ss 7, 7A, 30(1).

178 Walker, *Annual Report 2014*, above n 3, 2.

179 See Parliament of Australia, *Submissions* <[http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Legal\\_and\\_Constitutional\\_Affairs/INSLM\\_Bill\\_2014/Submissions](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/INSLM_Bill_2014/Submissions)>. See, eg, Public Law & Policy Research Unit, above n 175, 2–4.

recommend expanding the laws. It has been less keen to implement those of the Independent Monitor's recommendations which sought to introduce new safeguards or wind back the national security laws. As currently drafted, therefore, the *Independent National Security Legislation Monitor Act 2010* (Cth) does not ensure that the core function of the office is fulfilled; there is too much scope for the government to sideline, cherry-pick, misuse or ignore completely the Independent Monitor's recommendations in enacting, amending or repealing Australia's national security laws. However the office is not redundant; it is a significant improvement on alternative forms of post-enactment scrutiny, such as parliamentary committees. Walker provided four detailed reports on all aspects of Australia's national security laws, offering accountability and transparency where little previously existed. Furthermore, with a few minor reforms, such as requiring the government to respond meaningfully to the Independent Monitor's reports, appoint a new Independent Monitor promptly, and enabling the Independent Monitor to report on his or her own initiative, the office could truly fulfil its core function of ensuring that Australia's national security and anti-terrorism laws are effective at deterring, preventing and responding to terrorism, are consistent with Australia's international obligations, and contain appropriate safeguards for protecting individuals' rights. This will be essential if the current (and any future) government continues to enact anti-terrorism laws at the present pace.