The Independent National Security Legislation Monitor

The Independent National Security Legislation Monitor Act provides for the appointment of the INSLM. The Prime Minister recently described the INSLM as “an important and valued component of Australia’s national security architecture”. The INSLM independently reviews the operation, effectiveness and implications of national security and counter-terrorism laws; and considers whether the laws contain appropriate protections for individual rights, remain proportionate to terrorism or national security threats, and remain necessary. In conducting the review the INSLM has access to all relevant material, regardless of national security classification, can compel answers to questions, and holds public and private hearings. INSLM reports are provided to the Prime Minister and are tabled promptly in Parliament. The INSLM does not deal with complaints but welcomes submissions on the reviews. The INSLM is a part-time role and is supported by a small permanent staff located in Canberra. More information and contact details can be found at www.inslm.gov.au.

There have been three INSLMs since the role began in 2010: Bret Walker SC, the Hon Roger Gyles AO, QC and the current INSLM, Dr James Renwick SC (pictured).
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The Independent National Security Legislation Monitor via the Department of the Prime Minister and Cabinet
PO Box 6500 Canberra ACT 2600
www.inslm.gov.au
Australian Government

Independent National Security Legislation Monitor

Dr James Renwick SC

ONE NATIONAL CIRCUIT

BARTON ACT

16 October 2017

The Hon Malcolm Turnbull MP
Prime Minister
Parliament House
CANBERRA ACT 2600

Dear Prime Minister,

Independent National Security Legislation Monitor

2016-2017 Annual Report


This report is unclassified and suitable to be laid before both Houses of Parliament.

Yours sincerely

James Renwick
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Abbreviations

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

2016 Bill
Counter-Terrorism Legislation Amendment Bill (No.1) 2016

ACC
Australian Crime Commission (also known as the Australian Criminal Intelligence Commission)

ADF
Australian Defence Force

AFP
Australian Federal Police

AGD
Commonwealth Attorney-General’s Department

AHRC
Australian Human Rights Commission

APS
Australian Public Service

ASIO
Australian Security Intelligence Organisation

ASIO Act
*Australian Security Intelligence Organisation Act 1979* (Cth)

AUSTRAC
Australian Transaction Reports and Analysis Centre

CDO
Continuing Detention Order

CDPP
Commonwealth Director of Public Prosecutions

COAG
Council of Australian Governments

Crimes Act
*Crimes Act 1914* (Cth)

Criminal Code
*Criminal Code Act 1995* (Cth)

First INSLM
Mr Bret Walker SC

HRTTO Act
Criminal Code Amendment (High Risk Terrorist Offenders) Act 2016

ICCPR
International Covenant on Civil and Political Rights

IGIS
Inspector-General of Intelligence and Security

Independent
The review was conducted by the former Secretary of the Department of Foreign Affairs and Trade, Professor Michael L’Estrange, the former Deputy Secretary of the Department of Defence and Director of the Australian Signals Directorate, Mr Stephen Merchant.

INSLM
Independent National Security Legislation Monitor

INSLM Act
*Independent National Security Legislation Monitor Act 2010* (Cth)

ISA
*Intelligence Services Act 2001* (Cth)

ISIL
Islamic State of Iraq and the Levant

NPP
Non-parole period

NSI Act
*National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth)

NSWDC
New South Wales District Court

NSWSC
New South Wales Supreme Court
<table>
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<tr>
<th>Abbreviation</th>
<th>Full Form</th>
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<tr>
<td>PDO</td>
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<td>PID Act</td>
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<td>PM&amp;C</td>
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<td>VSCA</td>
<td>Court of Appeal Victoria</td>
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Executive Summary

The INSLM Act provides for the appointment of the INSLM. This is my first annual report to the Prime Minister as the INSLM. It covers two periods of time:

a. From 1 July 2016 to the end of the term of the second INSLM, the Hon Roger Gyles AO, QC, who resigned on 31 October 2016. His principal work during that period was the production of the report entitled *Certain Questioning and Detention Powers in relation to Terrorism*.

b. The start of my term as Acting INSLM on 24 February 2017 until 30 June 2017. My principal work during that period was the preparation of the three ‘statutory review’ reports which were delivered to the Prime Minister on 7 September 2017.

I was confirmed as INSLM on 24 August 2017, outside the current reporting period.

As explained below, either of my own motion or on a Prime Ministerial reference, as INSLM, I independently:

a. review the operation, effectiveness and implications of national security and counter-terrorism laws; and

b. consider whether the laws contain appropriate protections for individual rights, remain proportionate to terrorism or national security threats, and remain necessary.

In conducting the review, I have access to all relevant material, regardless of national security classification, can compel answers to questions, and hold public and private hearings. My reports are provided to the Prime Minister and are tabled promptly in Parliament.

I do not deal with complaints but welcome submissions on the reviews.

My role is part-time and is supported by a small permanent staff located in Canberra.

There have been three INSLMs since the role began in 2010: Bret Walker SC, the Hon Roger Gyles AO, QC and myself. I acknowledge the eminent service as INSLM of each of my predecessors.
By the time this report is tabled, the three statutory review reports will also have been tabled. While these reports were completed and presented outside the reporting period, and as a consequence are outside the scope of this report, they were the main focus of work for me and my Office for the balance of the reporting period.

Although the Office of the INSLM remained vacant from 1 November 2016 until my acting appointment in February 2017, the INSLM Principal Adviser conducted preparatory work for the three statutory deadline reviews which facilitated the reviews that I commenced on my appointment, and ensured that I was in a position to hold public and private hearings, conduct my reviews and present my reports on time to the Prime Minister.

Those reports concern:

- a. Division 3A of part IAA of the *Crimes Act 1914* (Cth) (Stop, Search & Seize Powers)
- b. Sections 119.2 and 119.3 of the Criminal Code (Declared Areas)
- c. Divisions 104 and 105 of the Criminal Code (Control Orders and Preventive Detention Orders) including the interoperability of the control order regime and the high risk terrorist offenders, continuing detention regime, in div 105A of the Criminal Code.

Each report contains a common chapter on the ‘National Security and counter-terrorism landscape’ which concludes in substance that:

- a. there is currently a ‘probable’ level of threat of one or more terrorist attacks occurring in Australia
- b. that threat level will remain a significant factor in the Australian national security and counter-terrorism landscape for the reasonably foreseeable future, certainly during my term as INSLM, which ends on 30 June 2020, and indeed for the next five years
- c. while more complex or extensive attacks cannot be ruled out, and must be prepared for, attacks by lone actors using simple but deadly weapons, with little if any warning, are more likely than the former type of attack
- d. there can be no guarantee that the authorities will detect and prevent all attacks
e. there is also the risk of opportunistic if unconnected ‘follow-up’ attacks in the immediate aftermath of a completed attack, at a time when police and intelligence agencies are fully occupied in obtaining evidence and returning the attacked locality to normality.

Formal reports, such as those referred to above, are my principal function. In order properly to perform that function I officially engage with relevant Ministers, other parliamentarians, officials (including police and intelligence officials, the Human Rights Commission, and my counterpart, the United Kingdom Independent Reviewer of Terrorism Legislation, Max Hill QC), academics, bodies such as the Law Council of Australia and members of the public. I do so through meetings, hearings, correspondence and the receipt of submissions. I acknowledge the considerable assistance of all who have engaged with me and my Office. I appear from time to time before a Senate Estimates committee (as part of that committee’s consideration of PM&C) and the PJCIS.

On 18 July 2017, shortly after the end of the reporting period, the government announced by press release from the Prime Minister - ‘A strong and secure Australia’ - the establishment of a Home Affairs portfolio, which included the following statement:

The Attorney-General’s portfolio will incorporate the Inspector-General of Intelligence and Security and the Independent National Security Legislation Monitor. The Government will also consider measures to strengthen the operation of both roles.

The portfolio movement of the INSLM from the Prime Minister to the Attorney-General means an actual move of my office and staff, possible legislative changes, and significant consequential machinery of government changes yet to be worked out, all of which will be mentioned in the next annual report.

I look forward to the next three years as INSLM.
Chapter 1: Overview

History/Background of the INSLM

1.1 The Australian counter-terrorism and national security landscape, like that of many other nations, changed significantly in response to the terrorist attacks in the United States on 11 September 2001. In the years that followed there were widespread and significant changes to the powers of national security and law enforcement agencies, as well as changes to the criminal law to respond to new and emerging threats. In the first five years after those attacks more than thirty pieces of legislation were enacted by the Parliament.¹

1.2 In the years that followed there were consistent calls for an independent reviewer to look holistically at the counter-terrorism and national security regime,² and in 2010 the INSLM was established by the INSLM Act.

1.3 In his first annual report the first INSLM, Bret Walker SC, wrote:

The functions of the INSLM and the object of the 2010 Act may be paraphrased as the review of the effectiveness and appropriateness of the CT [counter-terrorism] Laws. The specific words of secs 3, 6 and 8 of the 2010 Act govern, but the paraphrase serves to emphasize the twin poles between which the CT Laws are to be considered.

As to whether the CT Laws are effective, the question concerns their part in deterring and preventing, and responding to, terrorism and terrorism-related activity including that which threatens Australia’s security.

As to whether the CT Laws are appropriate, the question concerns, first, their consistency with Australia’s international obligations including human rights obligations, counter-terrorism obligations and international security obligations. Second, it concerns the safeguards contained in them for protecting the rights of individuals. Third, it concerns their proportionality to any threat of terrorism or threat to national security or both.

Linking the questions whether the CT Laws are effective and appropriate is a further question drawing on all these inquiries. It is whether the legislation comprising the CT

Laws ‘remains necessary’. Those two words in subpara 6(1)(b)(iii) of the 2010 Act compress all the issues to be examined by the INSLM. They seek a conclusion based on principle as well as overall policy. \(^3\)

1.4 I agree.

1.5 The role of the INSLM compliments other elements of the overall accountability and oversight framework for Australia’s national security and counter-terrorism regime. When I was appointed, the Prime Minister, the Hon Malcolm Turnbull, said this:

The Independent National Security Legislation Monitor is an important and valued component of Australia’s national security architecture, responsible for ensuring that national security and counter-terrorism legislation is applied in accordance with the rule of law and in a manner consistent with our human rights obligations.

In particular, as it becomes more important than ever for the Government to continue modernising and strengthening our laws to address the growing and evolving terrorist and espionage threat at home and abroad, the relevance of the independent reviewer becomes similarly important. This will help ensure that our individual freedoms that underpin the Australian way of life are balanced against the need to fight terrorism and other threats with every tool at our disposal. \(^4\)

Functions

1.6 Section 6(1) of the INSLM Act confers on me the following functions:

(a) to review, on his or her own initiative, the operation, effectiveness and implications of:

   (i) Australia’s counter-terrorism and national security legislation; and

   (ia) without limiting subparagraph (i), Division 105A of the Criminal Code and any other provision of that Code as far as it relates to that Division; and

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

\(^3\) INSLM Annual Report (16 December 2011), 4.

(b) to consider, on his or her own initiative, whether any legislation mentioned in paragraph (a):

(i) contains appropriate safeguards for protecting the rights of individuals; and

(ii) remains proportionate to any threat of terrorism or threat to national security, or both; and

(iii) remains necessary;

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

(d) to assess whether Australia’s counter-terrorism or national security legislation is being used for matters unrelated to terrorism and national security.

1.7 Section 8 of the INSLM Act requires me, when performing my functions (including carrying out a review under s 6(1)(a)), to have regard to Australia’s obligations under international agreements; as well as to arrangements agreed from time to time between the Commonwealth, the states and the territories, to ensure a national approach to countering terrorism. Each of those matters are of great importance. For example, state and territory Police work closely with Commonwealth agencies, including through Joint Counter Terrorism Teams.

1.8 International obligations concerning human rights, counter-terrorism and international security are just that: obligations. One of the most important international human rights treaties is the ICCPR. In each of my statutory review reports I noted that sometimes commentary on the human rights impact of terrorism focuses on the rights of those suspected of committing terrorist offences rather than the rights of the victims of terrorist attacks, whereas the true position, as I said, was that:

‘within limits, counter-terrorism laws which restrict the human rights of criminal suspects to protect the human rights of victims of terrorist acts, operate as envisaged by, and in a manner consistent with, the ICCPR’.

1.9 There are limitations on my functions by operation of s 6(2), which provides:

(2) To avoid doubt, the following are not functions of the Independent National Security Legislation Monitor:
(a) to review the priorities of, and use of resources by, agencies that have functions relating to, or are involved in the implementation of, Australia’s counter-terrorism and national security legislation.

(b) to consider any individual complaints about the activities of Commonwealth agencies that have functions relating to, or are involved in the implementation of, Australia’s counter-terrorism and national security legislation.

**Reporting Requirements**

1.10 Section 29 of the INSLM Act provides that the INSLM must prepare and give to the Prime Minister an annual report relating to the performance of my s 6 (1)(a), (b) and (c) functions (see paragraph 1.6).

1.11 The report must be given to the Prime Minister as soon as practicable after 30 June in each financial year and, in any event by the following 31 December. The relevant reporting period for each annual report is the financial year (ending on 30 June). This report covers the reporting period commencing on 1 July 2016 and ending on 30 June 2017.

1.12 Statutory deadline reviews and reviews conducted on matters referred by the Prime Minister are separately reported. The details of these reviews will not be repeated in this report.

1.13 Where appropriate, I am required to provide the Prime Minister with a declassified annual report. This is the only report that has been prepared under s 29 of the INSLM Act for the reporting period. A classified report has not been produced.

**INSLM Office**

1.14 Section 11(1) of the INSLM Act stipulates that the role of the INSLM is a part-time position. In order to carry out the functions described above I am supported, within the Department of the Prime Minister and Cabinet, by a small full-time staff with additional support provided by secondees or counsel-assisting as appropriate.

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5 INSLM Act s 29 (2).
6 INSLM Act s 6 (1B)-(1C).
7 INSLM Act s 30.
8 INSLM Act s 29 (2A).
1.15 At the time of my appointment my staff consisted of a full-time Principal Adviser, Mr Mark Mooney, and a full-time executive officer. I acknowledge with thanks their work and dedication. The Office is funded for additional staff; however, the positions were not filled while the INSLM role remained vacant.

1.16 During the reporting period, a revised staffing structure for my Office was proposed to PM&C. In essence, the revised structure consists of a core element of permanent APS staff (consisting of senior executive service band 1, executive level 2 legal officer, APS6 executive officer) with additional support on an as needed basis from consultants, including counsel and solicitors assisting. This mixture of APS and part-time consultants provides the INSLM with the capacity to flexibly increase resources to meet peak requirements and also allows for specialised support to be engaged when required, while maintaining a core full time office to support the INSLM. The solicitors/counsel assisting model is an efficient, and cost-effective model, which I intend to utilise in all future reviews.

1.17 Using this model, I retained Mr Anthony Hall and Mr Alex Kunzelmann from the Office of General Counsel in the Australian Government Solicitor as solicitors assisting, and for each statutory deadline report I appointed counsel assisting from the private bar, namely Dr Dominic Katter, Ms Anna Mitchelmore, and Ms Sophie Callan. I express my gratitude to them all.

1.18 I note that the restructure was developed prior to the government announcing its response to the Independent Intelligence Review. Further review may be required once the implications of the reforms for my Office are better understood.

1.19 During the reporting period, I had access to appropriate staffing and resources to complete the three statutory deadline reviews in the timeframe allocated. Since its establishment, the INSLM Office has been located in PM&C in Canberra. I gratefully acknowledge the Department’s logistical and other assistance to me and my staff in performing my role, while fully respecting my independence.
1.20 I do not anticipate any reduction in the resources available to my Office as a result of the implementation of the government’s response to the Independent Intelligence Review and the move of my Office to the Attorney-General’s portfolio, although as noted above the precise details concerning that move are not yet known.
Chapter 2: The National Security and Counter-Terrorism Outlook

2.2 As noted above, s 6(1)(b) of the INSLM Act requires me to consider whether Australia’s counter-terrorism and national security legislation remains proportionate to any threat of terrorism or threat to national security and whether it remains necessary. My understanding of the national security and counter-terrorism outlook is essential to this assessment of proportionality and necessity. In each review I undertake I intend to closely analyse this topic, and I did so in each of the three statutory reviews. For the purpose of this annual report I note the following general matters.

Domestic

2.3 The current National Terrorism Threat level remains at ‘probable’. This means there is credible intelligence indicating individuals or groups have both the intention and capability of conducting an attack in Australia. Since September 2014, there have been five attacks and twelve major counter-terrorism disruption operations in response to potential attack planning in Australia. Two of these attacks took place during the reporting period – the 10 September 2016 Minto stabbing and the 5 June 2017 Brighton siege. All five attacks and eleven of the twelve disruptions involved individuals motivated by Islamist extremist ideology. The twelfth disruption involved an extreme right-wing individual arrested in August 2016 – the first case in which a right-wing extremist has been charged under Commonwealth terrorism laws.

2.4 The AFP advises that during the reporting period, 23 individuals were charged with a range of counter-terrorism offences as a result of 10 counter-terrorism operations. Charges were subsequently discontinued against one individual. Of the 10 operations, one was in Brisbane, three were in Melbourne, and six were in Sydney. The majority of AFP investigations related to imminent onshore attack planning. However, several investigations related to suspected breaches of foreign incursions legislation. Later in the report I note details of terrorist convictions in the courts (see paragraphs 5.12-5.16).

2.5 ASIO continues to undertake a large number of high-priority investigations.
The flow of both foreign fighters and finance to overseas conflicts, and the return of foreign fighters to Australia – primarily from the conflicts in Syria and Iraq – remain priority concerns for the national security and counter-terrorism authorities.

**External**

The external terrorist landscape continues to be challenging. Islamist terrorism experienced a resurgence following the rise of ISIL in 2014, transforming the terrorism threat to Australia and Australian interests globally. But ISIL and its affiliates are not the only source of Islamist terrorism. The threat is now more diverse than it has ever been, with a growing cast of organisations, networks, and individuals intent on directing, inspiring and conducting violent attacks against Australia’s interests and people.

There were over 11 attacks in western countries, or against western targets, resulting in over 130 deaths during the reporting period. Most of these attacks were inspired by ISIL, rather than carried out directly. One such attack took place in Australia, with the siege and shooting of a clerk in an apartment complex in Brighton on 5 June 2017. Other attacks during the reporting period included the July 2016 Nice truck attack that killed over 80 people, the December 2016 Berlin Christmas market attack; and in the United Kingdom, the March 2017 Westminster, May 2017 Manchester, and June 2017 London Bridge attacks.

The changing terrorism environment means that counter-terrorism measures globally will continually evolve. Plot disruptions throughout the west are now at an unprecedented rate, yet attacks continue to occur. Many attacks are apparently conducted by individuals who are known peripherally to authorities or who are not known to them at all, making detection difficult. The appeal to some people of terrorist propaganda that drives many of these plots, and the dispersal of experienced terrorists from Syria and Iraq creating a diaspora, will ensure threats will remain.
Conclusions

2.10 During my recent statutory deadline reviews I considered the views of experts within the intelligence community and law enforcement as well as public submissions on the current national security landscape. Chapter 2 of my statutory deadline review reports, which is common to each report, provides the details of my review of the current national security landscape. While I consider that analysis representative of the national security landscape for the reporting period I do not believe that it is necessary to repeat that analysis in this report.
Chapter 3: Reviews conducted in the Reporting Period

3.1 During the reporting period, four separate reviews were progressed by the INSLM Office. The detail of those reviews and their conclusions is set out in the reports of each review submitted to the Prime Minister. While I do not consider it necessary to repeat that detail in this report, the subject matter and salient information on each review follows.

Certain Questioning and Detention Powers in relation to Terrorism – Second INSLM

3.2 Section 6(1B)(a) of the INSLM Act required the INSLM to complete a review of division 3 of part III of the Australian Security Intelligence Organisation Act 1979 (Cth) and any other provision of that Act as far as it relates to that division by 7 September 2017.

3.3 The second INSLM carried out this review concurrently with an ‘own motion’ review of part IC of the Crimes Act 1914 (Cth) and pt II div 2 of the Australian Crime Commission Act 2002 (Cth). Collectively, these reviews are referred to as ‘Certain Questioning and Detention Powers in Relation to Terrorism’. A call for submissions was made, and submissions were received, during the 2015-2016 reporting period. Both public and private hearings were held for this review early in this reporting period.

3.4 Prior to submitting his report of this review, the second INSLM publicly announced that he would step down as the INSLM.9

3.5 On his last day in office, 31 October 2016, the Hon Roger Gyles submitted his report of the review to the Prime Minister. Following the second INSLM’s final appearance before Senate Estimates the Attorney-General, the Hon George

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Brandis QC, thanked Mr Gyles for his work as the INSLM and also noted Mr Gyles’s many years of distinguished service to the nation in a myriad of roles.\textsuperscript{10}

3.6 On 8 February 2017, the report was tabled in both houses of Parliament. The report is available on the INSLM website. The recommendations from this review are listed at Appendix A.

**Stop, Search and Seize Powers**

3.7 Section 6(1B)(b) of the INSLM Act required the INSLM to complete a review of division 3A of part IAA of the *Crimes Act 1914* (Cth) and any other provision of that Act as far as it relates to that division by 7 September 2017.

3.8 Preparatory work for this review was conducted by INSLM Office staff while the INSLM office remained vacant. Following my appointment as acting INSLM on 24 February 2017, I called for and received submissions for this review, and held public and private hearings.

3.9 My report of the review was finalised and given to the Prime Minister on 7 September 2017, outside the current reporting period. The report will be made available on the INSLM website once it is tabled in the Parliament.\textsuperscript{11}

**Control Orders and Preventative Detention Orders (including the interoperability of Divisions 104 and 105A)**

3.10 Section 6(1B)(c) of the INSLM Act required the INSLM to review divisions 104 and 105 of the Criminal Code and any other provision of the Criminal Code as far as it relates to those divisions by 7 September 2017.

3.11 Preparatory work for this review was conducted by INSLM Office staff while the INSLM appointment remained vacant. Following my acting appointment


\textsuperscript{11} Section 29 of the INSLM Act provides for the tabling of the INSLM’s annual reports. Section 30 of the INSLM Act provides for the tabling of the INSLM’s reports on references by the Prime Minister. As noted above (paragraph 1.12), reports of statutory deadline reviews are separately reported, but there is no separate mechanism in the INSLM Act for the receipt and tabling of these reports. Given that the INSLM Act provides for one additional statutory deadline review (into division 105A of the Criminal Code), it seems appropriate for the INSLM Act to be amended to establish such a mechanism.
on 24 February 2017 I called for and received submissions for this review as well as holding public and private hearings for this review during the reporting period.

3.12 The control orders and preventative detention orders report was finalised and given to the Prime Minister on 7 September 2017, outside the reporting period. Following the report being tabled in the Parliament it will be made available on the INSLM website.

**Declared Areas**

3.13 Section 6(1B)(d) of the INSLM Act required the INSLM to review sections 119.2 and 119.3 of the Criminal Code and any other provisions of the Criminal Code as far as it relates to those sections by 7 September 2017.

3.14 Preparatory work for this review was conducted by INSLM Office staff while the INSLM appointment remained vacant. Following my acting appointment on 24 February 2017 I called for and received submissions for this review as well as holding public and private hearings for this review during the reporting period.

3.15 The declared areas review report was finalised and given to the Prime Minister on 7 September 2017, outside the reporting period. Following the report being tabled in the Parliament it will be made available on the INSLM website.
Chapter 4: Non-Reporting Activities

Second INSLM
4.1 The Hon Roger Gyles performed the role of INSLM from the commencement of the reporting period to 31 October 2016. During this period, the Office was focused on the finalisation of the Certain Questioning and Detention Powers in Relation to Terrorism report (see paragraphs 3.2-3.6) and compiling the 2015-2016 annual report.

Advice to Parliamentary Committees
4.2 The second INSLM appeared before the Senate Standing Committee on Finance and Public Accountability on 17 October 2016 during Supplementary Budget Estimates. On 14 June 2017 he attended a private hearing of the PJCIS to discuss his review of Certain Questioning and Detention Powers in Relation to Terrorism and the recommendations set out in his report.

Current INSLM
4.3 In addition to conducting my three statutory deadline reviews (see paragraphs 3.7 - 3.15) I was involved in a number of unrelated activities during the reporting period. These activities included advice to parliamentary committees, and engagement with elected representatives (both government and opposition), national security and counter-terrorism authorities, and domestic and international bodies operating in areas relevant to my functions.

4.4 As noted at the commencement of this report, in my opinion the reviews conducted, and reports produced, by the INSLM must be supported by both official and public engagement so that the fullest possible range of views are received by me in undertaking my role, thereby helping to maintain public confidence in the counter-terrorism and national security laws that I oversee in my capacity as INSLM.
Parliamentary Committees
4.5 I appeared before the Senate Standing Committee on Finance and Public Administration on 27 February 2017 during the 2016-2017 Additional Budget Estimates hearings, and on 22 May 2017 during the 2017-2018 Budget Estimates hearings.

4.6 Section 7A of the INSLM Act provides for the PJCIS to refer to my office matters of which it becomes aware in the course of performing its functions under s 29(1) of the ISA. It then becomes a function of my office to consider reviewing that matter. During the reporting period, the PJCIS did not refer any matter to my office for review. However, the reviews detailed in Chapter 3 of this report are complementary to reviews currently being conducted by the PJCIS.

4.7 During the reporting period, I met with the Chair and Deputy Chair of the PJCIS.

Engagement with Elected Representatives
4.8 During the reporting period, I met with Ministers and shadow Ministers to discuss the functions and priorities of my office. In particular I met with the Attorney-General, shadow Attorney-General, the Minister for Justice, and the shadow Minister for Foreign Affairs.

Engagement with National Security and Counter-Terrorism Authorities
4.9 In addition to requesting and receiving submissions and briefings relevant to the reviews conducted by my office, my staff and I also maintain strong liaison relationships with national security and counter-terrorism authorities. These relationships assist in maintaining our situational awareness and educating the national security and counter-terrorism community regarding the functions of the office.

4.10 During the reporting period I met with principals or representatives from the Commonwealth Counter-Terrorism coordinator, ADF, AFP, AGD, ASIO, AUSTRAC, CDPP, Commissioners and Deputy Commissioners of a number of state police forces and the lead reviewers for the Independent Intelligence Review.
Engagement with Accountability or Integrity Agencies
4.11 During the reporting period I met with the AHRC, the Commonwealth Ombudsman, the Australian Information Commissioner and IGIS.

Public Engagement
4.12 On 12 May 2017, in conjunction with representatives from the PJCIS and the IGIS I presented a lecture at the Australian National University on the role and challenges of the INSLM to a course on Australian National Security Law.

4.13 I also met with academics to discuss the role of the INSLM.


Chapter 5: Developments

Legislative developments

5.1 During the reporting period there were two significant pieces of legislation dealing with national security issues that were enacted by Parliament.

Counter-Terrorism Legislation Amendment Act (No. 1) 2016

5.2 On 15 September 2016 the Counter-Terrorism Legislation Amendment Bill (No.1) 2016 was introduced into Parliament. The 2016 Bill replaced the lapsed Counter-Terrorism Legislation Amendment Bill (No. 1) 2015. The 2016 Bill included additional provisions to implement recommendations made by COAG, the PJCIS and the second INSLM.

5.3 The Counter-Terrorism Legislation Amendment Act (No. 1) 2016 made a number of changes to national security and counter-terrorism laws including:

a. Criminal Code: the minimum age for a control order was lowered from 16 to 14, the threshold for imposing a PDO was amended, an offence of advocating genocide was introduced and additional exemptions relating to legal representation were added.

b. Crimes Act, TIA Act and SD Act: new monitoring powers were introduced in relation to persons subject to control orders.

c. ASIO Act: replaced the offence provisions in relation to disclosing information about a special intelligence operation creating separate offences for ‘insiders’ and ‘outsiders.’

d. Crimes Act: amendments to how the thresholds relating to the application and issue of delayed notification warrants apply.

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13 Explanatory Memorandum, National Security Legislation Amendment Bill (No. 1) 2016, 1.
14 This is not a complete list of the amendments enacted by Counter-Terrorism Legislation Amendment Act (No. 1) 2016. In addition to the Act itself, the amendments are discussed in detail in INSLM Report, Review of Divisions 104 and 105 of the Criminal Code (including the interoperability of Divisions 104 and 105A): Control Orders and Preventative Detention Orders, (7 September 2017), 23-29. See also, Parliament of Australia, Bills Digest No. 20, 2016-17, 10 October 2016.
e. NSI Act and PID Act: amendments to allow courts in control order proceedings to consider information that has not been disclosed to the controlee or their representative for security reasons.

f. NSI Act: a scheme of special advocates was introduced to represent the interests of a person who is the subject of a control order proceeding where that person and their legal representative has been excluded from seeing or hearing sensitive national security information and amendments to ensure that orders in security related circumstances override regulatory disclosure requirements.

5.4 The special advocates scheme was implemented in response to recommendations of the second INSLM,\textsuperscript{15} the PJCIS\textsuperscript{16} and the COAG.\textsuperscript{17} The INSLM recommendation that the commencement of changes to the NSI Act and PID Act allowing for courts in control order proceedings to consider information that has not been disclosed to the controlee or their representative for security reasons be delayed until the scheme was in place was not implemented.\textsuperscript{18}

5.5 Finally, the \textit{Counter-Terrorism Legislation Amendment Act (No. 1) 2016} implemented the Government’s response to the second INSLM’s report on the impact on journalists of section 35P of the ASIO Act.\textsuperscript{19} The Government supported and implemented the second INSLM’s recommendations that the offences related to disclosure of information about a special intelligence operation should distinguish between insiders (entrusted persons), who were in some way involved in the operation, and outsiders who have no involvement in or connection with the operation.\textsuperscript{20} While the second INSLM’s recommendations implied a complete

\textsuperscript{15} INSLM Report, \textit{Control order safeguards – special advocates and the Counter-Terrorism Legislation Amendment Bill (No. 1) 2015}, (January 2016), 10 recommendation 1.


\textsuperscript{17} COAG, \textit{Council of Australian Governments review of counter-terrorism legislation 2013}, (1 March 2013), 97.

\textsuperscript{18} INSLM Report, \textit{Control order safeguards – special advocates and the Counter-Terrorism Legislation Amendment Bill (No. 1) 2015}, (January 2016), 10, recommendation 2.


separation between insider and outsider offences, the offence provisions do not exclude the possibility of an entrusted person being prosecuted for an outsider offence.\textsuperscript{21} The Act also implements a modified version of the prior publication defence to the outsider offences recommended by the second INSLM.\textsuperscript{22}

**Criminal Code Amendment (High Risk Terrorist Offenders) Act 2016**

5.6 The Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016 was also introduced into Parliament on 15 September 2016.\textsuperscript{23} The COAG decision underpinning the HRTO Act was discussed in the 2015-2016 INSLM Annual Report.\textsuperscript{24}

5.7 Division 105A of the Criminal Code was enacted pursuant to the HRTO Act and commenced on 7 June 2017. The object of the division is ‘to ensure the safety and protection of the community by providing for the continuing detention of terrorist offenders who pose an unacceptable risk of committing serious Part 5.3 offences if released into the community.’\textsuperscript{25} Division 105A is largely based upon state and territory serious sex offenders legislation, the prototype for which was found to be constitutionally valid in *Fardon v Attorney-General (Qld)*.\textsuperscript{26}

5.8 Under div 105A, a state or territory Supreme Court may make a CDO in relation to a ‘terrorist offender’ on the application of the Commonwealth Attorney-General. A ‘terrorist offender’ is a person who has been convicted of a ‘serious Part 5.3 offence’, which is defined as an offence against Part 5.3 of the Criminal Code, the maximum penalty for which is 7 or more years of imprisonment.\textsuperscript{27} All of the offence provisions in divs 101, 102 and 103 of Part 5.3 meet that description save for one, s 102.8, associating with terrorist organisations. A terrorist offender is also a person who has been convicted of international terrorist activities using explosive or lethal devices, and foreign

\textsuperscript{21} Explanatory Memorandum, National Security Legislation Amendment Bill (No. 1) 2016, 1170.
\textsuperscript{22} Explanatory Memorandum, National Security Legislation Amendment Bill (No. 1) 2016, 1175-1176.
\textsuperscript{24} INSLM Annual Report (5 October 2016), 8.
\textsuperscript{25} HRTO Act s 105A.1.
\textsuperscript{26} [2004] HCA 46; (2004) 223 CLR 575.
\textsuperscript{27} HRTO Act s 105A.2.
incursions and recruitment offences (excluding the offence of publishing recruiting advertisements).\textsuperscript{28}

5.9 At the suggestion of the Attorney-General and the PJCIS I considered the discrete issue of the interoperability between the CDO under div 105A and control orders under div 104 of the Criminal Code in my Control Orders and Preventative Detention Orders (including the interoperability of Divisions 104 and 105A) report (see above 3.10 - 3.12).

**Developments in Jurisprudence**

5.10 During the reporting period, a number of court decisions were handed down that dealt with counter-terrorism and national security legislation.

**Control orders**

5.11 On 8 July 2016, Federal Circuit Court Judge Hartnett confirmed the interim control order made in relation to Harun Causevic under div 104 of the Criminal Code. The decision, in the case of *Gaughan v Causevic (No 2)*,\textsuperscript{29} was the outcome of the first comprehensive challenge to the confirmation of an interim control order since the control order regime was introduced in 2005. The proceedings in this case were reported in the 2015-2016 annual report,\textsuperscript{30} and several aspects of the case are discussed in detail in the control orders and preventative detention orders report.

**Counter-terrorism prosecutions**

5.12 A number of persons convicted of terrorism offences were sentenced during the reporting period. Details of these cases are set out in the table below.

<table>
<thead>
<tr>
<th>ACCUSED</th>
<th>CHARGES</th>
<th>PLEA</th>
<th>SENTENCE DECISION</th>
<th>SENTENCE</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ibrahim Ghazzawy</td>
<td>Section 101.5(1) of the Criminal Code (making a document to facilitate a terrorist act)</td>
<td>Guilty</td>
<td>8/05/2017 [2017] NSWSC 474</td>
<td>8 years and 6 months imprisonment NPP: 6 years and 4 months</td>
</tr>
</tbody>
</table>

\textsuperscript{28} See div 72 subdiv A and pt 5.5. The foreign incursion offences include offences under the now repealed *Crimes (Foreign Incursions and Recruitment) Act 1978* (Cth).

\textsuperscript{29} [2016] FCCA 1693.

\textsuperscript{30} INSLM Annual Report (5 October 2016), 22.
<table>
<thead>
<tr>
<th>ACCUSED</th>
<th>CHARGES</th>
<th>PLEA</th>
<th>SENTENCE DECISION</th>
<th>SENTENCE</th>
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</thead>
<tbody>
<tr>
<td>Ahmad Naizmand</td>
<td>Section 104.27 of the Criminal Code (contravening control order)</td>
<td>Guilty</td>
<td>2/02/2017</td>
<td>4 years imprisonment (3 years NPP)</td>
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<td>[2017] NSWDC 4</td>
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<tr>
<td>Omar Al Kutobi Mohammed Kiad</td>
<td>Sections 11.5 and 101.6(1) of the Criminal Code (conspiring to commit an act in preparation for, or planning, a terrorist act)</td>
<td>Guilty</td>
<td>9/12/2016</td>
<td>20 years imprisonment (15 years NPP)</td>
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<td>[2016] NSWSC 1760</td>
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<tr>
<td>MHK (a child)</td>
<td>Section 101.6(1) of the Criminal Code (act in preparation for a terrorist act)</td>
<td>Guilty</td>
<td>First instance</td>
<td>11 years imprisonment (8 years 3 months NPP)</td>
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<td></td>
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<td></td>
<td>7/12/2016</td>
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<td>[2016] VSC 742</td>
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<td>On appeal</td>
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<td>23/06/2017</td>
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<td></td>
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<td>[2017] VSCA 157</td>
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<tr>
<td>ACCUSED</td>
<td>CHARGES</td>
<td>PLEA</td>
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<tr>
<td>Hassan El Sabsabi</td>
<td>Section 7(1)(e) of the <em>Crimes (Foreign Incursions and Recruitment)</em> Act 1978 (preparation for incursion into a foreign country for the purpose of engaging in hostile activities)</td>
<td>Guilty</td>
<td>First instance 7/12/2016 [2016] VSC 740</td>
<td>44 days imprisonment declared as time served Community Corrections Order of 2 years duration Appeal dismissed</td>
</tr>
<tr>
<td>Omar Succarieh</td>
<td>Sections 7(1)(a) and 7(1)(e) of the <em>Crimes (Foreign Incursions and Recruitment)</em> Act 1978 (preparation for incursion into a foreign country for the purpose of engaging in hostile activities)</td>
<td>Guilty</td>
<td>First instance 2/11/2016 (Supreme Court of Queensland, unreported)</td>
<td>4 years imprisonment (3 years NPP) Appeal dismissed</td>
</tr>
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<td></td>
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<td></td>
<td>On appeal 12/5/2017 (Queensland Court of Appeal)</td>
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<tr>
<td>ACCUSED</td>
<td>CHARGES</td>
<td>PLEA</td>
<td>SENTENCE DECISION</td>
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<tr>
<td>Amin Mohamed</td>
<td>Section 7(1)(a) of the <em>Crimes (Foreign Incursions and Recruitment)</em> Act 1978 (preparation for incursion into a foreign country for the purpose of engaging in hostile activities)</td>
<td>Not Guilty</td>
<td>29/09/2016 [2016] VSC 581</td>
<td>5 years 6 months imprisonment (3 years 6 months NPP)</td>
</tr>
<tr>
<td>Sevdet Besim</td>
<td>Section 101.6(1) Criminal Code (act in preparation for, or planning, a terrorist act)</td>
<td>Guilty</td>
<td>First instance 5/09/2016 [2016] VSC 537 On appeal 23/6/2017 [2017] VSCA 158</td>
<td>First instance 10 years imprisonment (7 years 6 months NPP) On appeal 14 years imprisonment (10 years 6 months NPP)</td>
</tr>
<tr>
<td>ACCUSED</td>
<td>CHARGES</td>
<td>PLEA</td>
<td>SENTENCE DECISION</td>
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<tr>
<td>Hamdi Alqudsi</td>
<td>Section 7(1)(e) of the <em>Crimes</em> <em>(Foreign Incursions and Recruitment)</em> Act 1978 (preparation for incursion into a foreign country for the purpose of engaging in hostile activities)</td>
<td>Not Guilty</td>
<td>1/09/2016 [2016] NSWSC 1227</td>
<td>8 years imprisonment (6 years NPP)</td>
</tr>
<tr>
<td>Fatima Elomar</td>
<td>Section 7(1)(f) of the <em>Crimes</em> <em>(Foreign Incursions and Recruitment)</em> Act 1978 (preparation for incursion into a foreign country for the purpose of engaging in hostile activities)</td>
<td>Guilty</td>
<td>1/07/2016 (NSWDC, unreported)</td>
<td>2 years 3 months imprisonment, released on a recognizance</td>
</tr>
</tbody>
</table>

5.13 A number of these cases warrant additional commentary. The first is the *Naizmand* case. In the 2015-2016 annual report, the second INSLM reported on the 27 June 2016 decision of Harrison J of the Supreme Court of NSW to refuse bail to Ahmad Naizmand applying section 15AA of the *Crimes Act 1914* (Cth). As noted in the report, Mr Naizmand had been charged with an offence against s 104.27 of the Criminal Code for breaching a condition of a control order in relation to him by accessing certain electronic media depicting propaganda and

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31 INSLM Annual report (5 October 2016) 22.
promotional material for a terrorist organisation. Mr Naizmand pleaded guilty to each of the five counts.

5.14 On 2 February 2017, Judge Scotting of the District Court of NSW sentenced Mr Naizmand to four years imprisonment with a three year NPP, being the minimum period without parole that may be fixed under s 19AG of the *Crimes Act 1914*. In the sentencing remarks, the judge observed that the offence carried a relatively low maximum penalty compared to other terrorism offences in pt 5.3 of the Criminal Code. Nevertheless, Mr Naizmand’s conduct, whereby the media accessed ‘became progressively more disturbing’, constituted a serious offence that posed a threat to the safety of the community that the control was intended to alleviate. This is the second successful prosecution of an offence against s 104.27.

5.15 The second matter of note comprises the cases of *MHK* and *Besim*, which involved the successful prosecution of offences against section 101.6(1) of the Criminal Code (acts in preparation for, or planning, a terrorist act) arising out of separate terrorist plots.

5.16 In both cases, the Victorian Court of Appeal allowed the CDPP appeals and added 4 years imprisonment to the original head sentence. In doing so, the Court emphasised the unique nature of terrorism offending, both in bringing forward the stage at which criminal responsibility arises (as highlighted by Spigelman CJ in *Lodhi v The Queen*) and in greater weight being placed on the protection of society, deterrence and retribution than on the offender’s rehabilitation.

**Bail for terrorism suspects**

5.17 In the 2015-2016 annual report, the second INSLM commented on a number of cases involving the application of s 15AA of the *Crimes Act 1914 (Cth).* This provision establishes a presumption against bail being granted to a person charged with a terrorism offence. The presumption may be rebutted by the

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32 *R v Naizmand* [2017] NSWDC 4. An appeal against the sentence has been filed in the NSW Court of Criminal Appeal.
33 Details of the first prosecution are reported in *R v MO (No 1)* [2016] NSWDC 144.
34 *DPP (Cth) v MHK* [2017] VSCA 157; *DPP (Cth) v Besim* [2017] VSCA 158.
36 *DPP (Cth) v Besim* [2017] VSCA 158, [111]-[114].
37 INSLM Annual report (5 October 2016) 21-22.
applicant for bail satisfying the court that ‘exceptional circumstances’ exist to justify bail.\textsuperscript{38} He observed that, while the number of adults charged with terrorism offences that have been refused bail demonstrates that this is a difficult onus for the applicant to discharge, a ‘comparatively high proportion of minors have recently been granted bail’.

5.18 The decision of Beech-Jones J of the Supreme Court of NSW on 29 July 2016 in \textit{AB v Director of Public Prosecutions (Cth)} continues this trend.\textsuperscript{39} This decision is noteworthy in two respects. First, while the applicant’s age (17 years at the time of the hearing) and special needs in connection with an intellectual disability were not unusual considerations in satisfying the court that exceptional circumstances exist, the court held that the strength of the CDPP’s case against the applicant was also a relevant consideration. After observing that the prosecution had ‘minimal prospects of establishing that [the applicant] had planned a “terrorist attack”’,\textsuperscript{40} and acknowledging that ‘bail applications are generally unsuitable vehicles for making any detailed assessment of the strength of a CDPP case,’\textsuperscript{41} Beech-Jones J noted:

\begin{quote}
[If] the Court does determine that the CDPP’s case is weak then that is a matter that can strongly weigh in favour of a conclusion that “exceptional circumstances” are made out.\textsuperscript{42}
\end{quote}

5.19 Second, although the court was satisfied that ‘exceptional circumstances’ existed, and therefore that the applicant had rebutted the presumption against bail in s 15AA of the \textit{Crimes Act 1914 (Cth)}, Beech-Jones J nevertheless found that the applicant still posed an unacceptable risk to the community, even if released on strict bail conditions, and was therefore obliged under NSW bail legislation (s 19 of the \textit{Bail Act 2013 (NSW)}) to refuse bail.

5.20 In subsequent bail proceedings, the Court of Appeal was also satisfied that exceptional circumstances existed, but still refused bail, for reasons similar to those given by Beech-Jones J.\textsuperscript{43}

\begin{footnotes}
\item[38] See summary in \textit{R v NK} [2016] NSWSC 498, [26] (Hall J).
\item[39] \textit{AB v Director of Public Prosecutions (Cth)} [2016] NSWSC 1042.
\item[40] Ibid [5].
\item[41] Ibid [45].
\item[42] Ibid.
\item[43] \textit{AB v R (Cth)} [2016] NSWCCA 191, [32], [48] (Hoeben CJ at CL, Campbell and Button JJ agreeing).
\end{footnotes}
Chapter 6: Looking Ahead

6.1 I am honoured to have been appointed to the role of INSLM. It is a time of significant change in the nature and scope of counter-terrorism and national security threats, and in the organisation of the Australian national security and counter-terrorism community. Shortly after the end of the reporting period the government announced its response to the recommendations of the Independent Intelligence Review. The implementation of that response will see my office move to the Attorney-General’s portfolio. In addition to this move the government has indicated it will consider measures to strengthen the operation of my office. The reform process ushered in by the Independent Intelligence Review has been described by the Prime Minister as ‘the most significant reform of Australia’s national intelligence and domestic security arrangements and their oversight in more than forty years.’

6.2 The breadth of these reforms, and change in administrative arrangements for my office, will undoubtedly require adjustments. The implementation of these reforms as they affect my office will be a key focus area for me and my staff for the remainder of this reporting period continuing into 2018-2019.

6.3 During the next reporting period I also intend to develop a flexible forward work plan for my term of INSLM. The recent work of the office has focused on the conduct of reviews required by specifically legislated deadlines rather than following the application or consideration of those provisions, and this has limited opportunities for ‘own motion’ reviews. Unless provided with a reference by the Prime Minister or PJCIS, my intention is to conduct own motion reviews concentrated on those provisions which are most used, consistent with the guidance provided by s 9 of the INSLM Act.

6.4 While my primary focus since commencing the role of the INSLM has been the completion of the three statutory deadline reviews given to the Prime Minister on 7 September 2017, in July 2017 (outside this reporting period) I had the

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44 Prime Minister of Australia (Malcolm Turnbull), ‘A strong and secure Australia,’ media release, 18 July 2017.
45 INSLM Act s7.
46 INSLM Act s7A.
opportunity to engage with my counterpart in the United Kingdom, the Independent Reviewer of Terrorism Legislation. I met with the current Independent Reviewer, Mr Max Hill QC and the former Independent Reviewer, Mr David Anderson QC and found these meetings valuable.

6.5 The United Kingdom’s Independent Reviewer of Terrorism Legislation holds a unique place in the history of the INSLM office, with the role providing a blue-print from which the role of the INSLM was adapted to meet our national requirements, creating what has been referred to as ‘a global benchmark for the independent supervision of counter-terrorist activity’. While the two roles have their differences, as do the national security and counter-terrorism laws in our respective countries, the roles have much in common. I look forward to maintaining close ties between our two offices during my term as INSLM and continuing to share knowledge and experience which is mutually beneficial to the performance of our individual roles. I also intend to increase awareness of the important functions of the INSLM to increase the range of participation in my reviews.

6.6 Over the next three years I intend to work with government towards formalising responses to the recommendations of the INSLM. That is not to imply an expectation that all recommendations of the INSLM would be accepted and immediately implemented. The matters considered by my office are often complex and technical as well as being subject to financial constraints and other issues which are outside the remit of this office. However, there is value in consistently recording government and parliamentary responses to INSLM recommendations: it informs public debate, and it enhances public confidence in the role of the INSLM, which is appropriate as the role is, in the words of the Prime Minister “an important and valued component of Australia’s national security architecture”. I look forward to the next three years as INSLM.

47 Further information on the United Kingdom Independent Reviewer of Terrorism Legislation is available at https://terrorismlegislationreviewer.independent.gov.uk/
Appendix A – INSLM Recommendations

This appendix provides a complete list of the recommendations made by the INSLM during the reporting period.

<table>
<thead>
<tr>
<th>INSLM</th>
<th>Report</th>
<th>Recommendation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Second</td>
<td>Certain questioning and detention powers in relation to terrorism – <em>Crimes Act 1914</em> (Cth) Pt IC</td>
<td>1. The initial investigation period available pursuant to subdiv B of pt IC of the Crimes Act 1914 (Cth) be increased to eight hours (four hours if the person appears to be under 18 years of age, or an Aboriginal person or a Torres Strait Islander).</td>
</tr>
<tr>
<td>Second</td>
<td>Certain questioning and detention powers in relation to terrorism – <em>Crimes Act 1914</em> (Cth) Pt IC</td>
<td>2. There should be a reasonable outer limit to the period for detention without charge, regardless of dead time pursuant to pt IC of the Crimes Act 1914 (Cth) – a period for investigation should not be an indefinite de facto preventative detention power. In my view, 10 days is that outer limit.</td>
</tr>
<tr>
<td>Second</td>
<td>Certain questioning and detention powers in relation to terrorism – <em>Crimes Act 1914</em> (Cth) Pt IC</td>
<td>3. The procedures in and pertaining to making applications under subdiv B of pt IC of the Crimes Act 1914 (Cth) should be revised to ensure they are up-to-date with electronic capability.</td>
</tr>
<tr>
<td>Second</td>
<td>Certain questioning and detention powers in relation to terrorism – <em>Crimes Act 1914</em> (Cth) Pt IC</td>
<td>4. In the absence of a compelling justification, s 23DB (9) of the Crimes Act 1914 (Cth) and related provisions ought to be repealed. If justified, the section should be redrafted to clearly indicate the basis on which it should be exercised, and distinguished from s 23DF of the Crimes Act 1914 (Cth) and related provisions.</td>
</tr>
<tr>
<td>INSLM</td>
<td>Report</td>
<td>Recommendation</td>
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<tr>
<td>Second</td>
<td>Certain questioning and detention powers in relation to terrorism – <em>Crimes Act 1914</em> (Cth) Pt IC</td>
<td>5. The substance of the application of pt IC of the <em>Crimes Act 1914</em> (Cth) to terrorism cases should be reviewed together with control orders and preventative detention orders when those powers are reviewed pursuant to the Independent National Security Legislation Monitor Act 2010 (Cth). A part of that review should be to see how many arrests with periods of extended detention do not lead to a charge of a terrorism offence or lead to a charge that is dropped before trial. This will assist in judging whether the power is being misused. Another part should be to review the natural justice issue referred to in paragraph 7.32 of this report.</td>
</tr>
<tr>
<td>Second</td>
<td>Certain questioning and detention powers in relation to terrorism – <em>Crimes Act 1914</em> (Cth) Pt IC</td>
<td>6. The adoption of an alternative approach to investigative detention based on the New South Wales model should be kept under active consideration.</td>
</tr>
<tr>
<td>Second</td>
<td>Certain questioning and detention powers in relation to terrorism – <em>Australian Security Intelligence Organisation Act 1979</em> (Cth) Pt III Div 3</td>
<td>7. Subdivision C of div 3 of pt III of the Australian Security Intelligence Organisation Act 1979 (Cth) should be repealed or cease when the sunset date is reached. Successive extensions of the sunset date since 2006 should end.</td>
</tr>
<tr>
<td>Second</td>
<td>Certain questioning and detention powers in relation to terrorism – <em>Australian Security Intelligence Organisation Act 1979</em> (Cth) Pt III Div 3</td>
<td>8. The balance of div 3 of pt III of the Australian Security Intelligence Organisation Act 1979 (Cth) should either be repealed, or not extended beyond the present sunset date, and should be replaced by a questioning power following the model of coercive questioning available under the <em>Australian Crime Commission Act 2002</em> (Cth) as closely as possible. A sunset clause should not be necessary for such a questioning power.</td>
</tr>
<tr>
<td>INSLM</td>
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<tr>
<td>Second</td>
<td>Certain questioning and detention powers in relation to terrorism –</td>
<td>9. In the context of recommendation 8, the definition of a ‘terrorism offence’ in the Australian Security Intelligence Organisation Act 1979 (Cth) should be amended to include the foreign incursion and recruitment offences in pt 5.5 of the Commonwealth Criminal Code and the terrorism financing offences in the Charter of the United Nations Act 1945 (Cth), and the phrase ‘important in relation to a terrorism offence’ should be amended to read ‘important in relation to an actual or threatened terrorism offence’ wherever appearing.</td>
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<tr>
<td></td>
<td><em>Australian Security Intelligence Organisation Act 1979 (Cth) Pt III Div 3</em></td>
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<tr>
<td>Second</td>
<td>Certain questioning and detention powers in relation to terrorism –</td>
<td>10. A protocol should be developed between the Australian Security Intelligence Organisation, the Australian Criminal Intelligence Commission, and any relevant state body which shares information obtained by compulsory questioning, to avoid oppression by successive examinations. This protocol should then be approved and given appropriate status by the Attorney–General. The Independent National Security Legislation Monitor and other supervisory bodies such as the Inspector–General of Intelligence and Security and the Commonwealth Ombudsman should be able to monitor how this protocol operates in practice.</td>
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