Annual Report
2018-2019

Dr James Renwick CSC SC
The Independent National Security Legislation Monitor

The Independent National Security Legislation Monitor Act 2010 (Cth) provides for the appointment of the Independent National Security Legislation Monitor (INSLM). 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 Attorney-General and 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 CSC SC (pictured).
Copyright notice
© Commonwealth of Australia 2019
With the exception of the Commonwealth Coat of Arms, this work is provided under a Creative Commons Attribution 4.0 Australia licence (CC BY 4.0).
(http://creativecommons.org/licenses/by/4.0/au/deed.en)
For the avoidance of doubt, this means this licence only applies to material as set out in this document.

This work should be attributed as: ‘Annual Report 2018-2019.’

Cover photo: AUSPIC/DPS
Content photos: Bradley Cummings

The details of the relevant licence conditions are available on the Creative Commons website as is the full legal code for the CC BY 4.0 licence (www.creativecommons.org/licenses).

Use of the Coat of Arms
The terms under which the Coat of Arms can be used are detailed on the Department of the Prime Minister and Cabinet website: www.dpmc.gov.au/government/commonwealth-coat-arms

Enquiries regarding the licence and any use of this work are welcome at:
3-5 National Circuit, Barton ACT 2600
www.inslm.gov.au
23 December 2019

The Hon Christian Porter MP
Attorney-General
Parliament House
Canberra

Dear Attorney-General,

INDEPENDENT NATIONAL SECURITY LEGISLATION MONITOR 2018–2019 ANNUAL REPORT


As at least one of the recommendations directly concerns the Prime Minister, I am providing a copy of this report to him.

I advise that this report is unclassified and suitable to be laid before both Houses of Parliament. I would be grateful if an embargoed copy of this report is provided forthwith to the Parliamentary Joint Committee on Intelligence and Security to assist them in their work.

Yours sincerely,

James Renwick CSC SC
Independent National Security Legislation Monitor

Copy: The Hon Scott Morrison MP, Prime Minister
## CONTENTS

List of abbreviations v

Key Recommendations vii

**Executive Summary** viii

**Chapter 1: The role of the INSLM** 1

**Chapter 2: The National Security and Counter-Terrorism Outlook** 5

**Chapter 3: Reviews conducted in the Reporting Period** 11

**Chapter 4: Non-Reporting Activities** 17

**Chapter 5: Legislative Developments** 21

Appendix I – Counter-terrorism prosecutions 25

Appendix II – Lowy Institute Address 38

Appendix III – Budget Estimates 2018 - 2019 49

Appendix IV – UK Operation of police powers under the *Terrorism Act 2000* 53

Appendix V – Pine Gap Hansard Statements 55

Appendix VI – Counsel and Solicitors Assisting the 3rd INSLM 63
Abbreviations

AAT  Administrative Appeals Tribunal
ADF  Australian Defence Force
AGD  Commonwealth Attorney-General’s Department
AFP  Australian Federal Police
APS  Australian Public Service
ASD  Australian Signals Directorate
ASIS  Australian Secret Intelligence Service
ASIO  Australian Security Intelligence Organisation
ASIO Act  *Australian Security Intelligence Organisation Act 1979* (Cth)
CDO  Continuing Detention Order
CDPP  Commonwealth Director of Public Prosecutions
COAG  Council of Australian Governments
Constitution  *Commonwealth of Australia Constitution Act* (Cth) (Australian Constitution)
Crimes Act  *Crimes Act 1914* (Cth)
Criminal Code  *Criminal Code Act 1995* (Cth)
CRC  *Convention of the Rights of the Child* [1991] ATS 4
CVE  ‘Countering violent extremism’
IGIS  Inspector-General of Intelligence and Security
Independent Intelligence Review  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
PICIS or ‘the Committee’  Parliamentary Joint Committee on Intelligence and Security
ISA  *Intelligence Services Act 2001* (Cth)
ISIL  Islamic State of Iraq and the Levant
PM&C  The Department of the Prime Minister and Cabinet
Reporting period  1 July 2018 – 30 June 2019
TIA Act  *Telecommunications (Interception and Access) Act 1979* (Cth)
TOLA  *Telecommunications and Other Legislation Amendment (Assistance and Access) Act 2018* (Cth)
KEY RECOMMENDATIONS

1. That the INSLM Act now be amended to provide for an express power for the INSLM to report on a matter or matters within the statutory mandate but more urgently or particularly than by the annual report.

2. That the INSLM Act now be amended to require a formal response by the executive government to INSLM reports to be tabled in the Parliament within 12 months of delivery of the reports.

3. Noting that my term ends on 30 June 2020, that the Prime Minister take all necessary steps to ensure that the appointment of my successor as INSLM is made in time to allow that person to commence work on 1 July 2020.

4. That the Intelligence Services Act be amended to create a legal obligation modelled on s 94 of the ASIO Act requiring that the classified Annual Reports of ASIS and ASD be provided to the Leader of the Opposition in the House of Representatives, coupled with a duty for that person to treat as secret any parts of those reports not tabled in the Parliament.

5. That the Intelligence Services Act be amended by adding as s 29(1)(d) a provision that the PJCIS’ functions are to include the following:
   (d) to report to both Houses of the Parliament, with such comments as it thinks fit, upon any recommendation made by the INSLM in an Annual Report or any other INSLM report, which, in the opinion of the Committee, the attention of the Parliament should be directed.
EXECUTIVE SUMMARY

The INSLM Role

This is the ninth Annual Report of the Office of the INSLM. I am the third INSLM, having succeeded the Hon Roger Gyles AO QC and, before him, Bret Walker SC. As INSLM, I independently review the operation, effectiveness and implications of national security and counter-terrorism laws; and consider whether such laws contain appropriate protections for individual rights, remain proportionate to terrorism or national security threats, and remain necessary.

In conducting a 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, the Attorney-General or the PJCIS, and must be tabled in each house of the Parliament within 15 sitting days.

In 2020 the role of the INSLM will begin its 10th year. It is timely to recall its origins. The role is based upon the United Kingdom’s Independent Reviewer of Terrorism Legislation, a role which stretches back to the 1970s and whose distinguished office holders this century have been Lord Alex Carlile CBE QC, Lord David Anderson KBE QC, Max Hill QC and (currently) Jonathan Hall QC. I again acknowledge that I have greatly benefited from very regular consultations with each of them during my term of office.

The PJCIS in 2006, and the later Report of the Inquiry into the case of Dr Mohamed Haneef by the Hon John Clarke QC, both recommended the creation of the INSLM, and the Senate Finance and Public Administration Legislation Committee’s report on what became the INSLM Bill in 2009, further strengthened the independence and powers of the office. The final version of the Bill was then the subject of bipartisan support, including by the shadow Attorney-General, the Hon George Brandis QC. Attorney-General Robert McClelland’s second reading speech for the INSLM Bill noted that:

The government’s aims in establishing the monitor are, firstly, 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, counter terrorism and international security obligations. We all remain hopeful that one day there will be a time when the threat of terrorism will diminish and make these laws no longer necessary, and on that basis we hope the monitor will also be able to consider the extent to which our counterterrorism and national security laws remain necessary.

1 Bret Walker SC’s term began in April 2011
2 Parliamentary Joint Committee on Security and Intelligence, Review of Security and Counter Terrorism Legislation, December 2006
3 Parliamentary paper / The Parliament of the Commonwealth of Australia, 0727-4181 ; no. 18 (2009)
4 Senate Finance and Public Administration Legislation Committee Report concerning the National Security Legislation Monitor Bill 2009
5 Senate Hansard 2/2/2010
6 House Hansard 17/3/2010
Although I also hope that the threat of terrorism will one day diminish, I cannot yet see when that day will come. As I note in the chapter of this report on the security outlook, the risk of terrorist acts affecting Australia remains a matter of grave concern, and the threat to Australia caused by espionage and interference by foreign states has grown markedly.

The INSLM’s workload has significantly increased over time. That is unsurprising. When the PJCIS reported in 2006 there were approximately 30 national security or counter-terrorism laws. Now there are more than 80. Terrorism prosecutions have increased and there have been about 100 people charged, and 80 people convicted, many receiving substantial sentences of imprisonment. The first INSLM was expected to work in the role for about 60 days a year, Mr Gyles and I for about 100 days. All of us have treated these as the minimum time needed to undertake the role.

By the time my term finishes on 30 June 2020, I hope to have delivered 10 reports: six topic specific reports and four Annual Reports. This substantial workload will continue. My successor will at least be required in their three year term to undertake subject specific reports concerning the Criminal Code Amendment (High Risk Terrorist Offenders) Act and also concerning the following provisions of Chapter 5 of the Criminal Code: Division 82 (sabotage); Part 5.2 (espionage and related offences); Part 5.6 (secrecy of information). I am therefore pleased that AGD has provided me with excellent permanent premises, and has steadily increased my annual budget, although the Office’s operations remain lean and efficient. For this I especially thank Mr Chris Moraitis PSM, the Secretary of that Department.

The Past Year

During the past year, I have:

a) Provided to the Prime Minister, the Hon Scott Morrison MP, a report on the prosecution and sentencing of children for Commonwealth terrorist offences;

b) Provided an Annual Report to the Attorney-General, the Hon Christian Porter MP;

c) At the request of the Attorney-General, conducted a review of the operation, effectiveness and implications of terrorism-related citizenship loss provisions contained in the Australian Citizenship Act 2007, which led to the provision to the Attorney-General of both a classified and a declassified report, copied to the Prime Minister, on the due date of 15 August 2019. Some of my report’s recommendations were almost immediately reflected in the government’s Australian Citizenship Amendment (Citizenship Cessation) Bill 2019 which is now being reviewed by the PJCIS;

d) Received for the first time a reference from the PJCIS, to conduct a Review into the operation, effectiveness and implications of the Telecommunication and Other Legislation Amendment (Assistance and Access) Act 2018;

e) Appeared before a Senate Estimates committee and the PJCIS;

f) In Australia, continued to engage with Ministers, judges, senior office
holders in Commonwealth and State departments and police, the Australian Intelligence Community, the AHRC, bodies such as the Law Council of Australia, private practitioners, experts on terrorism and CVE, and academics;

g) In the United Kingdom, held many substantive meetings including with senior judges, private practitioners, MI5, MI6, GCHQ, Scotland Yard, the Crown Prosecution Service, academics and current and previous occupants of my counterpart office, the Independent Reviewer of Terrorism Legislation;

h) In New Zealand, attended the South Pacific Council of Youth and Children’s Court Annual Conference. During my visit, I met with the Inspector-General of Intelligence and Security for New Zealand, Ms Cheryl Gwynn. I also met with senior members of the judiciary, police, and public service;

i) Spoke at a number of legal conferences, to university students, and at the Lowy Institute;

j) Following the machinery of government changes caused by the creation of the Department of Home Affairs, moved into purpose-built premises within the building occupied by the Attorney-General’s Department at 3-5 National Circuit, Barton, Canberra;

k) Took note of the government’s and the Parliament’s consideration and implementation of my reports as INSLM and those of my predecessor the Hon Roger Gyles AO QC;

l) Kept up to date with the many new developments relevant to my role including in legislation, case-law and policy, this includes new legislation adding to my own motion powers such as the Counter-Terrorism (Temporary Exclusion Orders) (Consequential Amendments) Act 2019; and bills which at least in part would implement my recommendations, such as the Counter-Terrorism Legislation Amendment (2019 Measures No. 1) Bill 2019.

In this report I deal with these matters in detail and note also the current counter-terrorism and national security outlook.

For the purposes of s 6(1)(d) of the INSLM Act, I record that I saw no evidence that Australia’s counter-terrorism or national security legislation is being used for matters unrelated to terrorism and national security.

My role is part-time and is supported by a small permanent staff located in Canberra, and by counsel and solicitors assisting for each review. My Principal Adviser throughout the year has again been Mr Mark Mooney whose sound advice and hard work has been indispensable to my work and I record my thanks to him here.

**Amendments to the INSLM Act**

As indicated in previous years or reports, there are two important, and if I may say so, self-evident, amendments urgently needed to the INSLM Act, which I now repeat, namely:

1. That the INSLM Act now be amended to provide for an express power for the INSLM to report on a matter or matters within the statutory mandate but more
urgently or particularly than by the annual report;

2. That the INSLM Act now be amended to require a formal response by the executive government to INSLM reports to be tabled in the Parliament within 12 months of delivery of the reports.

‘Trust But Verify’; Secrecy And Openness

A continuing theme in the work of the INSLM Office since its inception has been not only the actual protection of individual rights but the means to verify this. Both in Australia and in comparable democracies, notably the United Kingdom and to an extent the United States and New Zealand, there is an important and persistent trend whereby those outside the executive government demand from it greater official openness in order to satisfy legitimate public concerns that powers are being exercised lawfully, for proper purposes and on the basis of appropriate evidence.

That is particularly important in Australia where, as many commentators have observed, since 2001 a large number of statutes have been passed which are relevant to national security or counter-terrorism. Some of these create new criminal offences and some create new powers of investigation, or powers to disseminate information, or for governments to be authorised to do what they would otherwise lack authority to do.

It cannot be emphasised too strongly how important it is that all that can be published about the exercise of such powers, consistently with the public interest, should be, and regularly, and not, as it were, as a favour, but as a matter of duty by the executive government, owed to the other branches of government and to civil society. One often overlooked reason for publishing information is to prevent or correct error and to forestall mischievous speculation. In a world where malicious actors propound ‘fake news’ unnecessary secrecy can be seriously counter-productive.

Let me give some recent examples.

The operation of Pine Gap, the joint USA-Australia facility in the Northern Territory, is a very important manifestation of the alliance between Australia and the United States. Details of exactly what it does and how it does it are necessarily secret, as I can attest to, having undertaken an informative visit for the purpose of my role. However, on the occasion of the 50th anniversary of the establishment of Pine Gap, in 2018, quite detailed statements were made in Parliament by the then Minister for Defence and the then Shadow Minster for Defence. Copies of the Hansard extracts are contained in an appendix to this report. They revealed or confirmed a number of details about the work of that establishment and properly and desirably so. That is a model to be emulated.

In my 2018 report to the Prime Minister on the prosecution and sentencing of children for terrorist offences I pointed out that, unlike the United Kingdom Home Office, there is no practice by any government agency in Australia of routinely publishing consolidated statistics as to the number of counter-terrorism arrests, convictions and acquittals and details of the sentences. A recent example follows from the United Kingdom.⁷

---

Annex A: Arrests and outcomes¹, year ending 30 June 2019²

<table>
<thead>
<tr>
<th>Outcome</th>
<th>Number</th>
</tr>
</thead>
<tbody>
<tr>
<td>Arrested</td>
<td>266</td>
</tr>
<tr>
<td>Charged</td>
<td>63</td>
</tr>
<tr>
<td>Released without charge</td>
<td>85</td>
</tr>
<tr>
<td>Released on bail or released under investigation</td>
<td>14</td>
</tr>
<tr>
<td>Alternative sentence</td>
<td></td>
</tr>
<tr>
<td>Decision pending</td>
<td>2</td>
</tr>
<tr>
<td>Prosecuted</td>
<td>28</td>
</tr>
<tr>
<td>Not proceeded against</td>
<td>5</td>
</tr>
<tr>
<td>Other outcome</td>
<td>12</td>
</tr>
<tr>
<td>Convicted¹ (terrorist-related)</td>
<td>25</td>
</tr>
<tr>
<td>Convicted² (non-terrorist-related)</td>
<td>3</td>
</tr>
<tr>
<td>Acquitted</td>
<td>0</td>
</tr>
<tr>
<td>Convicted³ (terrorist-related)</td>
<td>0</td>
</tr>
<tr>
<td>Convicted⁴ (non-terrorist-related)</td>
<td>11</td>
</tr>
<tr>
<td>Acquitted</td>
<td>1</td>
</tr>
</tbody>
</table>

It is true that there are some similar details on the Commonwealth DPP website and an interested and very diligent person might be able to work out some but not all of those matters from media reports.

I recommended that such statistics regularly be made public, as is the practice of the United Kingdom Home Office. There has been no response to this recommendation. I repeat it. There is simply no good reason not to do it, it would encourage public confidence and it is something which should be repeated more widely. (This report also contains in an Appendix details of many notable convictions and sentences.)

Of course, sometimes there are matters concerning national security and counter-terrorism which cannot be made public. That is why s 94 of the Australian Security Intelligence Organisation Act when dealing with ASIO’s Annual Report provides as follows:

(3) A copy of the report must be given to the Leader of the Opposition in the House of Representatives, but it is the duty of the Leader of the Opposition to treat as secret any part of the report that is not tabled in a House of the Parliament;

(4) Subject to subsection (5), the Minister must cause a copy of the report to be laid before each House of the Parliament within 20 sitting days of that House after the report is received by the Minister;

(5) For the purposes of subsection (4), the Minister may make such deletions from the report as the Minister, after obtaining advice from the Director-General, considers necessary in order to avoid prejudice to security, the defence of the Commonwealth, the conduct of the Commonwealth’s international affairs or the privacy of individuals.

It is the practice of ASIO to provide the full report to my Office. I note there is no comparable provision in relation to ASIS or ASD: see ss 42 and 42A of the ISA. Although I note that by law the Directors-General of both ASIS and ASD must consult regularly
with the Leader of the Opposition in the House of Representatives for the purpose of
keeping him or her informed on matters relating to each agency (see ss 19 and 27D), I
see no good reason why the Leader of the Opposition should not by law receive a copy
of the ASIS and ASD Annual Reports and I recommend that this occur.

**Recommendation:** I recommend that the Intelligence Services Act be amended to
create a legal obligation modelled on s 94 of the ASIO Act requiring that the classified
Annual Reports of ASIS and ASD be provided to the Leader of the Opposition in the
House of Representatives, coupled with a duty for that person to treat as secret any
parts of those reports not tabled in the Parliament.

In making decisions about what government information should be made public, it
should go without saying that official discomfort is an insufficient reason for secrecy or
suppression. As Mason J said in *Commonwealth v John Fairfax & Sons Ltd* (1980) 147
CLR 39 at 51, a case where the Commonwealth sought to prevent publication of some
official information:

> It may be a sufficient detriment to the citizen that disclosure of information
relating to his affairs will expose his actions to public discussion and criticism.
But it can scarcely be a relevant detriment to the government that publication
of material concerning its actions will merely expose it to public discussion and
criticism. It is unacceptable in our democratic society that there should be a
restraint on the publication of information relating to government when the
only vice of that information is that it enables the public to discuss, review and
criticize government.

In my remaining time as INSLM I will be recommending further requirements for regular
and open reporting about the exercise of national security and counter-terrorism
powers, and highlighting the benefits for public trust in so doing.

As Lord Anderson QC has written, in terms I gratefully adopt:

> Public consent to intrusive laws depends on people trusting the authorities,
both to keep them safe and not to spy needlessly on them... Trust in powerful
institutions depends not only on those institutions behaving themselves (though
that is an essential prerequisite), but on there being mechanisms to verify that
they have done so. Such mechanisms are particularly challenging to achieve in
the national security field, where potential conflicts between state power and
civil liberties are acute, suspicion rife and yet information tightly rationed...
Respected independent regulators continue to play a vital and distinguished role.
But in an age where trust depends on verification rather than reputation, trust
by proxy is not enough. Hence the importance of clear law, fair procedures, rights
compliance and transparency. 8

Finally, I note that in his Boyer Lectures of 2000, then Australian Chief Justice Murray
Gleeson AC said:

---

8 A Question of Trust 13.3-13.4.
In our society, threats to the rule of law are not likely to come from large and violent measures. They are more likely to come from small and sometimes well-intentioned encroachments upon basic principles, sometimes by people who do not understand those principles.9

While the Boyer Lectures were delivered the year before the events of September 11, 2001, if I may say so, the propositions stated in that quote remain sound and relevant.

The INSLM’s role includes identifying and publicising such encroachments, both large and small, in national security and counter-terrorism laws, principally through public reports. I expect this will be an important part of my review of the TOLA Act and my final annual report.

The PJCIS

In my address at the Lowy Institute this year (Appendix II) I noted the ‘ever decreasing time available for scrutiny of [counter-terrorism and national security bills] and an increasing number of [such] bills’. I also said:

I am also interested to see what the government says about the important recommendations of the 2017 Independent Intelligence Review concerning an expanded role for the PJCIS: It stated:

Recommendation 23: The role of the Parliamentary Joint Committee on Intelligence and Security (PJCIS) be expanded by amending relevant legislation to include:

a) a provision enabling the PJCIS to request the Inspector-General of Intelligence and Security (IGIS) conduct an inquiry into the legality and propriety of particular operational activities of the National Intelligence Community (NIC) agencies, and to provide a report to the PJCIS, Prime Minister and the responsible Minister;

b) a provision enabling the PJCIS to review proposed reforms to counter-terrorism and national security legislation, and to review all such expiring legislation;

c) provisions allowing the PJCIS to initiate its own inquiries into the administration and expenditure of the ten intelligence agencies of the NIC as well as proposed or existing provisions in counter-terrorism and national security law, and to review all such expiring legislation;

d) provisions enabling the PJCIS to request a briefing from the Independent National Security Legislation Monitor (the Monitor), to ask the Monitor to provide the PJCIS with a report on matters referred by the PJCIS, and for the Monitor to provide the PJCIS with the outcome of the Monitor’s inquiries into existing legislation at the same time as the Monitor provides such reports to the responsible Minister; and

e) a requirement for the PJCIS to be regularly briefed by the Director-General of the Office of National Intelligence, and separately by the IGIS.

The PJCIS performs the important functions set out in s 29 of the ISA. Its United Kingdom counterpart the ISC similarly performs important functions and I met this year with its Chairman, the Rt Hon Dominic Grieve QC, MP.

In recent years a frequent legislative requirement is that the INSLM Act requires me to

---

review specified legislation, often but not always in the context of a ‘sunsetting’ clause, and s 29 of the ISA requires the PJCIS to conduct its own review, informed by my report. In that way we each perform our functions independently but in a complementary fashion. There is however a significant gap at present whereby the PJCIS is unable of its own motion to inquire into the response (or sometimes absence of a response) of the government of the day into my reports. I repeat my recommendation that the government of the day should be legally required to respond to my recommendations within 12 months to avoid recommendations being ignored or becoming stale. For similar reasons, coupled with the need for Parliament to remain appropriately informed, I now make the following recommendation modelled upon s 29(1) of the ISA.

Recommendation: I recommend that the Intelligence Services Act be amended by adding as s 29(1)(d) a provision that the PJCIS’ functions are to include the following:

(d) to report to both Houses of the Parliament, with such comments as it thinks fit, upon any recommendation made by the INSLM in an Annual Report or any other INSLM report, to which, in the opinion of the Committee, the attention of the Parliament should be directed.

The 4th INSLM

This is my penultimate Annual Report as my term concludes on 30 June 2020. As I have made clear since at least last year, the importance of independence and the desirability for a regular refreshing of the role mean that there will need to be a new INSLM from 1 July 2020 as I would not accept a further term. That also was the view of INSLM Walker SC who wrote:

_There should be no possibility of reappointment of the INSLM. The nature of the task should not only involve quasi-judicial tenure (during the term of appointment) so as to remove fear of the Executive, but there should as well be no hope of preferment from the Executive. As a corollary of this suggested repeal of subsect 12(2) of the INSLM Act and its replacement by a prohibition on reappointment, consideration should be given to the enlargement of the term of office probably to four years and possibly to five years._

Because of the continuing relevance, and increasingly substantial workload, of this part-time position, the importance of continuity, and the need for the new INSLM to obtain the highest security clearance, I recommend that the Prime Minister, who, by operation of s 11(2) of the INSLM Act, must ‘before a recommendation is made to the Governor-General …consult with the Leader of the Opposition in the House of Representatives’, take all necessary steps to ensure that my successor can commence work on 1 July 2020.

Recommendation: I recommend that the Prime Minister take all necessary steps to ensure that the appointment of my successor as INSLM is made in time to allow that person to commence work on 1 July 2020.

It remains a privilege to serve as the INSLM. I look forward to the remainder of my term.

Mr Mark Mooney, Principal Adviser; Dr James Renwick CSC SC, INSLM; and Mr Gim del Villar, Counsel

---

Executive Summary

Assisting at the public hearing into the terrorism-related citizenship loss provisions - Canberra, 27 June 2019
CHAPTER 1: THE ROLE OF THE INSLM

INSLM Functions

1.1. As my first Annual Report recorded the rationale for the creation of the INSLM and the functions and powers conferred by the INSLM Act, it is not necessary to repeat those matters here. I therefore outline below key aspects of the INSLM’s role and functions pertinent to activities during the reporting period.

Statutory Functions

1.2. INSLM reviews come from one or more of five sources:

First, and most usually, by an ‘own motion review’ when the INSLM reviews one or more of the laws defined in s 4 of the INSLM Act as ‘counter-terrorism and national security legislation’ together with related laws: see s 6(1)(a) and (b).

Second, the Prime Minister (and third, since 2018, the Attorney-General) may, either independently or at the request of the INSLM, refer for review ‘a matter relating to national security or counter terrorism’ (s 7). This allows topics and laws beyond the own motion power to be reviewed. This has frequently occurred. The reference concerning the prosecution and sentencing of Children for Commonwealth terrorism offences is an example of a requested review, the review conducted by the 2nd INSLM on the impact on journalists of section 35P of the ASIO Act is an example of a matter referred by a Prime Minister of his own motion. The Prime Minister alone may prioritise INSLM reviews.

Fourth, the INSLM Act itself may require a particular review to take place by a particular time, sometimes because the law will expire unless reviewed. The three reports I produced in 2017 are examples of such reviews. Future requirements include reviews of the law relating to sabotage, espionage and secrecy of information, and of CDO’s relating to high risk terrorist offenders: see s 6.

Fifth, the PJCIS may refer a matter to the INSLM it becomes aware of in the course of performing its functions under s 29(1) of the ISA.

The own motion power

1.3. A critical aspect of the INSLM’s role is the ability, independently, to decide what matters to review, subject only to the Prime Minister being able to prioritise one review over another.

1.4. The INSLM is not otherwise subject to direction, and, in particular, is completely independent as to the conclusions of any review.

1.5. It is important to note that ‘own motion reviews’ may arise incidentally during, for example, a Prime Ministerial/Attorney-General’s review or a ‘sunsetting’ review required elsewhere in the INSLM Act. This can occur because, under the INSLM Act, the INSLM may at any time conduct an own motion review.
of Australia’s ‘counter-terrorism and national security legislation’ and other Commonwealth laws relating to that legislation: s 6(1)(a)(i) and (iii) of the INSLM Act. In construing s 6(1), part of the statutory context is provided by s 10(1) of the INSLM Act which requires that the INSLM ‘must have regard to:

(a) the functions of agencies that have functions relating to, or are involved in the implementation of, that legislation; and functions relating to that legislation that are conferred on a person who holds any office or appointment under a law of the Commonwealth or of a State or Territory.

1.6. ASIO is an example of an agency referred to in s 6(1)(a). Judges of Commonwealth courts, or of State or Territory courts who do, or could, following legislative change, try terrorism cases, fall within s 10(i) (b), as does the Commonwealth Attorney-General in relation to parole in terrorism matters.

Counter-terrorism and national security legislation

1.7. The following legislation is reviewable of the INSLM’s own motion as part of the INSLM’s functions:

(a) Sections 33AA, 35 and 35A of the Australian Citizenship Act 2007 and any other provision of that Act as far as it relates to those sections (loss of citizenship because of, for example, terrorist activities);

(b) Division 3 of Part III of the ASIO Act and any other provision of that Act as far as it relates to that Division (questioning warrants and questioning/detention warrants);

(c) Part 4 of the Charter of the United Nations Act 1945 (Cth) and any other provision of that Act as far as it relates to that Part (Security Council decisions that relate to terrorism and dealings with assets, which, for example, creates offences of dealing with freezable assets and giving an asset to a proscribed person or entity);

(d) The following provisions of the Crimes Act

- Division 3A of Part IAA and any other provision of that Act as far as it relates to that Division;
- Sections 15AA (bail) and 19AG (requirement that terrorism offenders serve at least 75% of their head sentence before being eligible for parole) and any other provision of that Act as far as it relates to those sections;
- Part IC, to the extent that the provisions of that Part relate to the investigation of terrorism offences (within the meaning of that Act), and any other provision of that Act as far as it relates to that Part;

(e) Chapter 5 of the Criminal Code and any other provision of that Act as far as it relates to that Chapter;

(f) Part IIIAAA of the Defence Act 1903 (Cth) and any other provision of that Act as far as it relates to that Part;
(g) The NSI Act;
(h) Any other law of the Commonwealth to the extent that it relates to Australia’s counter terrorism and national security legislation (for example other laws which facilitate terrorism investigations).

Comprehensive Review of the Legal Framework Governing the National Intelligence Community

1.8. As I noted in my previous Annual Report, the Comprehensive Review of the Legal Framework Governing the National Intelligence Community conducted by Dennis Richardson AC is ongoing and due to deliver its final classified review by December 2019. I await with keen interest its findings and will assess their applicability to this office and future INSLMs in my final Annual Report.

1.9. But for the fact that Mr Richardson’s review includes the topic of the operation of, and potential reform to, the NSI Act, by which, relevantly to my role, judicial suppression orders are authorised, I would have undertaken investigation of the operation of that legislation, of my own motion. I will nevertheless seek to monitor any exceptional or apparently unwarranted instances of the Act’s use during the remainder of my term.

INSLM Office

1.10. 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 by a small full-time staff with additional support provided by secondees or counsel assisting as appropriate.

1.11. The total budget for 2019-20 is $1.160m (including $0.319m of additional one-off funding for 2019-20 only). AGD has continued the practice which has always applied to my office of not charging rent for office space or back-office support with IT, payroll, security and the like. I thank them for this arrangement.

1.12. During the reporting period, I continued to use the staffing structure outlined in my previous Annual Report. This structure consists of a core element of permanent APS staff (consisting of a Principal Adviser, a Deputy Principal Adviser - unfilled as of 30 June 2019 - and an Executive Officer), with additional support on an as needed basis from consultants, including counsel and solicitors assisting. This combination of APS staff and part-time consultants provides me 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.

---

1.13. Following the Office’s move into the Attorney-General’s portfolio, the Office was supplemented by a 2019 graduate adviser on secondment from AGD. I intend to continue this arrangement and welcome new graduates for future rotations. I have continued to use the solicitors/counsel assisting model for my reviews and will do so for my final review as INSLM into the TOLA Act.

1.14. During the reporting period, I had access to appropriate staffing and resources to undertake the review of the citizenship loss provisions contained in the Australian Citizenship Act 2007, and commence the reference from the PJCIS into the operation effectiveness and implications of the TOLA Act 2018.

1.15. I gratefully acknowledge AGD’s logistical and other assistance to me and my staff in performing my role, while fully respecting my independence.

1.16. I have already acknowledged Mr Mooney’s work, I now also gratefully acknowledge the work of the following in the year under review:

(a) Executive Officers: Ms Emmy Arthurson, Ms Cara Yianoulakis and Ms Karen Thornton;

(b) Adviser from AGD: Mr Alexander Blackwell

(c) Counsel Assisting: Mr Gim del Villar and Mr Brodie Buckland;

(d) Solicitor Assisting from the Australian Government Solicitor: Mr Tom Colwell.
CHAPTER 2: THE NATIONAL SECURITY AND COUNTER-TERRORISM LANDSCAPE

2.1 Section 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 closely analyse this topic.

2.2 I also receive regular briefings from relevant police and security agencies as to these matters. In the year under review I therefore acknowledge the valuable briefings received from the AFP, ASIO, ASIS and ASD, and the Departments of PM&C, Foreign Affairs and Trade, Defence, Home Affairs and the AGD.

2.3 I take this opportunity to acknowledge with thanks the considerable support to me and my Office provided by the retiring Director-General of Security, Duncan Lewis AO DSC CSC.

2.4 For the purpose of this Annual Report I note the following aspects of the national security and counter-terrorism landscape. In summary, to continue the theme of previous years, while noting some new factors, in my opinion:

(a) The credible threat of one or more terrorist attacks will remain a significant factor in the Australian national security and counter-terrorism landscape for the reasonably foreseeable future;

(b) 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;

(c) There can be no guarantee that the authorities will detect and prevent all attacks although most have been;

(d) 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;

(e) The threats come mainly from radical and violent Islamist action – which is not to be confused with the great world religion of Islam which practices peace, but there are also increasing concerns about radical, violent, right wing activity;

(f) The implications of the recent atrocities in Christchurch and Sri Lanka are yet to be fully worked out. Equally hard to predict are the likely activities of the remnant foreign fighters (and their supporters) of the so-called Caliphate of ISIL; and

(g) As well as terrorism threats, there is an increasing threat to Australia’s national security posed by acts contrary to the Criminal Code including foreign interference, foreign interference involving foreign intelligence agencies, and espionage.
Domestic

2.5 The current National Terrorism Threat level remains at ‘probable’ – the level was set in November 2015. This means there is credible intelligence indicating individuals or groups have both the intention and capability of conducting an attack in Australia.

2.6 Since September 2014, there have been seven attacks and 16 major counter-terrorism disruption operations in response to potential attack planning in Australia. About 100 people have been charged as a result of 45 counter-terrorism-related operations across the country.

2.7 One of these attacks took place during the reporting period – on 9 November 2018 a man set his car on fire and stabbed three people – one fatally – on Bourke Street in Melbourne. The assailant was subsequently killed by police.

2.8 Since 2014, all seven attacks and all but one of the disruptions involved individuals motivated by Islamist extremist ideology. The remaining 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).

2.9 An added risk emerged during the reporting period. The attack by an Australian in Christchurch, New Zealand in March 2019 brought to the fore the dangers of violent extremists drawing on ethno-nationalist, racist or fringe right-wing narratives and ideologies. The perpetrator conducted the attack alone. However, he drew inspiration from a global network of like-minded individuals who often disseminate and discuss their views online. The phenomenon is not new. Similar, albeit relatively less lethal, attacks inspired by the same narrative both preceded and followed from the Christchurch attack. Still, Christchurch turned into a seminal event in the history of such terrorism for its lethality and use of technology to maximise impact, in particular the live streaming of the attacks on social media.

2.10 In turn, that use of technology led to the swift enactment of the Criminal Code Amendment (Sharing of Abhorrent Violent Material) Act 2019 and also a number of international initiatives led by Australia to limit and prevent the internet from being a safe haven for terrorist and violent extremist content and activity, notably the G20 Osaka Leaders’ Statement on Preventing the Exploitation of the Internet for Terrorism and Violent Extremism Conducive to Terrorism12 and the Joint meeting of Five Country Ministerial and quintet of Attorneys-General: communiqué, London 2019.13

---

12 https://www.g20.org/en/documents/final_g20_statement_on_preventing_terrorist_and_vect.html
2.11 While the threat level remained at probable during the reporting period, security agencies advise that the nature of the threat faced by Australia continues to evolve. There is an ongoing risk of low-level attacks, conducted by individuals or small groups, likely targeting crowded places. The trend of using low capability weapons such as knives and vehicles is ongoing — this is an attack methodology that can require minimal planning often over short time frames. The risk of large scale complex terrorist attacks — such as the July 2017 Sydney aviation plot — persists with terrorist groups trying to conduct complex, mass casualty attacks when they can. And the threat from extreme right wing terrorists was brought into stark relief by the Christchurch attack.

2.12 ASIO continues to undertake a large number of high-priority investigations mainly of Islamist extremists. These investigations include approximately 80 Australians currently overseas either fighting with, or supporting Islamist extremist groups, or in detention in Syria and Iraq. There are also an unidentified number of minors — the children of those Australians — assessed to be in Syria and Iraq. It also includes people in Australia either providing support to Syrian and Iraqi extremist groups, including through funding and facilitation, or who have sought to travel — since 2012 at least 230 Australians travelled to the conflict zone. Around 40 have returned home — some of whom remain of significant security risk — and around 110 have been killed as a result of their involvement in the conflict. Approximately 250 Australian passports have been cancelled or refused in relation to the Syria/Iraq conflict.

2.13 The return of foreign fighters and their families to Australia – primarily from the conflict in Syria and Iraq – remains a priority concern for the AFP and intelligence agencies. The AFP has about 40 active arrest warrants relating to alleged foreign fighters who are offshore.

2.14 Finally, bearing in mind the required review by my successor of the provisions in the Criminal Code concerning foreign interference, sabotage, and espionage, I note with concern the following remarks made by then Director-General of Security, Duncan Lewis, in one of his final speeches in that role:

“The counter-espionage and foreign interference issue... is something which is ultimately an existential threat to the state, or it can be an existential threat to the state. It has the capacity to do that.” This threat is not confined to “one particular nation”, although sophistication and intent varied greatly among other countries. ASIO assessed that “the current scale and scope of foreign intelligence activity against Australian interests is unprecedented...Unlike the immediacy of terrorism incidents, the harm from acts of espionage may not present for years or even decades. These sort of activities are typically quiet, they’re insidious and they have a long tail.”

---

External

2.15 Externally the terrorist landscape continues to change and adapt to counter terrorism efforts. The apparent end of ISIL’s territorial caliphate in April 2019 has changed the nature of the threat the group poses. ISIL and its affiliate network are not the only source of Islamist terrorism – al Qaida and its affiliates retain a significant global presence. In addition, there is a large constellation of Islamist organisations, networks, and individuals, intent on directing, inspiring and conducting violence against Australia’s interests and those of our allies and partners.

2.16 In various places I have made the following points which I now repeat:

(a) The rise of ISIL, which led to the so-called Caliphate, took almost everyone by surprise; I expect its capacity to surprise will continue. ISIL has produced a large, now widely dispersed, radicalised, highly trained diaspora of actual or potential terrorists, many of whom remain with their supporters and dependents (including children), outside their countries of citizenship;

(b) Children deserve special mention. Since the rise of ISIL, children and young people variously travelled to ISIL-controlled areas of their own volition (the ‘jihadi brides’, for example), were taken by their parents or guardians, and were, then or later, unable or unwilling to leave and were then pressed into service of ISIL;

(c) Australia’s important obligations under international law towards children under for example the Convention on the Rights of the Child were considered by me in my 5th report to the Prime Minister, *The prosecution and sentencing of children for terrorism offences*. As I there wrote, and as remains the case in the context of this report:

> There are ... parallels between child soldiers and Australian children in territory controlled by ISIL: the fact that each are certainly victims does not mean they cannot also become perpetrators, and thus they remain a cohort of interest.

(d) It is also important to distinguish the different legal position of children depending upon their age: under 10, no criminal liability; under 14, a presumption of no criminal intent, i.e. doli incapax; and 14–18, where the position in our federal system is more complex (as explained in my 5th report).

2.17 During the reporting period, attacks and plots by extreme right wing terrorists in Europe and the United States gained momentum and drew the public’s attention. The United Kingdom was particularly hard hit in the previous year with major attacks in Manchester and in London (Westminster Bridge, London Bridge and Parsons Green).

2.18 The fundamental narratives underpinning the terrorist threat to Australia are also evolving and diversifying but retain a strong focus on violent confrontation. The extremist narrative told by jihadists rests partly on the notion that the only realistic remedy for perceived oppression is violence. This
narrative continues to resonate despite setbacks in the case of al Qaida even after years of counter terrorism pressure and for ISIL’s more virulent version even after the loss of its last remaining territory. For both groups the narrative is re-cast to account for setbacks.

2.19 In the case of the extreme right wing, the narrative is more diffuse but centres on the belief that white races are being replaced by non-whites with the connivance of elites that encourage immigration. The narrative is also an mix of illiberal ideas, anti-capitalism, neo-Nazism and nativism often with an overlay of personal grievances and an apocalyptic worldview. The advocated response is violence directed at both groups to reverse this trend and to achieve ‘racial purity’.

2.20 ISIL’s loss of territory has changed the threat associated with foreign fighters. Of the tens of thousands of foreign extremists estimated to have flocked to the Syrian and Iraq conflicts thousands have died in the fighting and large numbers have been captured. Small numbers have left either for their home countries or elsewhere and others will attempt to flee. There has still not been a large outflow but the trickle has been constant and will continue for some time. Even small numbers of trained, experienced and well connected jihadists will pose a significant global threat. There are also large numbers of women and children associated with foreign fighters, most of whom are currently held in Internationally Displaced Persons’ camps in Syria. They have been exposed to the trauma of violence and the virulence of radicalisation. Should they return to their home countries they will pose security, de-radicalisation and reintegration challenges for many years to come.

2.21 The propaganda which glorifies indiscriminate violence and its dissemination via an ever growing social media presence still poses an enormous challenge. Although there has been a significant decline in ISIL’s prolific media output, it has not stopped. Nor will the already huge body of professionally produced, easy to digest historical jihadist material be eliminated. That material romanticises and justifies violence and provides practical ‘how to’ advice. Australia continues to feature in this material, either directly or indirectly, as a desirable target. The proliferation and functionality of online platforms have revolutionised radicalisation across ideologies and will continue to do so as these technologies evolve.

2.22 ISIL’s use of social media and propaganda created a paradigm shift in terrorist methods. Huge numbers of small online extremist communities now use encrypted social media platforms to inspire, encourage and plan attacks. This has allowed ISIL to reach into Western societies with minimal effort. Despite the group’s setbacks, these communities appear self-sustaining, generating a low level of terrorism mostly using crude methods. Still, some will have a high impact and result in significant causalities. Extreme right wing individuals are developing similar networks and linkages, disseminating their propaganda across borders and praising and encouraging violence such as the Christchurch attack.
2.23 Throughout the reporting period the number of attacks in the West declined. Most of these attacks were small scale and inspired by ISIL, rather than carried out directly. Despite this decline, the Easter 2019 bombings in Sri Lanka that killed over 250 people serve as a reminder that the group is still capable of motivating sympathisers to carry out sophisticated and devastating mass attacks.

2.24 Although ISIL has suffered setbacks the group is persisting as an insurgency in Iraq and parts of Syria. And while the group’s propaganda output is much reduced from its peak it is still capable of significant coordinated releases, including the April 2019 video of al Baghdadi — the first public appearance by ISIL’s leader in almost five years. ISIL’s affiliate network around the world — including in South East Asia — is proving resilient and new groups are being added to it.

2.25 The global counter terrorism response continues to evolve. Plot disruptions throughout the Western world continue apace but so do episodic attacks. Plots and potential perpetrators are hard to detect because they often exist on the periphery of investigations or are not known to the authorities at all. And the ubiquitous use of social media and encrypted communications makes detection and disruption difficult across the ideological spectrum. The resonance of terrorist propaganda and the dispersal of experienced terrorists from Syria and Iraq will help ensure that threat remains with us for many years. The current resurgence of extreme right wing violence will also require special scrutiny to prevent its expansion. And there is a real risk that all forms of terrorism will flourish in ungoverned and under-governed territory — both real and virtual — and wherever counter terrorism efforts are weak.

2.26 For those reasons, it would appear that at least some counter terrorism laws will be necessary for many years to come. Of course, that conclusion does not provide carte blanche under the INSLM Act for any particular statute, because the questions concerning the necessity of each particular law, its proportionality and its protection of individual rights must still be asked and answered.

15 As this report went to print, Al Baghdadi was killed by US special forces soldiers, but promptly replaced by Abu Ibrahim al-Hashimi al-Quraishi.
 CHAPTER 3: REVIEWS CONDUCTED IN THE REPORTING PERIOD

3.1. During the reporting period, I completed an Annual Report and one other report concerning the prosecution and sentencing of children for Commonwealth terrorism offences (children’s report). That review also raised related issues which I considered concurrently as part of my ‘own motion’ powers.

Children’s Report

3.2. In relation to my children’s report, I made the following recommendations to the Prime Minister.

Recommendation 1
I recommend that s 19AG be amended so that s 19AG no longer applies to offenders who were under 18 at the time of offending. This will also enable the s 20AB options to be available for those offenders.

Recommendation 2
I recommend that:
  a. Section 15AA of the Crimes Act be amended so that, in the case of children, and within the exceptional circumstances test, it expressly provides for additional consideration of the best interests of the child in every case as a primary consideration, and protection of the community as a paramount consideration.
  b. The Prime Minister refer this aspect of my report to COAG for its consideration as part of COAG’s reform of the law concerning bail and parole.
Recommendation 3
I recommend that there be a minimum threshold set by federal law such that:

a. Serious terrorism charges – those carrying a maximum sentence of imprisonment of 15 years or more – should always be tried on indictment (in which case s 80 of the Constitution guarantees a jury trial) and not in children’s courts.

b. There be no change to the current provisions which permit the CDPP and the accused to agree to proceed summarily with reduced penalties where the maximum penalty would normally be (up to) ten years.

c. In all other cases, the matter should be transferred to a court which can hear the matter with a jury unless the accused can persuade the court there are special circumstances which justify the matter being heard by the children’s court.

d. Implementation of these recommendations should not detract from the ability of State and Territory laws to lower the threshold at which point a matter must be heard on indictment.

Recommendation 4
I recommend that the Federal Court of Australia be given concurrent jurisdiction with the courts of the States and Territories to hear all terrorism matters, including for children.

If this recommendation is accepted, I also recommend that consideration be given to conferring jurisdiction on the Federal Court, concurrent with the Supreme Courts of the States and Territories, to grant CDO’s under Div 105A of the Criminal Code and any provisions to make extended Supervision Orders as discussed in my 2017 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.

Recommendation 5
I recommend that the Crimes Act be amended to expressly exclude any State or Territory law which purports to set a maximum sentence for juvenile federal offenders which is lower than that prescribed in the Commonwealth provision creating the offence, or which otherwise deprives the court of the full range of sanctions legislative by the Commonwealth Parliament.
### Recommendation 6
If Recommendation 1 is adopted, I **recommend** that it be made clear that in exempting children from the application of s 19AG, it is Parliament’s intent that a judge sentencing a child for a terrorism offence be free to impose, as appropriate in the circumstances, any of the sentencing options which would ordinarily be available under ss 20AB and 20C of the Crimes Act.

### Recommendation 7
I **recommend** that COAG review current judicial visitation rights to provide a right of access to all judges in the relevant jurisdiction in the form contained in the Victorian legislation.

### Recommendation 8
I **recommend** that the Attorney-General (personally or by his or her delegate) have a statutory right of access to all federal prisoners.

### Recommendation 9
I **recommend** that the Parliament provide a new appropriation of monies to the appropriate Australian judicial education bodies for the next three years so as to allow two English and two Australian judges expert in the conduct of terrorism trials to travel each year to the other jurisdiction to observe the conduct of terrorism trials and to provide or receive judicial continual legal education with a view to encouraging improvements and appropriate innovations in the conduct of such trials. Further, training in Australia should include presentation from experts, judicial and otherwise, in juvenile behaviour and how this affects trials and punishment.
Recommendation 10

I recommend that there be a legal obligation, at least annually, for the appropriate Commonwealth agency to publish statistics concerning the counter-terrorism threat. Where children are included in those statistics that should be indicated and separate statistics provided. In particular those statistics should reveal:

a. the number of terrorism arrests;
b. the number of convictions for terrorist offences including the offences and sentences;
c. the length of terrorism trials;
d. the number of prisoners currently incarcerated for terrorism offences;
e. the number and length of orders made under Divs 104, 105 and 105A of the Criminal Code; and
f. an approximate annual average of the number of persons under investigation by the AFP and ASIO for counter-terrorism activity in the year in question.

I anticipate that all of this information may be made public. If classified information is included, the additional classified material should be provided, under appropriate conditions of confidentiality, to the Leader of the Opposition, the PJCIS, the Ombudsman, the IGIS and the INSLM.

Recommendation 11

I recommend that within 12 months the Commonwealth Government, through the appropriate Minister, advise the Parliament of its response to these recommendations, and, where relevant, any implementation of those recommendations.
3.3. Partly in response to my children’s report, Government introduced into Parliament the *Counter-Terrorism Legislation Amendment (2019 Measures No. 1) Bill 2019* (Bill). This Bill addresses recommendations 1 & 2 in the children’s report. I note that the Government has stated it is carefully considering recommendations 3-11 in the report, as well as the two recommendations I made in last year’s Annual Report.

3.4. Schedule 1 of the Bill implements the COAG decisions on 9 June 2017 and 5 October 2017 to ensure there is a presumption against bail and parole for persons who have demonstrated support for, or have links to, terrorist activity by clarifying the existing presumption against bail in the Crimes Act and introducing a presumption against parole for terrorism-related offenders.

**Bail**

3.5. The Bill expands the application of s 15AA of the Crimes Act (the existing presumption against bail) for a broader group of offenders, namely:

- persons charged with or convicted of a terrorism offence, including persons who might have been previously charged with or convicted of one of the offences listed in s 15AA, but are currently being considered for bail for a further federal offence;
- persons who are the subject of a control order within the meaning of Part 5.3 of the Criminal Code and;
- persons who have made statements or carried out activities supporting, or advocating support for, terrorist acts within the meaning of Part 5.3 of the Criminal Code.

**Parole**

3.6. The new presumption against parole (new s 19ALB of the Crimes Act) will operate in a similar way to the proposed expanded presumption against bail to prevent terrorist offenders and other terrorism-related offenders being released on parole unless exceptional circumstances exist.

3.7. The Bill also responds directly to issues raised in my report, namely the application to children of the existing presumption against bail and the minimum non-parole period for terrorist offenders under s 19AG of the Crime Act. Specifically, the Bill:

- implements recommendation 2a of the children’s report by amending s 15AA of the Crimes Act to make it explicit that bail authorities, when determining whether exceptional circumstances exist to justify bail for persons under the age of 18 years, must take have regard to the best interests of the child as a primary consideration while maintaining the protection of the community as the paramount consideration, and
• responds to recommendation 1 by amending the application of s 19AG in relation to children by introducing a degree of judicial discretion in the form of a presumption (relating to the existing mandatory requirement that the court must fix a single non-parole period of at least three-quarters) and to make explicit that when determining whether exceptional circumstances exist to justify setting a lower non-parole period for a person under the age of 18 years, the court have regard to the best interests of the child as a primary consideration, with the protection of the community as the paramount consideration.
CHAPTER 4: NON-REPORTING ACTIVITIES

4.1. As I have previously noted, 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 oversight mechanisms for counter-terrorism and national security laws.

4.2. An important aspect of the role of INSLM is engaging with the public. On 12 June 2019 I gave an address at the Lowy Institute in Sydney, discussing “Encryption and citizenship stripping legislation: Are Australia’s latest security laws necessary and proportionate?” This address appeared to be well received and achieved its aims of further engagement with my then current review into the terrorism-related citizenship loss provisions in the Citizenship Act.

4.3. Engagement with the Parliament is vital. I appeared before the Senate Legal and Constitutional Affairs Legislation Committee on 23 October 2018 during the Supplementary Budget Estimates hearings. A copy of my opening statement to that committee is included as Appendix III.

4.4. I also have an increasingly close relationship with the PJCIS. 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.

4.5. On 26 March 2019, the PJCIS referred for my review the TOLA Act. The PJCIS Press Release on that topic stated in part; this is the first referral to the INSLM in the Committee’s history. In referring the review, the Committee has requested that Dr Renwick review whether the Act contains appropriate safeguards for protecting the rights of individuals, remains proportionate to the threat to national security and remains necessary. Committee Chair Mr Andrew Hastie MP and Deputy Chair the Hon Anthony Byrne MP made the following statement:

"this is the first referral to the INSLM in the Committee’s history. In referring the review, the Committee has requested that Dr Renwick review whether the Act contains appropriate safeguards for protecting the rights of individuals, remains proportionate to the threat to national security and remains necessary. Committee Chair Mr Andrew Hastie MP and Deputy Chair the Hon Anthony Byrne MP made the following statement. The Assistance and Access Act seeks to respond to highly technical challenges encountered by Australian intelligence and law enforcement agencies, and the Act has attracted significant domestic and international attention. In our view, the INSLM provides a valuable, independent perspective on the balance between necessary security measures and the protection of civil liberties. As such, the INSLM is an important and valued component of Australia’s national security architecture. As an eminent barrister, Dr Renwick brings a wealth of legal expertise to the role of INSLM and has a strong understanding of national security issues and the operation of relevant security agencies. The Committee looks forward to the outcome and any recommendations made by the INSLM in the review and report."
4.6. I will formally commence this review in the next reporting period and that review will be my last as INSLM.

4.7. I also note that Jonathan Hall QC has been appointed as the new Independent Reviewer of Terrorism Legislation, my United Kingdom counterpart. I have met with him and have continued to develop the strong relationship between our Offices.

4.8. In my capacity as INSLM, I have consulted widely, including with the following individuals and organisations:

- The Hon Christian Porter MP, Attorney-General;
- Mr Arthur Moses SC, President, Law Council of Australia;
- Michelle Price, Chief Executive Officer, AustCyber;
- The Rt Hon Dominic Grieve QC MP, Chairman of the Intelligence and Security Committee, United Kingdom Parliament;
- Rt Hon Baroness Warsi of Dewsbury, United Kingdom;
- Sir Charles Haddon-Cave, Lord Justice of Appeal and Presiding Terrorism Judge, United Kingdom;
- Sir Brian Leveson PC, President of the Queen’s Bench Division and Head of Criminal Justice, United Kingdom;
- Sir Colman Treacy, Lord Justice of Appeal and Chair of Sentencing Council for England and Wales, United Kingdom;
- Dame Cressida Dick DBE QPM, Commissioner of the Metropolitan Police Service, London;
- Neil Basu, Specialist Operations Assistant Commissioner of the Metropolitan Police Service, London;
- Lord Carlile of Berriew CBE QC, former Independent Reviewer of Terrorism Legislation from 2001 to 2011;
- Lord Anderson of Ipswich KBE QC, former Independent Reviewer of Terrorism Legislation from 2011 to 2017;
- Max Hill QC, former Independent Reviewer of Terrorism Legislation, United Kingdom from 2017 to 2018;
- Jonathon Hall QC, current Independent Reviewer of Terrorism Legislation, United Kingdom;
- Judge Stephen O’Driscoll, District/Youth Court of New Zealand;
- Judge John Walker, Principal Youth Court Judge of New Zealand;
- Michael Pannett, Assistant Commissioner International and National Security, New Zealand Police;
- Cheryl Gwynn Inspector-General of Intelligence and Security, New Zealand;
- Madeleine Laracy, Deputy Inspector-General of Intelligence and Security, New Zealand;
- Many other members of the judiciary and the legal profession.
Government Agencies and organisations in Australia, United Kingdom and New Zealand

- The PJCIS
- Attorney-General’s Department
- Australian Signals Directorate
- Australian Security Intelligence Organisation
- Australian Secret Intelligence Service
- Australian Federal Police
- The Office of the Commonwealth Director of Public Prosecutions
- Commonwealth Parole office
- Department of Home Affairs
- Department of Defence
- Department of the Prime Minister and Cabinet
- Office for Security and Counter-Terrorism Prevention Home Office and UK Home Office, United Kingdom
- MI5, United Kingdom
- MI6, United Kingdom
- New Scotland Yard, United Kingdom
- Crown Prosecution Service, United Kingdom
- Inspector General of Intelligence and Security
- Commonwealth Ombudsman
- Police, judicial and oversight bodies in New Zealand.
CHAPTER 5: LEGISLATIVE DEVELOPMENTS

Legislative developments

5.1. During the reporting period there were 10 significant pieces of legislation dealing with national security issues that were enacted by Parliament. I here note their key features.

<table>
<thead>
<tr>
<th>Legislation</th>
<th>Changes</th>
<th>Date of Royal Assent</th>
</tr>
</thead>
</table>
| **Criminal Code Amendment (Sharing of Abhorrent Violent Material) Act 2019** | • The Act amends the *Criminal Code Act 1995* to introduce a new offence that applies to internet, hosting or content services who fail to refer abhorrent violent material that occurred in Australia to law enforcement, and new offences that apply to hosting and content services who fail to remove abhorrent violent material that is capable of being accessed within Australia through their service.  
  • The Act also enables the eSafety Commissioner to issue a written notice to a provider of a hosting or content service notifying them that abhorrent violent material can be accessed through, or is hosted on, their service. | 5 April 2019         |
| **Foreign Influence Transparency Scheme Amendment Act 2019** | • The Act made technical amendments to the *Foreign Influence Transparency Scheme Act 2018* to address a gap in reporting obligations for persons undertaking activities during a voting period who are not already registered.  
  • The definition of ‘communications activity’ was also amended to clarify that it covers producing material for the purpose of communicating or disseminating it to the public. | 5 April 2019         |
<p>| <strong>Intelligence Services Amendment Act 2018</strong>         | • This Act modernises the legislative framework governing the use of force by ASIS to enable the Minister to specify additional persons outside Australia who may be protected by ASIS, and provides that ASIS staff members performing activities outside Australia can use reasonable and necessary force when performing their functions. The PJCIS Report on the Bill was tabled into Parliament on 4 December 2018. | 10 Dec 2018          |</p>
<table>
<thead>
<tr>
<th>Legislation</th>
<th>Changes</th>
<th>Date of Royal Assent</th>
</tr>
</thead>
</table>
| **Foreign Influence Transparency Scheme Legislation Amendment Act 2018**   | • The Act amends the FITS Act to require the Secretary of the department administering the FITS Act to continue to publish certain information about registered persons after they cease to be registered.  
• The Act also amends the *National Security Legislation Amendment (Espionage and Foreign Interference) Act 2018* to shorten the grace period applying to those whose existing arrangements will make them liable to register under the FITS Act once the FITS Act commences. | 10 Dec 2018         |
<p>| <strong>Defence Amendment (Call Out of the Australian Defence Force) Act 2018</strong>   | • This Act streamlines the legal procedures for call out of the Australian Defence Force (ADF) and enhances the ability of the ADF to protect states, territories and Commonwealth interests, onshore and offshore, against domestic violence, including terrorism. | 10 Dec 2018         |
| <strong>Office of National Intelligence (Consequential and Transitional Provisions) Act 2018</strong> | • This Act amends numerous pieces of legislation to reflect the proposed operation of the <em>Office of National Intelligence Bill 2018</em>, which established the new Office of National Intelligence. The PJCIS Report on the Bill was tabled into Parliament on 24 October 2018. | 10 Dec 2018         |
| <strong>Office of National Intelligence Act 2018</strong>                               | • This Act establishes the Office of National Intelligence (ONI) as an independent statutory authority whose functions include leadership, coordination and evaluation of the National Intelligence Community (NIC). The Director-General of ONI is the head of the NIC and the Prime Minister’s principal advisor on NIC matters. The PJCIS Report on the Bill was tabled into Parliament on 24 October 2018. | 10 Dec 2018         |</p>
<table>
<thead>
<tr>
<th>Legislation</th>
<th>Changes</th>
<th>Date of Royal Assent</th>
</tr>
</thead>
</table>
| **Telecommunications and Other Legislation Amendment (Assistance and Access) Act 2018**                                     | • The Act amends several pieces of legislation (most notably the TIA Act to establish a modern framework through which Australian law enforcement and national security agencies and the modern communications industry can work together to address technology obstacles to investigations into serious crimes and national security threats. The PJCIS has conducted two reviews of the Act. The first review of the legislation was prior to enactment and completed in December 2018. The first review made fifteen recommendations which were accepted by the Government. The second review was post-commencement of the Act and was completed in April 2019. The second review made three recommendations.  
• The PJCIS is currently in the process of conducting a third review and is due to report on the Act by September 2020. This review will build on the findings of the review currently being conducted by the Independent National Security Legislation Monitor and two previous PJCIS reviews. | 8 Dec 2018           |
| **Criminal Code Amendment (Food Contamination) Act 2018**                 | • This Act increased maximum penalties available for offences relating to the contamination of goods, and introduced new offences relating to the contamination of goods where the person is reckless as to whether their actions will cause public alarm or anxiety, economic loss or harm (or risk of harm) to public health. The Act also expanded sabotage offences in the Criminal Code to apply to sabotage of food. | 21 Sept 2018         |
| **Counter-Terrorism Legislation Amendment Act (No. 1) 2018**              | • This Act extended the operation of key counter-terrorism provisions’ in the Criminal Code, Crimes Act and Australian Security Intelligence Organisation Act 1979 ahead of their scheduled sunset date of 7 September 2018. The Act also implements the Government’s response to recommendations of the PJCIS and the INSLM in separate reports (see PJCIS Report on the Bill). | 24 Aug 2018          |
In the next reporting period I hope to engage an expert academic lawyer to produce regular updates for the INSLM website.

Canberra
December 2019
Dr James Renwick CSC SC
3rd INSLM
## APPENDIX I - COUNTER-TERRORISM PROSECUTIONS

A selection of the reportable cases concerning convictions for terrorism offences are set out in the table below. I gratefully acknowledge the assistance of the CDPP in preparing this part of the report.

<table>
<thead>
<tr>
<th>NO.</th>
<th>ACCUSED</th>
<th>CHARGES</th>
<th>SENTENCE DECISION</th>
<th>SENTENCE</th>
</tr>
</thead>
</table>
| 1.  | Faheem Lodhi      | • Section 101.4(1) of the Criminal Code – possessing a thing connected with the preparation for a terrorist act  
• Section 101.5(1) of the Criminal Code – collect/make document connected with preparation for a terrorist act  
• Section 101.6(1) of the Criminal Code – doing an act in preparation for a terrorist act | 23 August 2006   | 20 years’ imprisonment  
Non-parole period: 15 years |
| 2.  | Belal Khazaal     | • Section 101.5(1) of the Criminal Code – collect/make documents connected with preparation for a terrorist act | 25 September 2009 | 12 years’ imprisonment  
Non-parole period: 9 years  |
| 3.  | Abdul Nacer Benbrika | • Section 102.3(1) of the Criminal Code – membership in a terrorist organisation  
• Section 102.2(1) of the Criminal Code – directing the activities of a terrorist organisation | 3 February 2009   | 15 years’ imprisonment  
Non-parole period: 12 years |
<table>
<thead>
<tr>
<th>NO.</th>
<th>ACCUSED</th>
<th>CHARGES</th>
<th>SENTENCE DECISION</th>
<th>SENTENCE</th>
</tr>
</thead>
<tbody>
<tr>
<td>4.</td>
<td>Khaled Cheikho</td>
<td>• Sections 11.5 and 101.6(1) of the Criminal Code – conspiring to do acts in preparation for a terrorist act</td>
<td>15 February 2010</td>
<td>27 years’ imprisonment</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Non-parole period: 20 years and 3 months</td>
</tr>
<tr>
<td>5.</td>
<td>Abdul Rakib Hasan</td>
<td>• Sections 11.5 and 101.6(1) of the Criminal Code – conspiring to do acts in preparation for a terrorist act</td>
<td>15 February 2010</td>
<td>26 years’ imprisonment</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Non-parole period: 19 years and 6 months</td>
</tr>
<tr>
<td>6.</td>
<td>Mohamed Ali Elomar</td>
<td>• Sections 11.5 and 101.6(1) of the Criminal Code – conspiring to do acts in preparation for a terrorist act</td>
<td>15 February 2010</td>
<td>28 years’ imprisonment</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Non-parole period: 21 years</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>[An application for special leave is listed in the High Court on 19 October 2018]</td>
</tr>
<tr>
<td>7.</td>
<td>Moustafa Cheikho</td>
<td>• Sections 11.5 and 101.6(1) of the Criminal Code – conspiring to do acts in preparation for a terrorist act</td>
<td>15 February 2010</td>
<td>26 years’ imprisonment</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Non-parole period: 19 years and 6 months</td>
</tr>
<tr>
<td>8.</td>
<td>Mohammed Omar Jamal</td>
<td>• Sections 11.5 and 101.6(1) of the Criminal Code – conspiring to do acts in preparation for a terrorist act</td>
<td>15 February 2010</td>
<td>23 years’ imprisonment</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Non-parole period: 17 years and 3 months</td>
</tr>
<tr>
<td>NO.</td>
<td>ACCUSED</td>
<td>CHARGES</td>
<td>SENTENCE DECISION</td>
<td>SENTENCE</td>
</tr>
<tr>
<td>-----</td>
<td>---------------</td>
<td>-------------------------------------------------------------------------</td>
<td>------------------</td>
<td>-----------------------------------------------</td>
</tr>
</tbody>
</table>
| 9.  | Omar Baladjam | • 2 x section 101.6(1) of the Criminal Code – doing an act in preparation for a terrorist act  
     |                 | • 2 x section 101.4(1) of the Criminal Code – possessing a thing connected with the preparation for a terrorist act | 7 April 2009     | 18 years and 8 months’ imprisonment  
     |                 |                                                                         |                  | Non-parole period: 14 years  
     |                 |                                                                         |                  | [Appeal against sentence was heard on 8 August 2018, judgment is reserved] |
| 10. | Saney Aweys   | • Sections 11.5(1) and 101.6(1) of the Criminal Code – conspiracy to do acts in preparation for a terrorist act | 16 December 2011 | 18 years’ imprisonment  
     |                 |                                                                         |                  | Non-parole period: 13 years and 6 months |
| 11. | Nayef El-Sayed| • Sections 11.5 and 101.6(1) of the Criminal Code – conspiring to do acts in preparation for a terrorist act | 16 December 2011 | 18 years’ imprisonment  
     |                 |                                                                         |                  | Non-parole period: 13 years and 6 months |
| 12. | Wissam Fattal | • Sections 11.5(1) and 101.6(1) of the Criminal Code – conspiring to do acts in preparation for a terrorist act | 16 December 2011 | 18 years’ imprisonment  
     |                 |                                                                         |                  | Non-parole period: 13 years and 6 months |
| 13. | Hamdi Alqudsi | • 7 x section 7(1)(e) of the Crimes (Foreign Incursions and Recruitment) Act 1978 – preparing for incursions into foreign States for the purpose of engaging in hostile activities | 1 September 2016 | 8 years’ imprisonment  
<pre><code> |                 |                                                                         |                  | Non-parole period: 6 years |
</code></pre>
<table>
<thead>
<tr>
<th>NO.</th>
<th>ACCUSED</th>
<th>CHARGES</th>
<th>SENTENCE DECISION</th>
<th>SENTENCE</th>
</tr>
</thead>
<tbody>
<tr>
<td>14.</td>
<td>Sevdet Besim</td>
<td>• Section 101.6(1) of the Criminal Code – doing acts in preparation for, or planning, a terrorist act</td>
<td>5 September 2016</td>
<td>Re-sentenced to 14 years’ imprisonment on 23 June 2017</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Non-parole period: 10 years and 6 months</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>[Original sentence 10 years’ imprisonment with a non-parole period of 7 years and 6 months]</td>
</tr>
<tr>
<td>15.</td>
<td>Amin Mohamed</td>
<td>• 3 x section 7(1)(a) of the Crimes (Foreign Incursions and Recruitment) Act 1978 – preparing for incursions into foreign States for the purpose of engaging in hostile activities</td>
<td>29 September 2016</td>
<td>5 years and 6 months’ imprisonment</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Non-parole period: 3 years and 6 months</td>
</tr>
<tr>
<td>16.</td>
<td>Omar Succarieh</td>
<td>• 2 x section 7(1)(a) of the Crimes (Foreign Incursions and Recruitment) Act 1978 – preparing for incursions into foreign States for the purpose of engaging in hostile activities</td>
<td>2 November 2016</td>
<td>4 years and 6 months’ imprisonment</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Non-parole period: 3 years</td>
</tr>
<tr>
<td></td>
<td></td>
<td>• 2 x section 7(1)(e) of the Crimes (Foreign Incursions and Recruitment) Act 1978 – preparing for incursions into foreign States for the purpose of engaging in hostile activities</td>
<td></td>
<td></td>
</tr>
<tr>
<td>NO.</td>
<td>ACCUSED</td>
<td>CHARGES</td>
<td>SENTENCE DECISION</td>
<td>SENTENCE</td>
</tr>
<tr>
<td>-----</td>
<td>---------</td>
<td>---------</td>
<td>-------------------</td>
<td>----------</td>
</tr>
<tr>
<td>17.</td>
<td>MHK</td>
<td>• Sections 101.6(1) of the Criminal Code – committing an act in preparation for, or planning a terrorist act</td>
<td>7 December 2016</td>
<td>Re-sentenced to 11 years’ imprisonment on 23 June 2017. Non-parole period: 8 years and 3 months. [Originally sentenced to 7 years’ imprisonment with a non-parole period of 5 years and 3 months]</td>
</tr>
<tr>
<td>18.</td>
<td>Omar Al Kutobi</td>
<td>• Sections 11.5(1) and 101.6(1) of the Criminal Code – conspiring to do acts in preparation for, or planning, a terrorist act</td>
<td>9 December 2016</td>
<td>20 years’ imprisonment. Non-parole period: 15 years</td>
</tr>
<tr>
<td>19.</td>
<td>Mohammed Kiad</td>
<td>• Sections 11.5(1) and 101.6(1) of the Criminal Code – conspiring to do acts in preparation for, or planning, a terrorist act</td>
<td>9 December 2016</td>
<td>20 years’ imprisonment. Non-parole period: 15 years</td>
</tr>
<tr>
<td>20.</td>
<td>Ahmad Naizmand</td>
<td>• 5 x section 104.27 of the Criminal Code – contravening a control order</td>
<td>2 February 2017</td>
<td>4 years’ imprisonment. Non-parole period: 3 years</td>
</tr>
<tr>
<td>21.</td>
<td>Ibrahim Ghazzawy</td>
<td>• Section 101.5(1) of the Criminal Code – collecting or making documents likely to facilitate terrorist acts</td>
<td>8 May 2017</td>
<td>8 years and 6 months’ imprisonment. Non-parole period: 6 years and 4 months</td>
</tr>
<tr>
<td>NO.</td>
<td>ACCUSED</td>
<td>CHARGES</td>
<td>SENTENCE DECISION</td>
<td>SENTENCE</td>
</tr>
<tr>
<td>-----</td>
<td>--------------------------------</td>
<td>-------------------------------------------------------------------------</td>
<td>-------------------</td>
<td>-----------------------------------------</td>
</tr>
</tbody>
</table>
| 22  | Ali Al Talebi                  | • 2 x Sections 11.2A, 11.1(1) and 102.7(1) of the Criminal Code (Cth) – jointly attempting to knowingly provide support or resources to a terrorist organisation  
     • Sections 11.2A, 11.1(1) and 102.6(1) of the Criminal Code – jointly attempting to knowingly receive, make available to or collect funds for or on behalf of, directly or indirectly, a terrorist organisation | 28 August 2017     | 12 years’ imprisonment  
     Non-parole period: 9 years |
| 23  | Sulayman Khalid                | • Sections 11.5(1) and 101.6(1) of the Criminal Code— conspiring to do acts in preparation for, or planning, a terrorist act | 3 November 2017   | 22 years and 6 months’ imprisonment  
     Non-parole period: 16 years and 9 months |
| 24  | Jibryl Al Maouie               | • Sections 11.5(1) and 101.6(1) of the Criminal Code – conspiring to do acts in preparation for, or planning, a terrorist act | 3 November 2017   | 18 years and 10 months’ imprisonment  
     Non-parole period: 14 years and 2 months |
| 25  | IM (14 year old at offence)    | • Sections 11.5(1) and 101.6(1) of the Criminal Code – conspiring to do acts in preparation for, or planning, a terrorist act | 3 November 2017   | 13 years and 6 months’ imprisonment  
     Non-parole period: 10 years and 1 month  
     [Appeal heard on 9 July 2018, judgment reserved] |
<table>
<thead>
<tr>
<th>NO.</th>
<th>ACCUSED</th>
<th>CHARGES</th>
<th>SENTENCE DECISION</th>
<th>SENTENCE</th>
</tr>
</thead>
<tbody>
<tr>
<td>26.</td>
<td>Mohamed Al Maouie</td>
<td>• Section 101.5(1) of the Criminal Code – collecting or making documents connected with the preparation for a terrorist act</td>
<td>3 November 2017</td>
<td>9 years’ imprisonment</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Non-parole period: 6 years and 9 months</td>
</tr>
<tr>
<td>27.</td>
<td>Farhad Said</td>
<td>• Section 101.5(1) of the Criminal Code – collecting or making documents connected with the preparation for a terrorist act</td>
<td>3 November 2017</td>
<td>9 years and 6 months’ imprisonment</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Non-parole period: 7 years and 1 month</td>
</tr>
<tr>
<td>28.</td>
<td>Raban Alou</td>
<td>• Sections 11.2(1) and 101.1(1) of the Criminal Code – Aiding, abetting, counselling or procuring commission by another of a terrorist act</td>
<td>1 March 2018</td>
<td>44 years’ imprisonment</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Non-parole period: 33 years</td>
</tr>
<tr>
<td>29.</td>
<td>Tamim Khaja</td>
<td>• Section 101.6(1) of the Criminal Code – doing an act in preparation for, or planning, a terrorist act</td>
<td>2 March 2018</td>
<td>19 years’ imprisonment</td>
</tr>
<tr>
<td></td>
<td></td>
<td>• Section 119.4(1) of the Criminal Code – preparing for incursions into foreign countries for the purpose of engaging in hostile activities (taken into account on a Section 16BA schedule)</td>
<td></td>
<td>Non-parole period: 14 years and 3 months</td>
</tr>
<tr>
<td>30.</td>
<td>Mehmet Biber</td>
<td>• Section 6(1)(a) of the Crimes (Foreign Incursions and Recruitment) Act 1978 – entering a foreign state with the intent to engage in a hostile activity in that state contrary</td>
<td>27 April 2018</td>
<td>4 years and 9 months’ imprisonment</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Non-parole period: 2 years and 6 months</td>
</tr>
<tr>
<td>NO.</td>
<td>ACCUSED</td>
<td>CHARGES</td>
<td>SENTENCE DECISION</td>
<td>SENTENCE</td>
</tr>
<tr>
<td>-----</td>
<td>--------------------</td>
<td>--------------------------------------------------------------------------</td>
<td>-------------------</td>
<td>--------------------------------------------------------------------------</td>
</tr>
<tr>
<td>31.</td>
<td>Talal Alameddine</td>
<td>• Section 101.4(2) of the Criminal Code – intentionally possess a thing reckless as to the connection of the thing to the preparation for a terrorist act</td>
<td>18 May 2018</td>
<td>7 years and 2 months’ imprisonment</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Non-parole period: 5 years and 3 months</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>[Offender was also sentenced to 14 years and 2 months’ imprisonment on a charge contrary to s 51(1A) of the Firearms Act (NSW)]</td>
</tr>
<tr>
<td>32.</td>
<td>AH (age suppressed)</td>
<td>• Section 101.6(1) of the Criminal Code – doing an act in preparation for, or planning, a terrorist act.</td>
<td>22 June 2018</td>
<td>12 years’ imprisonment</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Non-parole period: 9 years</td>
</tr>
<tr>
<td>33.</td>
<td>Agim Kruezi</td>
<td>• Section 7(1)(a) of the Crimes (Foreign Incursions and Recruitment) Act 1978 – preparing for incursions into a foreign State for the purpose of engaging in hostile activities</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>• Section 101.6 of the Criminal Code – doing an act in preparation of a terrorist act</td>
<td>31 July 2018</td>
<td>17 years and 4 months’ imprisonment</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Non-parole period: 13 years</td>
</tr>
<tr>
<td>NO.</td>
<td>ACCUSED</td>
<td>CHARGES</td>
<td>SENTENCE DECISION</td>
<td>SENTENCE</td>
</tr>
<tr>
<td>-----</td>
<td>---------------</td>
<td>-------------------------------------------------------------------------------------------</td>
<td>-------------------</td>
<td>-----------------------------------------------</td>
</tr>
</tbody>
</table>
| 34  | Milad Atai    | • Section 11.2(1) and 101.1(1) Criminal Code – Aid, abet, counsel or procure the commission of a terrorist act  
• 2 x Section 102.6(1) Criminal Code – Intentionally collect funds for, or on behalf of an organisation, namely Islamic State, knowing that the organisation was a terrorist organisation  
• Section 102.3(1) Criminal Code – Membership of a terrorist organisation (Taken into account on a s16BA schedule) | 23 November 2018 | 38 years’ imprisonment                       |
<p>|     |               |                                                                                          |                   | Non-parole period: 28 years and 6 months       |
|     |               |                                                                                          |                   | [Appeal against sentenced has been lodged]     |
| 35  | HG            | • Section 101.6 of the Criminal Code – Do act in preparation for, or planning, a terrorist act | 30 November 2018 | 16 years’ imprisonment                       |
|     |               |                                                                                          |                   | Non-parole period: 12 years                   |
| 36  | Sameh Bayda   | • Section 11.5(1) and 101.6(1) Criminal Code – Conspire to do act in preparation for, or planning, a terrorist act | 31 January 2019  | 4 years’ imprisonment                        |
|     |               |                                                                                          |                   | Non-Parole period: 3 years                    |
| 37  | Alo-Bridget Namoa | • Section 11.5(1) and 101.6(1) Criminal Code – Conspire to do act in preparation for, or planning, a terrorist act | 31 January 2019  | 3 years and 9 months’ imprisonment           |
|     |               |                                                                                          |                   | Non-parole period: 2 years and 10 months      |</p>
<table>
<thead>
<tr>
<th>NO.</th>
<th>ACCUSED</th>
<th>CHARGES</th>
<th>SENTENCE DECISION</th>
<th>SENTENCE</th>
</tr>
</thead>
<tbody>
<tr>
<td>38.</td>
<td>Paul Dacre</td>
<td>• Section 119.4(1) Criminal Code by virtue of Section 11.2A (joint commission) - Preparation for incursions into foreign countries for the purpose of engaging in hostile activities</td>
<td>22 February 2019</td>
<td>4 years’ imprisonment Non-parole period: 3 years</td>
</tr>
<tr>
<td>39.</td>
<td>Antonio Granata</td>
<td>• Section 119.4(1) Criminal Code by virtue of Section 11.2A (joint commission) - Preparation for incursions into foreign countries for the purpose of engaging in hostile activities</td>
<td>22 February 2019</td>
<td>4 years’ imprisonment Non-parole period: 3 years</td>
</tr>
<tr>
<td>40.</td>
<td>Kadir Kaya</td>
<td>• Section 119.4(1) Criminal Code by virtue of Section 11.2A (joint commission) - Preparation for incursions into foreign countries for the purpose of engaging in hostile activities</td>
<td>22 February 2019</td>
<td>4 years’ imprisonment Non-parole period: 3 years</td>
</tr>
<tr>
<td>41.</td>
<td>Murat Kaya</td>
<td>• Section 119.4(1) Criminal Code by virtue of Section 11.2A (joint commission) - Preparation for incursions into foreign countries for the purpose of engaging in hostile activities</td>
<td>22 February 2019</td>
<td>3 years and 8 months’ imprisonment Non-parole period: 2 years and 9 months</td>
</tr>
<tr>
<td>42.</td>
<td>Shayden Thorne</td>
<td>• Section 119.4(1) Criminal Code by virtue of Section 11.2A (joint commission) - Preparation for incursions into foreign countries to engage in hostile activities</td>
<td>25 February 2019</td>
<td>3 years and 10 months’ imprisonment Non-parole period: 2 years, 10 months and 16 days</td>
</tr>
<tr>
<td>NO.</td>
<td>ACCUSED</td>
<td>CHARGES</td>
<td>SENTENCE DECISION</td>
<td>SENTENCE</td>
</tr>
<tr>
<td>-----</td>
<td>------------------</td>
<td>------------------------------------------------------------------------</td>
<td>-------------------</td>
<td>-----------------------------------------------</td>
</tr>
</tbody>
</table>
| 43. | Omarjan Azari    | • Section 101.6(1) Criminal Code – Act in preparation, or planning, for a terrorist act  
• Section 11.1(1) & s 102.6(1) Criminal Code – Attempt to knowingly receive, make available to or collect funds for or on behalf of, directly or indirectly, a terrorist organisation (2 additional charges to be taken into account on a s 16BA schedule) | 22 March 2019     | 18 years’ imprisonment  
Non-parole period: 13 years and 6 months |
| 44. | Robert Cerantonio| • Section 119.4(1) Criminal Code by virtue of Section 11.2A (joint commission) - Preparation for incursions into foreign countries for the purpose of engaging in hostile activities | 3 May 2019        | 7 years’ imprisonment  
Non-parole period: 5 years and 3 months |
| 45. | Renas Lelikan    | • Section 102.3(1) Criminal Code – Knowingly being a member of a terrorist organisation | 7 May 2019        | Community Corrections order pursuant to s 20AB(1) Crimes Act 1914 and Section 8 Crimes (Sentencing Procedure) Act 1999 NSW  
[Director’s Appeal concluded on 15 August 2019, judgment is reserved] |
<table>
<thead>
<tr>
<th>NO.</th>
<th>ACCUSED</th>
<th>CHARGES</th>
<th>SENTENCE DECISION</th>
<th>SENTENCE</th>
</tr>
</thead>
<tbody>
<tr>
<td>46.</td>
<td>Ihsas Khan</td>
<td>• Section 101.1(1) Criminal Code – Committing a terrorist act</td>
<td>23 May 2019</td>
<td>36 years’ imprisonment</td>
</tr>
<tr>
<td></td>
<td></td>
<td>• Section 27 Crimes Act (NSW) – Cause wounding / Grievous bodily harm with intent to murder</td>
<td></td>
<td>Non-Parole period: 27 years</td>
</tr>
<tr>
<td>47.</td>
<td>Momena Shoma</td>
<td>• Section 101.1(1) Criminal Code - Committing a terrorist act</td>
<td>5 June 2019</td>
<td>42 years’ imprisonment</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Non-parole period: 31 years and 6 months</td>
</tr>
<tr>
<td>48.</td>
<td>Haisem Zahab</td>
<td>• Section 102.7(1) of the Criminal Code – Providing support to a terrorist organisation</td>
<td>7 June 2019</td>
<td>9 years’ imprisonment</td>
</tr>
<tr>
<td></td>
<td></td>
<td>• Section 3LA of the Crimes Act - Failing to comply with an order to assist access to data in a computer</td>
<td></td>
<td>Non-parole period: 6 years and 9 months</td>
</tr>
<tr>
<td>49.</td>
<td>Moudasser Taleb</td>
<td>• Section 119.4(1) Criminal Code - Preparation for incursions into a foreign country for the purpose of engaging in hostile activity</td>
<td>14 June 2019</td>
<td>5 year recognizance release order pursuant to s 20(1) (a) of the Crimes Act</td>
</tr>
<tr>
<td>50.</td>
<td>Ahmed Mohamed</td>
<td>• 2 x Section 101.1 Criminal Code – Terrorist act</td>
<td>24 July 2019</td>
<td>22 years’ imprisonment</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Non-parole period: 17 years</td>
</tr>
<tr>
<td>NO.</td>
<td>ACCUSED</td>
<td>CHARGES</td>
<td>SENTENCE DECISION</td>
<td>SENTENCE</td>
</tr>
<tr>
<td>-----</td>
<td>--------------------</td>
<td>--------------------------------------------------------------------------</td>
<td>-------------------</td>
<td>-----------------------------------------------</td>
</tr>
<tr>
<td>51.</td>
<td>Abdullah Chaarani</td>
<td>• 2 x Section 101.1 Criminal Code – Terrorist act</td>
<td>24 July 2019</td>
<td>22 years’ imprisonment</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Non-parole period: 17 years</td>
</tr>
<tr>
<td>52.</td>
<td>Hatim Moukhaiber</td>
<td>• Section 101.1 Criminal Code – Terrorist act</td>
<td>24 July 2019</td>
<td>16 years’ imprisonment</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Non-parole period: 12 years</td>
</tr>
<tr>
<td>53.</td>
<td>Bourhan Hraichie</td>
<td>• Section 101.6(1) of the Criminal Code – doing an act in preparation for, or planning, a terrorist act</td>
<td>2 August 2019</td>
<td>20 years’ imprisonment</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Non-parole period: 15 years</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>[Offender was also sentenced to 20 years’ imprisonment on a charge contrary to Sections 27 and 33(1)(b) Crimes Act 1990 (NSW) and 6 years and 3 months’ imprisonment on a charge contrary to Section 31 Crimes Act (NSW)]</td>
</tr>
<tr>
<td>54.</td>
<td>Mustafa Dirani</td>
<td>• Section 11.5(1) and 101.6(1) Criminal Code – Conspire to do act in preparation for, or planning, a terrorist act</td>
<td>9 August 2019</td>
<td>28 years’ imprisonment</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Non-parole period: 21 years</td>
</tr>
<tr>
<td>55.</td>
<td>Amin Elmir</td>
<td>• Section 119.4(1) Criminal Code - Preparation for incursions into foreign countries for the purpose of engaging in hostile activities</td>
<td>16 August 2019</td>
<td>5 years and 5 months’ imprisonment</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Non-parole period: 4 years and 1 month</td>
</tr>
</tbody>
</table>
Today, I will say something about:16

- the INSLM role and its origins;
- the counter-terrorism threat;
- my tentative views on the citizenship inquiry, namely that some laws pass muster and some don’t’
- my approach to my encryption inquiry; and
- some key questions.

The INSLM role and its origins

In 2001, there were no federal anti-terrorism laws and thus no such prosecutions, ASIO had shrunk with the end of the Cold War, Al-Qaeda was hardly a household name and ISIL didn’t exist. The attacks of 9/11 changed many things, and they certainly began a process of legislative and government response to terrorism activities which has continued to this day and which has resulted in over 75 separate statutes being passed and a similar number of people—10% of whom were children—being convicted of such offences so far, with many receiving lengthy sentences. And that is not all: there are:

- new or updated laws concerning espionage and sabotage;
- a variety of laws to deal with the still sizeable cohort of foreign fighters, their supporters and dependants; and
- new encryption laws to counter organised criminals and terrorists using technology to ‘go dark’ as far as surveillance of them by police and intelligence authorities is concerned, although in the UK the preferred terms are not ‘going dark’ but ‘going spotty’ or even ‘going different’.

The new laws (like the new threats) were and are often unsettling in their novelty and reach and raise legitimate questions:

- Do they go too far?
- Do they work?
- Do they properly deal with legitimate human rights concerns?

16 All views expressed in this speech are my own.
In a skeptical world, it is no longer enough for any government minister anywhere to say ‘just trust us’ or ‘if you knew what I know you would be satisfied’. As Sir Adrian Fulford, the United Kingdom Investigatory Powers Commissioner, has said of transparency:

*In the post-Snowden world, the security and law enforcement agencies can no longer expect to work in the shadows, in the sense that material which can properly be made public should be widely available for scrutiny.17*

In 2010 Australia adapted the role of the United Kingdom’s Independent Reviewer of Terrorism Legislation, by enacting the *Independent National Security Legislation Monitor Act* which provides for the appointment of a part-time INSLM. With my appointment in early 2017, I followed two eminent lawyers, namely the Honourable Roger Gyles AO QC and, before him, Bret Walker SC.

Fundamentally, to adopt the language of former Independent Reviewer Lord Anderson KBE QC, both Reviewer and INSLM share the following features:

- **first**, independence;
- **second**, an entitlement to see everything of relevance, even the most highly classified material: this is one answer to the person unconvinced by a Minister who says ‘if you could see what I see’ as both INSLM and Reviewer can and do see just that; and
- **third**, compulsory publication of the reports to government, in my case tabling of any declassified report must occur within 15 sitting days so that the Parliament and the public can read and consider for themselves.

As INSLM I don’t investigate complaints or look at bills, rather, I independently:

- review the operation, effectiveness and implications of national security and counter-terrorism laws; and consider whether such laws
  - contain appropriate protections for individual rights;
  - remain proportionate to terrorism or national security threats; and
  - remain necessary.

Many reviews can be conducted by me of my own motion, however, the Prime Minister and the Attorney-General can send me any topic related to counter-terrorism or national security – a much broader concept – and the increasingly important and highly respected Parliamentary Joint Committee on Intelligence and Security (PJCIS) can also send me certain matters, and they in fact have recently sent me their first reference, namely the encryption review, which I will come to.

**Threats**

Because I must consider whether particular laws remain proportionate to threats of terrorism or to national security or both, I receive regular briefings from police, policy and intelligence agencies on all matters of relevance to my reviews. As has been the

---

case for the past four years, the current threat of a terrorist act occurring in Australia remains at the ‘probable level’. My views are that:

- The credible threat of one or more terrorist attacks in Australia will remain a significant factor in the Australian national security and counter-terrorism landscape for the reasonably foreseeable future;
- 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;
- There can be no guarantee that the authorities will detect and prevent all attacks although most have been;
- 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;
- The threats come mainly from radical and violent Islamist action – which is not to be confused with the great world religion of Islam which advocates peace;  
  
\[18\] As Mr Justice Haddon-Cave, then Judge managing the Terrorism Cases List in England and Wales, said when sentencing the Parson’s Green Bomber, in terms I would adopt:

\[48\] ... the Qur’an is a book of peace; Islam is a religion of peace. The Qur’an and Islam forbid anything extreme, including extremism in religion. Islam forbids breaking the ‘law of the land’ where one is living or is a guest. Islam forbids terrorism (hiraba). The Qur’an and the Sunna provide that the crime of perpetrating terror to ‘cause corruption in the land’ is one of the most severe crimes in Islam. So it is in the law of the United Kingdom. 

\[19\] This has been referred to as the ‘bleed-out’ effect. (See Barak Mendelson “Foreign Fighter- Recent Trends” (2011) 55(2) Orbis.

- There are also increasing concerns about radical, violent, right wing activity;
- The implications of the recent atrocities in Christchurch and Sri Lanka, as with the likely future roles of the remnant foreign fighters of the so-called caliphate, are yet to be fully worked out.

Turning to the dual citizenship issue: a key focus of the current operation of counter-terrorism laws concerns Foreign Fighters, which brings me to say something about ISIL members and supporters.

The rise of ISIL, which led to the so-called caliphate, took almost everyone by surprise. I expect its capacity to surprise will continue. ISIL has produced a large, now widely dispersed, radicalised, highly trained diaspora of actual or potential terrorists, many of whom remain with their supporters and dependants (including children), and most of whom remain outside of their countries of citizenship. Foreign Fighters abroad or at ‘home’ pose a durable threat, directly by pursuing violence, indirectly by inspiring others.  

The formation of Al-Qaeda is said to be a good example of this, where Foreign
Fighters involved in the 1970’s/1980’s Afghan–Soviet conflict later formed the core of Al-Qaeda.20 And the ISIL threat is wider than the Foreign Fighter group, large though it is, because of the effectiveness of its message, particularly over the internet, to inspire other attacks. As the [then] UK Home Secretary, Sajid Javid, said in a speech on 20 May this year:

In fact, of all the terrorist plots thwarted by the UK and our Western allies last year, 80% were planned by people inspired by the ideology of [ISIL]/Daesh, but who had never actually been in contact with the so-called Caliphate.21

We still have much in common with the United Kingdom, for example:

- legal history and institutions;
- membership of Five Eyes;
- close collaboration in intelligence and law reform, and, unfortunately;
- dual citizens who are either ISIL terrorist, their supporters or their child dependants.

There has been much reporting about the plight of such children or those who travelled as children. Let me say something about children in this context, although I will be careful to say nothing which could interfere with Australia’s current diplomatic and aid efforts.

The position of children and young people is not straightforward. Of course, as a matter of humanity, reflecting the terms of the Convention on the Rights of the Child, the plight of very young children is distressing and there is general hope for their safe return. Beyond the very young, the position becomes more complex.

As I said in my recent report to the Prime Minister concerning the Prosecution And Sentencing Of Children For Terrorism Offences:

There are...parallels between child soldiers and Australian children in territory controlled by ISIL: the fact that each are certainly victims does not mean they cannot also become perpetrators, and thus they remain a cohort of interest.22

This remains true even though ISIL no longer controls territory as it once did. As a matter of law, the cohort of children need to be divided, between:

- those under the age of criminal responsibility, which is 10;
- those under 14 where there the presumption against criminal intent applies;
- and those between 14 and 18 who are to be tried and punished as juveniles.

It is very possible that there were young Australians over 14 years of age who have committed one or more terrorist offences or breached the declared area provisions which made it a crime to be in Mosul or Raqqa without reasonable excuse. Finally, within these groups no doubt the level of criminal culpability will vary.

---

The current Citizenship review

While revoking citizenship due to terrorist conduct is a recent development the concept of stripping citizenship for criminal conduct is not new.\(^{23}\) There are two types of provisions of relevance in the *Australian Citizenship Act*. First, there are what I might call the conventional provisions in s 35A. The requirements that must be met to empower the Minister to revoke a person’s citizenship under s 35A are:

- the person has been convicted of a specified offence related to terrorism;
- the person has been sentenced to at least six years imprisonment for such offences;
- the person is a national or citizen of a country other than Australia;
- the Minister is satisfied that the person’s conduct demonstrates that they have repudiated their allegiance to Australia; and
- the Minister is satisfied that it is in the public interest for the person to no longer be an Australian citizen, having regard to certain factors.

My preliminary view is that such provisions pass muster under the INSLM Act, at least for the following reasons.

First, there is a conviction by a jury – so the terrorist conduct is established.

Second, there is a substantial sentence imposed by a judge, which shows the level of seriousness of the conduct.

Third, the person will not be rendered stateless, thus we continue to comply with the Convention on Statelessness.

Fourth, it seems to me too absolute to say that citizenship revocation for terrorists is either always or is never justified or is either always or is never an effective way to protect the Australian community. Rather, *sometimes* it is both justified and effective.

The argument in favour of such revocation might go like this:

- Citizenship still has at its core the notion of allegiance to a nation state;
- Just as it can be expressly disavowed by renunciation, it can be impliedly disavowed by inconsistent conduct: take the historical case of spying or fighting for the enemy during World War 2;
- Although there are no longer declared wars between nation states, is it not so very different where an Australian citizen fights for ISIL against the Australian Defence Force or its allies?
- The High Court has said ‘Australian citizenship is a common bond, involving reciprocal rights and obligations’\(^{24}\) and that ‘a federal offence is, in effect, an offence against the whole Australian community’\(^{25}\) - and a serious terrorism offence is a clear case of an offence against the Australian community and one which may break the common bond;

\(^{23}\) As put by Audrey Macklin, historians view citizenship revocation as recrudescent rather than as emergent: Deniz Kayis n-S.
\(^{24}\) *Roach v Electoral Commissioner* (2007) 233 CLR 162, 177 [12].
\(^{25}\) In *Pham v R* (2015) 256 CLR 550 the plurality said at [24]: “As Kirby J observed in Putland v The Queen, a federal offence is, in effect, an offence against the whole Australian community and so the offence is the same for every offender throughout the Commonwealth.”
• If all of that is accepted, then there is a logical argument that it may, I emphasise, may, be in the public interest in an individual case to revoke citizenship.26 In the language of the INSLM Act the law may be ‘necessary’. But because there may be many competing factors a decision must be made considering the facts and surrounding circumstances in each particular case.

In contrast there are two ‘operation of law provisions’ (ss 33AA and 35) which in effect provide that if:

• a person is a dual citizen of Australia and another country;
• is 14 years of age or more;
• is outside Australia; and
• engages in fact in specified forms of acts related to terrorism – such as committing a terrorist act, or fighting for ISIL, then
• by operation of law, without any further event such as conviction by jury or decision by a minister, official, judge or Tribunal member, the person then and there loses their citizenship.

These provisions operate to cease a person’s Australian citizenship automatically on the occurrence of certain ‘conduct’ (s 33AA) or where the person fights for, or is in the service of a Declared Terrorist Organization (s 35). Upon the relevant Minister27 becoming aware of citizenship so ending under s 33AA, 35, or 35A, he must give (or make reasonable attempts to give) notice to the person of that event as soon as practicable unless there is a decision made on the grounds of security, international relations etc. not to notify in which case the former citizen will not be aware of their loss of citizenship.

In contrast to my preliminary views on s 35A, my preliminary view of ss 33AA and 35 is that each are problematic under the INSLM Act for at least the following reasons.

First, the law operates in an uncontrolled and uncertain manner. The Australian government has publicly announced that the provisions of the law have operated to deprive 12 persons of Australian citizenship although, mainly because of Ministerial decisions not to notify the affected persons, the names of the persons are not known publicly except for Neil Prakash, where there is a disagreement between Australia and Fiji as to which country he remains a citizen of.

It is very likely that there are more, perhaps many more, persons who have in this way lost their citizenship, but who are not known to the authorities. The most obvious group of such persons are those who fought for or supported ISIL without the knowledge of Australia, but the same could be said of as yet unknown terrorist recruiters or financiers anywhere in the world. Any government should be able to say at any particular time who is and is not a citizen but this law prevents it from definitively doing so.

I note that the Minister may reverse the revocation, but is under no compulsion even to consider such action. If, however, he does so, Parliament must be advised of the fact and the reasons for doing so. The provisions make citizenship comparatively easy to lose but hard to regain even if many years pass before the government or the person become aware of the citizenship loss.

---

26 The First INSLM’s final Annual Report so stated.
27 Formerly the Attorney-General, now the Minister for Home Affairs
Second, the law lacks the traditional and desirable accountability which comes from a person taking responsibility for a decision whether that is a Minister, an official, a judge or a tribunal member.

Third, there will inevitably be cases where it is not in the public interest to cancel a particular person’s citizenship for terrorist conduct, support or affiliation: examples of relevant factors can readily be imagined: actually, they don’t need to be imagined because they are already listed as reasons to be taken into account in a Ministerial exemption decision under s 33AA (17), namely:

- the severity of the conduct engaged in;
- the degree of threat posed by the person to the Australian community;
- the age of the person;
- if the person is aged under 18--the best interests of the child as a primary consideration – that reflects Australia’s obligations under the Convention on the rights of the child;
- whether the person is being or is likely to be prosecuted in relation to the conduct engaged in, and, I would add, the extent to which they might be prepared to be a Crown witness against co-accused or others;
- the person’s connection to the other country of which the person is a national or citizen and the availability of the rights of citizenship of that country to the person;
- Australia’s international relations;
- any other matters of public interest.

None of these matters is considered when the law first operates: to that extent the operation of the law is likely to be disproportionate to the threat posed by some persons and, in any event their rights in relation to the loss of the valuable right of Australian citizenship seem insufficiently safeguarded.

Fourth, the problems are compounded by the capacity of the Minister not to give notice of the loss of citizenship: the revokee may well order their life on the basis that they remain a citizen when they do not. Take the possibility of an Australian woman who decided to have another child wrongly thinking the child will be Australian: there is then no technical breach of either the Convention on the Rights of the Child or the Convention on Statelessness, but it is highly problematic for both mother and child.

Fifth, there are real problems with review and scrutiny. Although the courts can make a declaration that at the relevant time the person was not in fact a dual citizen and thus cannot have lost their (sole) Australian citizenship, the conclusion by an inter-departmental committee that the disqualifying conduct has occurred cannot easily be challenged, if it can at all.

However, my preliminary view is that there is a solution to these problems which might work, and that is to adopt the existing procedures for challenges to passport cancellations, where, as here, there is often much sensitive intelligence material which cannot be disclosed to the revokee, but where the Security Appeals Division of the Administrative Appeals Tribunal adopts a more inquisitorial model and tests the intelligence material in private in the absence of the revokee. This is essentially the model used in the UK in the Special Immigrations Appeals Commission. Noting that the Commonwealth is about to appoint special advocates to deal with Control Order cases,
I would favour the UK model of using Special Advocates to represent the interests of the revoke in the closed session. The Tribunal could be required to apply all the factors the Minister may currently apply in deciding whether to reverse the revocation.

As you can appreciate, these are complex and difficult issues and the main reason for my appearance today at the Lowy Institute is to encourage wide participation in this and indeed all of my inquiries including the public hearings on citizenship due to be held 27 June 2019.

Encryption

The *Telecommunications and Other Legislation Amendment (Assistance and Access) Act 2018* (TOLA) commenced in early December last year having been introduced as a bill some 6 weeks before. The PJCIS urgently considered its terms - however, having received advice from the government that there was an immediate need to provide agencies with additional powers and to pass the Bill in the last sitting week of 2018, it cut short its consideration and recommended enactment with some amendments, with the proviso that there be further review by both the Committee and my Office. This year it referred review of the Act to me.

The key features of the Act that have received attention are the new ability of federal intelligence and Australian police to get technical assistance from a designated communications provider either by agreement or ultimately by compulsion to require that provider to take certain steps to help the authorities perhaps by giving access to an app, or a service offered by an ISP, or an encrypted communication, but with a view to “better deal with the challenges posed by ubiquitous encryption”28. Today is not the day to go into any detail on how this complex Act works: the 2019 report29 on the Act by the PJCIS is a good summary of the many controversies which attend the Act.

Today I advise all those interested in this important law to become engaged in my review. I would like to set up consultative groups so please let me know if you would like to take part. May I suggest a few principles, some derived from the report by David Anderson, called ‘A Question of Trust’30.

- First, just as in the physical world we do not accept lawless ghettos where the law does not apply, so also it should be in the virtual world: in this context it means intrusive surveillance powers – conferred by law and with clear thresholds and safeguards – which already apply in the physical world should in principle apply in the analogous virtual world unless there are good reasons otherwise, an example of such a good reason would be if, I emphasise if, the operation of the law would unduly undermine, say, the integrity of the financial and banking system.
- Second, what the law permits and forbids must be clear.

---

29 Parliamentary Joint Committee on Intelligence and Security, Advisory Report on the Telecommunications and Other Legislation Amendment (Assistance and Access) Bill 2018, December 2018
• Third, oversight and safeguards are vital and there are comparative models of interest: so, in the UK, industry is involved through a technical advisory panel and also in adjudicating on some requests through membership of a technical advisory board. It may also be appropriate to have a ‘double lock’ for decisions with the relevant Minister’s most intrusive powers subject to routine review by a panel of retired judges who have access to all the underlying material.

This is a very complex review and I welcome wide participation.

**Key Questions**

May I finish by noting some key questions:

• First, how can the role of Parliament and key committees such as the PICIS in scrutinising counter-terrorism and national security laws be enhanced?  

• Second, how best to achieve the desirable aim ‘that material which can properly be made public should be widely available for scrutiny’: one way to start, as I suggested in my latest report to the Prime Minister is following the UK practice of regularly making accessible figures on numbers of arrests and convictions.

---

31 There is the ever decreasing time available for scrutiny of bills and an increasing number of bills. I am also interested to see what the government says about the important recommendations of the 2017 Independent Intelligence Review concerning an expanded role for the PICIS: see Commonwealth of Australia, Department of the Prime Minister and Cabinet, 2017 Independent Intelligence Review https://www.pmc.gov.au/sites/default/files/publications/2017-Independent-Intelligence-Review.pdf

Recommendation 23: The role of the Parliamentary Joint Committee on Intelligence and Security (PICIS) be expanded by amending relevant legislation to include:

a) a provision enabling the PICIS to request the Inspector-General of Intelligence and Security (IGIS) conduct an inquiry into the legality and propriety of particular operational activities of the National Intelligence Community (NIC) agencies, and to provide a report to the PICIS, Prime Minister and the responsible Minister;

b) a provision enabling the PICIS to review proposed reforms to counter-terrorism and national security legislation, and to review all such expiring legislation;

c) provisions allowing the PICIS to initiate its own inquiries into the administration and expenditure of the ten intelligence agencies of the NIC as well as proposed or existing provisions in counter-terrorism and national security law, and to review all such expiring legislation;

d) provisions enabling the PICIS to request a briefing from the Independent National Security Legislation Monitor (the Monitor), to ask the Monitor to provide the PICIS with a report on matters referred by the PICIS, and for the Monitor to provide the PICIS with the outcome of the Monitor’s inquiries into existing legislation at the same time as the Monitor provides such reports to the responsible Minister; and

e) a requirement for the PICIS to be regularly briefed by the Director-General of the Office of National Intelligence, and separately by the IGIS.

32 I look forward to a comprehensive response by government to my latest report to the Prime Minister concerning the prosecution and sentencing of children for Commonwealth terrorism offences. Although perhaps the most important recommendation is to bring Australia’s sentencing laws for juvenile terrorists into line with the Convention on the Rights of the Child by allowing sentencing judges more discretion, and thus a greater chance of rehabilitating juvenile terrorism offenders, I also look forward to a response to my recommendations that: As is proposed with Corporations Act offences, the Federal Court have concurrent jurisdiction with the Supreme Courts of the States and Territories to try all terrorist offences.
• Third, how best to enhance the vital role of the guardians whether that is the judiciary; or the bodies like the Inspector-General of Intelligence and Security to whom whistle-blowers may legitimately turn with any concerns they may have about illegality or maladministration?\textsuperscript{33}

• Fourth, how to ensure proper safeguards against misuse of internet technology?\textsuperscript{34}

\textsuperscript{33} That the government provide annual funds – miniscule in amount in comparison to the counter-terrorism budget – to allow a small number of Australian and English judges - say two a year - to attend each other’s annual judicial training to encourage appropriate improvements and innovations in the conduct of terrorism trials. Further detail on each is as follows:

Rights of the Child: In federal criminal law, where imprisonment is ordered, there is a head sentence imposed, and a judicial determination of a non-parole period. Because of a perception that an early terrorism offender had received a lenient non-parole period, s 19AG of the Crimes Act (Cth) was enacted. It requires every court imposing a term of imprisonment on an adult or child convicted of a terrorism offence to fix a non-parole period of at least three-quarters of the duration of the head sentence, hence the ‘75% rule’. At the time s 19AG was enacted, parole was almost automatic. That is no longer the case. This change diminishes dramatically the necessity of the provision. Section 19AG precludes any judicial discretion in setting a child’s non-parole period. I concluded that Section 19AG in its current form, as it applies to children, is in breach of Australia’s obligations under the CRC and recommended that it no longer apply to those under 18 at the time of offending.

Federal Court: I recommended that in all terrorism matters tried on indictment, the Federal Court of Australia should have jurisdiction concurrent with the courts of the States and Territories, including because of:

• the disparity in the approaches taken in the eight State and Territory jurisdictions;
• the complexity of federal legal and procedural issues which typically arise in terrorism cases;
• the truly national nature of terrorism offences;
• the fact that the Federal Court already has jurisdiction to make Control Orders under Div 104 of the Criminal Code and is shortly to be given concurrent jurisdiction in criminal prosecutions for breaches of the Corporations Act (Cth)
• the recent appointment of specialist criminal law judges to the Federal Court.

Judicial Education: As Chief Justice Ferguson of the Supreme Court of Victoria said in her submission to the inquiry: ‘Terrorism trials generally involve a high level of legal and evidentiary complexity and require significant pre-trial management. Cross-jurisdictional learning is an important tool’. I concluded that enhancing judicial training in terrorism matters, including on the unique issues arising in the trial of children, is highly desirable. The Judges of England and Wales who regularly try terrorism matters told me that they welcome the participation of Australian judges in their annual training. The details of such training are matters for the independent judiciary. I therefore recommended that monies be made available to the appropriate Australian judicial education bodies to allow English and Australian judges expert in the conduct of terrorism trials to travel each year to the other jurisdiction to observe the conduct of terrorism trials and to provide or receive judicial continuing legal education with a view to encouraging appropriate improvements and innovations in the conduct of such trials.

Openness: A key function of the INSLM is in monitoring whether relevant laws remain ‘proportionate to any threat of terrorism or threat to national security, or both’. In a sceptical age, in both Australia and the United Kingdom it is not infrequently said that the terrorism and national security threats are overstated. It is important for public confidence that as much as possible is authoritatively revealed, provided the national interest is not thereby damaged. The public and its elected representatives have a strong interest in being told by government with regularity and accuracy how often counterterrorism powers are used, and equally statistics as to consequential arrests, convictions and other limitations upon liberty, and I have so recommended.

\textsuperscript{34} Apart from my inquiry, there is for example the important Digital Platforms Inquiry of the ACCC: https://www.accc.gov.au/focus-areas/inquiries/digital-platforms-inquiry.
I suggest that one way to start to answer all of these questions is to measure them against the critical issue of trust in a democratic society. As David Anderson has written:

*Public consent to intrusive laws depends on people trusting the authorities, both to keep them safe and not to spy needlessly on them...*

*Trust in powerful institutions depends not only on those institutions behaving themselves (though that is an essential prerequisite), but on there being mechanisms to verify that they have done so. Such mechanisms are particularly challenging to achieve in the national security field, where potential conflicts between state power and civil liberties are acute, suspicion rife and yet information tightly rationed...*

*Respected independent regulators continue to play a vital and distinguished role. But in an age where trust depends on verification rather than reputation, trust by proxy is not enough. Hence the importance of clear law, fair procedures, rights compliance and transparency.*

I look forward as INSLM to continuing to play my part on the issue of trust.
It is a privilege to do so.

12 June 2019
This is my first appearance before this committee. It may assist you if I say something about my role, my current work and my resources. I have been the Independent National Security Legislation Monitor since February last year. I was appointed for three years until the 30 June 2020 by the Governor-General last year. I am the third monitor. The first was Bret Walker SC; the second was the Hon. Roger Gyles AO QC.

The office I occupy and occupy part-time is set up by the act of parliament of the same name. I review the operation, effectiveness and implications of national security and counterterrorism laws. Pausing there—I don’t look at bills; I don’t look at proposed laws. I consider whether the laws contain appropriate protections for individual rights, whether they remain proportionate to terrorism or national security threats and whether they remain necessary.

The role is based on the English equivalent, the Independent Reviewer of Terrorism Legislation, and my recent counterparts in that role summarise the role in a way which is applicable to me in three parts. Firstly, I’m independent; secondly, I’m entitled to see everything I need to see, regardless of security classification; and, thirdly, my reports, insofar as they’re not classified, must be made public within 15 sitting days.

As an independent office holder having a very small establishment, I’m still in One National Circuit, but as a result of the MOG I’m moving to the building next door, Attorney- General’s, run by Mr Moraitis. As far as staff and resources go, I have an entitlement to four staff. I have a principal adviser and an office manager, and I have an entitlement to a deputy principal adviser, but what I’ve chosen to do is to use counsel and solicitors assisting. This is a way of getting highly qualified people for a particular job at normal government procurement rates, and when they finish that task they go off and do other things—they’re not a permanent impost on the Commonwealth. It also gives the advantage, I may say, that we’re building up a cohort of informed people—and I’ve ensured that it’s a very diverse cohort—from whom future monitors might be chosen.

My total budget is a modest, if I may say so, $841,000 a year, which includes all salaries, travel and publishing costs. The whole of that amount is being transferred from PM&C to Attorney-Generals, and the department, no doubt, will continue the practice of not charging me for back office and the like. If that changes, I’ll let you know!

As Monitor I get work from five sources. Firstly, and very importantly, I can decide, on my own motion, to conduct a review in relation to any of the counterterrorism or national security laws referred to in my act—and my predecessors often did that. Secondly and thirdly, I can get a reference from the Prime Minister, and now the Attorney-General, on a matter relating to counterterrorism and national security, which is a wider concept. My current review concerning the trial and punishment of children for terrorism offences...
is such a prime ministerial reference. I can combine it with own motion matters which arise in the review. I’ll report on that review to the Prime Minister later in the year.

Fourthly, the PJCIS—and I see that Senator Molan, with whom I speak regularly, is here—may also refer to me a matter arising out of their activities, although they haven’t yet done so. And, finally, my statute itself can require a review, and currently requires reviews by 2021 in relation to sabotage, espionage, secrecy and high-risk terrorist offenders.

I have produced four reports already, including the important report on control orders and high-risk terrorist offenders. That’s important, because there are about 20 terrorist offenders who will become eligible for release next year, and applications can be made.

Can I say something about the threat. The rate of terrorism convictions is up, and the rate of charging is up. There have been 55 people convicted since 2002, including six children. But there are a further 40 people before the courts for terrorism matters, and those are not insignificant figures.

... Six children have been convicted. One was the subject of a hung jury, and is the subject of a retrial which will come on next year.

Can I say something briefly about my children’s report. Of course, I can answer any questions you wish when I come to that, but I will just make these points. Firstly, this was suggested by the Commonwealth DPP, Ms McNaughton. It was a very good suggestion, because it’s an enormously complex area of law and I have found some very surprising discrepancies in the children’s courts around the country. It’s a classic federalism question, in a way: to what extent do we have things applying uniformly when we’re talking about a national set of offences?

Can I just make a couple of other points. The risk of children committing terrorism offences has emerged as a significant issue since 2014, as measured by significant increases—sometimes from zero—in levels of intelligence interest; adverse security assessments and passport cancellations; police investigations and arrests; and charges and convictions. Secondly, some of the sentences have been very substantial. Some people have not survived the terrorist attacks. Had Farhad Mohammad, the 15-year-old boy who killed Curtis Cheng in Sydney, not been killed by the police in an exchange of gunfire, he would have undoubtedly been charged with a terrorist offence. His co-offender received a very substantial sentence, and no doubt he would have as well, albeit he was then 15. Some of the sentences imposed have been up to 13½ years on, say, a 14-year-old.

There are two other brief matters, on consultation. I consult with ministers and shadow ministers in this building as well as estimates and the PJCIS. I consult with key federal agencies. I regularly get briefings, classified and otherwise, from relevant agencies—ASIO, Home Affairs, the AFP, the ADF. There have never been difficulties with me getting anything I’ve asked for. I consult with state courts, ministers and officials. Indeed, this year I’ve consulted with over 100 people. I have excellent relations with my UK counterpart. You will recall that’s where the idea for the office came from. I’ve met with the recently retired reviewer and his predecessors on a number of occasions. This year, in July, I met with them and also members of the judiciary, MI5, Scotland Yard and the equivalent of the PJCIS and others. It’s invaluable for that sort of consultation.

Finally, as a result of a question from Senator McAllister at the last estimates hearing, I
can advise that the government has now responded to all outstanding recommendations made by me and Mr Gyles. The reference is question 28. My term finishes on 30 June 2020. Shortly after I complete my report to the Prime Minister and I have conducted my annual report, which is also due, I’ll start considering what further reports I might undertake in what will by then be the last 18 months of my part-time appointment. I welcome suggestions from everyone, including you, of course, senators, about future work topics. I’m happy to answer any questions.
APPENDIX IV – UK Operation of police powers under the **Terrorism Act 2000 (UK)**
Arrests as of June 2019

Key results

There were 266 arrests for terrorism-related activity in the year ending 30 June 2019, a decrease of 25% compared with the 354 arrests in the previous year.

Of the 266 arrests for terrorist-related activity:

- 104 (39%) persons were either released under bail pending further investigation, or released under investigation
- 86 (32%) resulted in a charge, of which 63 were for terrorism-related offences
- 60 people (23%) were released without charge
- 14 (5%) faced alternative action, for example receiving a caution, being recalled to prison or being transferred to immigration authorities
- 2 cases (1%) were pending an outcome.
Mr PYNE (Sturt—Minister for Defence and Leader of the House) (10:32): by leave—The joint facilities we operate with the United States, such as the Joint Defence Facility Pine Gap, as well as the Australian facilities that host US strategic capabilities, are some of the most tangible manifestations of the strength and depth of the Australia-United States alliance.

However, due to the classified nature of some of the most sensitive work performed at these facilities, it is necessary that relatively few people are briefed on those roles and functions.

It is therefore in the public interest that governments make periodic public statements on these facilities.

Today, I want to update the parliament and the Australian public on the deliberate policy principles that govern these facilities and the contributions they make not only to regional and global security but to our own security and national prosperity.

The public can have confidence that its government is acting lawfully and responsibly in overseeing such activities and that Australia’s continuing support for these activities is in our nation’s best interests.

The Australia-United States alliance — underpinning Australian security

The United States is our most important ally. Our military forces work side by side around the world to meet global security challenges and to promote peace and stability in the Indo-Pacific region.

No other global power has values and interests more closely aligned with Australia’s than the United States.

The presence of US military forces across the Indo-Pacific plays a vital role in ensuring regional security, and the strategic and economic weight of the US is essential to the continued effective functioning of the rules based global order.

Australia’s alliance with the US is enshrined in the ANZUS Treaty, signed on 1 September 1951.

With the support of successive Australian and US governments, the alliance has grown in depth and complexity over time, and it continues to deliver real benefits to both our countries.

The alliance gives us unparalleled access to the most advanced technology, equipment and intelligence, which is central to maintaining the potency of the Australian Defence Force.

Australia sources much of our most critical combat capability from the US.

Australia would be unable to develop the range of high-end capabilities we need without the alliance.
Crucially, the alliance also means that Australia benefits from the extended nuclear deterrence provided by the US.

During the Cold War, the US contributed to the security of its allies through its ability to respond with nuclear weapons if allies were attacked by the Soviet Union.

Today, global geopolitics have changed, but the core principles of extended nuclear deterrence have not.

Potential adversaries understand that an attack on Australia is an attack on the alliance. This brings me to an important point.

Australia is not only a beneficiary of the US policy of extended nuclear deterrence, it is an active supporter of it, through our joint efforts with the US at Pine Gap and at other facilities, such as the Naval Communication Station Harold E Holt, and the Joint Geological and Geophysical Research Station.

As the then Prime Minister, Bob Hawke, noted in his public statement on Pine Gap in 1984, Australia should not claim the protection of nuclear deterrence without being willing to make a contribution to its effectiveness.

Hosting these joint facilities and US strategic capabilities on our soil is Australia’s important contribution to the alliance, and I know it is supported in a bipartisan way by the Labor Party.

**The Joint Defence Facility Pine Gap — over fifty years of success**

The Joint Defence Facility Pine Gap has made—and continues to make—a critical contribution to the security of both Australia and the US.

It represents one of the finest examples of collaboration, innovation and integration, and has delivered remarkable intelligence dividends to both our nations.

As its name clearly states, Pine Gap is a ‘joint’ defence facility, run by the governments of both Australia and the US—as close and enduring partners.

Pine Gap’s workforce is split approximately 50:50, between Australians and Americans, with Australians holding key decision-making positions at the facility and having direct involvement in operations and tasking.

Since its establishment in 1967, Pine Gap has evolved from its original Cold War mission, focused on early warning for Soviet ballistic missiles, to meet new demands and new challenges.

It has acquired cutting-edge, innovative technologies to do so.

Pine Gap has become a central element of our intelligence cooperation with the US and it continues to have relevance in delivering intelligence on a range of contemporary security priorities, such as terrorism, the proliferation of weapons of mass destruction and monitoring foreign weapons development.

Pine Gap also supports compliance monitoring with international arms control and disarmament agreements.

By hosting this capability, Australia supports the verification of adherence to arms control agreements, in keeping with the government’s comprehensive policy approach to arms control and counter proliferation.

It has provided monitoring and early warning capabilities of ballistic missile launches
since 1999, following the closure of Joint Defence Facility Nurrungar.

Reliable, early and accurate warning of ballistic missile launches provides a crucial contribution to global stability, with Pine Gap helping to provide reassurance against the possibility of a surprise missile attack.

Much has been theorised about Pine Gap’s role, for instance its contribution to US operations against terrorism.

While the Australian government, as a matter of longstanding practice, does not comment on intelligence matters, Australians can be assured that the government has full oversight of activities undertaken at Pine Gap and that these activities are undertaken in accordance with Australian and international law.

The significant value of Australian facilities supporting United States capabilities

While Pine Gap may be the highest profile joint facility on Australian soil, it is not the only facility in Australia that is jointly operated with the US, or that hosts US defence activities and capabilities.

The Joint Geological and Geophysical Research Station is another joint facility that Australia operates with the US in Alice Springs.

This facility, run by Geoscience Australia and the US Air Force, was established in 1955 to monitor nuclear explosions during the Cold War.

Today, it performs a crucial role as part of the International Monitoring System of the Comprehensive Nuclear-Test-Ban Treaty, which prohibits ‘any nuclear weapon test explosion’ anywhere in the world. It is a little-known fact that this research station in Alice Springs detected and geolocated North Korea’s sixth nuclear test, on 3 September 2017.

Like Pine Gap, the Naval Communication Station Harold E Holt, in Exmouth, Western Australia, has also contributed to Australia’s national security for over half a century. This Australian facility, which was previously jointly operated with the US Navy until we assumed full control in the 1990s, provides communications for Australian and US submarines and ships. This includes communications for the submarine based nuclear deterrence capabilities of the US in the Indo-Pacific, which are crucial to credible deterrence, a stable nuclear balance and our own security.

Another important communications facility is the Australian Defence Satellite Communications Station in Geraldton, Western Australia, which hosts a ground station for US military satellite communications systems used by Australian and US forces on operations. This facility contributes to the safety of deployed Australian and US military personnel.

More than military and intelligence value

While much of the public debate seems to centre on the military applications of US capabilities in Australia or their contributions to intelligence matters, these capabilities also play a crucial role in our everyday lives. In 2017, a new space surveillance radar reached full operational capability at the Harold E Holt facility. This radar serves as a dedicated sensor node in the global Space Surveillance Network, in support of our combined space operations cooperation with the US, United Kingdom, Canada and New Zealand. It will be joined by a new space surveillance telescope, which is scheduled to reach full operational capability in 2022.
Together, this radar and telescope will identify and track objects in space, which will help satellite owners avoid collisions with space junk and other satellites. With so many aspects of Australian life and business reliant on satellites, if one were to be severely damaged or knocked out of orbit that could have disastrous impacts on Australian individuals and businesses.

As another example, the Learmonth Solar Observatory, also in Western Australia, monitors solar emissions, which helps to protect communications equipment from solar interference. This space weather facility is jointly operated by the Bureau of Meteorology and the US Air Force. Solar weather can affect transmission quality for services, such as mobile phone and internet networks as well as television and radio transmissions. Solar weather can also affect power grids, causing blackouts. Predicting solar weather is important because it allows organisations that own infrastructure, such as satellites, communication networks or power grids, to mitigate its impacts. This is particularly relevant as more people use wireless internet devices as part of their daily lives, whether that be for entertainment, education, social media or business.

Our work with the US has also allowed us to share critical information. As a result, the intelligence we produce together has saved lives. It has saved American and Australian lives, not only on the battlefield, but it has saved civilian lives as well.

**Protecting and enhancing our economic wellbeing**

As outlined in the 2016 Defence white paper, defending our maritime trade routes is part of Australia’s primary strategic defence priorities. These maritime highways are the backbone of our foreign trade coming in and out of Australia. It is crucial for Australian jobs and our economy that these routes remain open and secure, with unimpeded freedom of access.

Regional actions have the ability to adversely impact regional security and economic stability. Facilities such as Pine Gap help reduce this risk, in support of the rules based global order, by providing early warning of potentially hostile activities and developments that threaten to destabilise the region.

It is also important to recognise the real economic and social benefits these facilities have in regional Australia. Apart from the jobs generated directly by these facilities, workers contribute to local economies and form part of the social fabric of these communities.

**Full knowledge and concurrence —protecting Australia’s sovereignty**

While successive Australian governments have recognised the national security benefits that we gain from the joint facilities and by hosting US capabilities, they have also recognised that our national interests and sovereignty have to be honoured and protected. This has been achieved, as the shadow minister would know, by our policy of full knowledge and concurrence.

Full knowledge and concurrence is central to Australia hosting any foreign capability, be they from the US or any other country. It is an expression of Australia’s sovereignty and a fundamental right to know what activities foreign governments conduct on our soil.

It is an expression of Australia’s sovereignty and a fundamental right to know what activities foreign governments conduct on our soil.
‘Full knowledge’ equates to Australia having a full and detailed understanding of any capability or activity with a presence on Australian territory or making use of Australian assets.

‘Concurrence’ means that Australia approves the presence of a capability or function in Australia, in support of mutually-agreed goals.

It doesn’t mean that Australia approves each and every activity or tasking undertaken; rather, it means that Australia agrees to the purpose of activities conducted in Australia and also understands the outcomes of those activities.

But I can assure the parliament and the Australian public, we maintain appropriate levels of oversight for the activities undertaken.

Importantly, concurrence also means that Australia can withdraw agreement if the government considers that necessary.

At a practical level, full knowledge and concurrence means:

First, that Australia is to be consulted about any new purpose proposed for any activity, or a significant change to an existing purpose, and we will be advised of any significant change to expected outcomes.

Second, it means that Australia will be briefed and advised on outcomes actually achieved.

And finally, proposals for new equipment or significant upgrades to existing equipment, including communications links, will be advised in sufficient time to confirm that the changes align with mutually-agreed purposes, or to seek further clarification, if required.

There is much work undertaken to ensure that the objectives of these practical steps are met.

The Department of Defence regularly reviews the management and implementation of this policy to ensure—and be fully satisfied—that governance is effective and being appropriately and stringently adhered to.

Australians who hold senior positions at these joint facilities, as well as at Australian facilities that are used by foreign governments, are fully and deeply integrated into decision-making and implementation processes.

While the details of the policy and its implementation have evolved over time, to better reflect the changes in our national security environment and to keep pace with technological progress, the fundamental principles of full knowledge and concurrence have not changed, and we are never complacent about its application.

**Conclusion**

It’s in both nations’ interests to have a secure and stable region, and the joint facilities and capabilities all play their role in ensuring regional security and stability is achieved. But the alliance and regional stability cannot be taken for granted.

This government remains committed to growing and deepening all aspects of the relationship and working with the US to advance our mutual defence and security interests.

Our defence and intelligence cooperation will continue to evolve to meet ever-changing threats and challenges. As it must.
The spirit of innovation shared by our nations will continue to support the Australia-US alliance and continue to be our strength, as the alliance evolves now and into the future.

As we adapt to meet new challenges to the rules based global order, our defence and intelligence cooperation and joint facilities will endure as our ever-vigilant eyes and ears in the world.

I thank the House. I present a copy of my statement.

Mr MARLES (Corio) (10:48): As the minister has said, the nature of the functions performed at Pine Gap are such that they need to be done within the context of a great deal of security and confidentiality, and therefore the making of a statement by the minister about the operations of Pine Gap and the other joint facilities to this parliament and, through it, to the Australian people is a very important statement to make indeed, and we thank the minister for making it. It is a statement that has been made as a step in a series of statements that ministers over the years have made in relation to the joint facilities since they came into operation.

On this occasion, perhaps the most important point I can make in response is that, happily, Labor supports every word the minister has said today. We won’t try to be in that habit too much, but we can say that today! But, in all seriousness, in a sense, there is a habit of doing that in relation to national security, defence and foreign affairs, where there is a great deal in common between the major parties. The significance of the United States alliance to Australia’s world view, the joint facilities that are operated consistent with that alliance—Pine Gap being the most significant of them—and the policy of operating those facilities with full knowledge and concurrence have absolutely been bipartisan policy between the major parties since the joint facilities came into operation, and they are very much bipartisan policy of the major parties today.

At the heart of what underpins the joint facilities is our alliance with the United States. As the minister said, that formally began with the signing of the ANZUS Treaty back on 1 September 1951. But the relationship between Australia and the United States goes back much further than that. Last year, on 4 July, we celebrated what we coined ‘the century of mateship’: 100 years since the Battle of Hamel in the First World War, in which American and Australian troops fought together and General Sir John Monash, in that battle, commanded American troops for the first time. Since then, from the Western Front in France to Papua New Guinea, Korea, Vietnam, Somalia, Iraq and Afghanistan—indeed, every conflict in which America has participated since then—Australia has been there side-by-side with the United States, and it has forged a very significant relationship which is at the heart of our foreign and strategic policy.

The relationship has its foundation in shared values. They are values that, domestically, are about democracy and the rule of law but, importantly, have sought to establish a global, rules based order. Those things that emerged out of the Second World War and the Bretton Woods institutions—things like the United Nations Convention on the Law of the Sea—are all critical international norms which both Australia and the United States fundamentally believe in and try to make sure are asserted globally so that the world operates not on the basis of force but on the basis of reason.

We have a unique military relationship with the United States where we operate hand in hand with them not just in times of war but in times of peace and through exercises. Exercise Talisman Sabre, which occurs biennially and is occurring this year, is a significant exercise that the Australian Defence Force engages in—really the most significant
exercise that the Australian Defence Force engages in—and is done hand in hand with the United States Armed Forces. We are embedded in a range of positions within the United States military. For example, the deputy commander of the United States Army in the Pacific is institutionally an Australian. Right now it is a position occupied by Major General Roger Noble. It’s a position that has been occupied previously by the current Chief of Army, Lieutenant General Rick Burr. We need only to look at the marine rotation in Darwin to again see an example of the extent of cooperation between the United States and Australia. It’s in that context that the joint facilities operate.

Australia and the United States established joint facilities at Pine Gap in the Northern Territory, Nurrungar in Woomera and North West Cape in Western Australia back in the 1960s. Nurrungar was commissioned in 1969 and then decommissioned 30 years later, in 1999. Pine Gap, which is the most prominent of the joint facilities, was commissioned back in 1967. It was in 1976 that we can perhaps first see it as a joint defence facility where the full policy of full knowledge and concurrence began to operate. As the minister articulated, that is full knowledge on the part of Australia as to what the function of Pine Gap is and what it does, and full concurrence in the authorisation of those functions. In other words, what it does, it does with the permission of Australia and the United States together.

In 1984, as the minister alluded to, the then Prime Minister, Bob Hawke, in one of the first statements to the parliament about the operations of Pine Gap, pointed to its significance in maintaining a strategic balance between the then superpowers during the Cold War. But, as the minister pointed out, he also explained Australia’s national interest in the operations of Pine Gap. He made the point that Australia enjoyed the protection of America’s extended nuclear deterrence and that in enjoying that protection it was important that Australia played its part, and Pine Gap was a perfect example of that.

In 1988, when Prime Minister Bob Hawke again made a statement to this parliament about Pine Gap, he reiterated the extent to which Pine Gap not only served the United States’ national interest but served Australia’s. In 2007, the then Minister for Defence, Dr Brendan Nelson, again reinforced the contribution that was being made by Pine Gap to Australia’s national interest and to the policy of full knowledge and concurrence. This, again, was affirmed by the then Minister for Defence, Stephen Smith, back in 2013. And it’s in that line of statements that the minister has added his own today.

As the minister outlined, Pine Gap is involved in the collection of intelligence data on a range of security priorities, including terrorism and the proliferation of weapons of mass destruction, along with monitoring foreign weapons developments. It also provides ballistic missile early-warning information.

In my role, I have been fortunate enough to visit Pine Gap, which I did last year, and to see firsthand what a remarkable institution it is. It’s an institution which employs hundreds of people. The notion of it being joint can be felt the moment that you walk inside that place. There is a sense in which, actually, nationality between Australia and the United States seems to dissolve; it is just a group of people working on an endeavour. It’s really clear—embodied, in fact, by the deputy manager of the operation, who is an Australian—that Australians occupy senior positions throughout the facility. Australians manage Americans and Americans manage Australians. Indeed, national identity inside that building doesn’t seem to matter. It is a place where there is a unified aim in terms
of the objective between both Australia and the United States. It is actually a wonderful thing to see. It is, obviously, a place where you see science at the cutting edge. This is a deeply high-tech facility which, in turn, in that sense, provides Australia with an enormous capability dividend.

I had dinner when I was there with our American host. It was clear in talking with our American host and those in Alice Springs that the American community who work at Pine Gap have been received by that town really well. And, indeed, the Americans seem to get into the spirit of life in the Centre and enjoy the time that they spend in Alice Springs.

As I said, obviously, there is a lot that we cannot say about what happens at Pine Gap. But it is clear that the sensitive nature of what goes on there and the high degree of cooperation which occurs between Australia and the United States in the performance of those functions almost define Pine Gap as being the centre of trust as it is expressed in our alliance with the United States. Pine Gap is one of the joint facilities. It is the most significant, but there are others, as the minister has noted. The Joint Geological and Geophysical Research Station, which was established in 1955 and which also operates in Alice Springs, is jointly run by the US Air Force and Geoscience Australia. As the minister indicated, it was originally established to monitor nuclear explosions during the Cold War, but it does now play a critical role in monitoring the international system in respect of the Comprehensive Nuclear-Test-Ban Treaty. The minister referred to the fact that it was there that the sixth North Korean detonation was first picked up.

The Naval Communication Station Harold E Holt, on the North West Cape of Western Australia, is also a joint facility. It was originally commissioned as a United States base back in 1967. It became a joint facility in 1974 under the Whitlam government and, indeed, an Australian facility in 1993 under the Hawke government. In July 2008, the then defence minister, Minister Fitzgibbon, and the then US defence secretary, Robert Gates, signed a treaty between Australia and the United States which provided for the United States to have access to the Australian facility over the next 25 years. It provides communications for both Australian and US submarines and ships. A new space surveillance radar operating from this facility has reached full operational capability as of 2017 and serves as a dedicated sensor node. There are other joint facilities that the minister has mentioned—the Learmonth Solar Observatory and the Australian Defence Satellite Communications Station in Geraldton—which also play important roles and are operated jointly by agencies in the United States and Australia.

As I said, the joint facilities go to the heart of defining the trust that exists between Australia and the United States in the context of our alliance. That we are prepared to operate at the very core of our national interests just demonstrates exactly how close our relationship is. Kim Beazley, writing on the 50th anniversary of Pine Gap, referred to a phrase used by the late Des Ball, who said, in respect of the joint facilities, that they represent ‘the strategic essence of the alliance’, which is between Australia and America. That statement is absolutely true now. These are really important facilities in the context of the alliance. They’re very important facilities in the context of Australia’s national interests. They are run with full knowledge and concurrence, and they are run and supported on that basis in a completely bipartisan way between the major parties in this country.
APPENDIX VI – COUNSEL AND SOLICITORS ASSISTING THE 3RD INSLM

Counsel Assisting the INSLM
Dr Dominic Katter
Ms Anna Mitchelmore (now of Senior Counsel)
Ms Sophie Callan
Mr Christopher Tran
Ms Jennifer Single (now of Senior Counsel)
Mr Gim Del Villar
Mr Brodie Buckland

Solicitors Assisting from the Office of the Australian Government Solicitor:
Mr Anthony Hall
Mr Alex Kunzelmann
Mr David Rowe
Mr Tom Colwell