



# **Independent National Security Legislation Monitor Act 2010**

**No. 32, 2010**

**An Act to provide for the appointment of an  
Independent National Security Legislation Monitor,  
and for related purposes**

Note: An electronic version of this Act is available in ComLaw (<http://www.comlaw.gov.au/>)



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# **Independent National Security Legislation Monitor Act 2010**

**No. 32, 2010**

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**An Act to provide for the appointment of an  
Independent National Security Legislation Monitor,  
and for related purposes**

*[Assented to 13 April 2010]*

The Parliament of Australia enacts:

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*Independent National Security Legislation Monitor Act 2010 No. 32, 2010 1*

## Part 1—Preliminary

### 1 Short title

This Act may be cited as the *Independent National Security Legislation Monitor Act 2010*.

### 2 Commencement

This Act commences on the day after it receives the Royal Assent.

### 3 Object

The object of this Act is to appoint an Independent National Security Legislation Monitor who will assist Ministers in ensuring that Australia's counter-terrorism and national security legislation:

- (a) is effective in deterring and preventing terrorism and terrorism-related activity which threatens Australia's security; and
- (b) is effective in responding to terrorism and terrorism-related activity; and
- (c) is consistent with Australia's international obligations, including:
  - (i) human rights obligations; and
  - (ii) counter-terrorism obligations; and
  - (iii) international security obligations; and
- (d) contains appropriate safeguards for protecting the rights of individuals.

### 4 Definitions

In this Act:

***Committee on Intelligence and Security*** means the Parliamentary Joint Committee on Intelligence and Security established under the *Intelligence Services Act 2001*.

***counter-terrorism and national security legislation*** means the following provisions of Commonwealth law:

- (a) Division 3 of Part III of the *Australian Security Intelligence Organisation Act 1979* and any other provision of that Act as far as it relates to that Division;
- (b) Part 4 of the *Charter of the United Nations Act 1945* and any other provision of that Act as far as it relates to that Part;
- (c) the following provisions of the *Crimes Act 1914*:
  - (i) Division 3A of Part IAA and any other provision of that Act as far as it relates to that Division;
  - (ii) sections 15AA and 19AG and any other provision of that Act as far as it relates to those sections;
  - (iii) 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;
- (d) Chapter 5 of the *Criminal Code* and any other provision of that Act as far as it relates to that Chapter;
- (e) Part IIIAAA of the *Defence Act 1903* and any other provision of that Act as far as it relates to that Part;
- (f) the *National Security Information (Criminal and Civil Proceedings) Act 2004*.

**head** means:

- (a) in relation to the Australian Federal Police—the Commissioner of Police; or
- (b) in relation to the Australian Crime Commission—the Chief Executive Officer of the Australian Crime Commission; or
- (c) in relation to Customs—the Chief Executive Officer of Customs; or
- (d) in relation to the Australian Security Intelligence Organisation—the Director-General of Security; or
- (e) in relation to the Australian Secret Intelligence Service—the Director-General of the Australian Secret Intelligence Service; or
- (f) in relation to the part of the Department of Defence known as the Defence Imagery and Geospatial Organisation—the Director of that part of the Department; or

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- (g) in relation to the part of the Department of Defence known as the Defence Intelligence Organisation—the Director of that part of the Department; or
- (h) in relation to the part of the Department of Defence known as the Defence Signals Directorate—the Director of that part of the Department; or
- (i) in relation to any other part of the Department of Defence—the Chief of the Defence Force and the Secretary of the Department; or
- (j) in relation to the Office of National Assessments established by the *Office of National Assessments Act 1977*—the Director-General of the Office of National Assessments; or
- (k) in relation to any other Commonwealth government agency:
  - (i) in the case of a Department of the Commonwealth—the Secretary of the Department; or
  - (ii) in the case of a body established for a public purpose—the person holding, or performing the duties of, the principal office in respect of the body; or
- (l) in relation to a State or Territory government agency—the person holding, or performing the duties of, the principal office in respect of the agency.

***Independent National Security Legislation Monitor*** means the person appointed in accordance with section 11.

***law enforcement or security agency*** means any of the following agencies:

- (a) the Australian Federal Police;
- (b) the Australian Crime Commission;
- (c) Customs;
- (d) the Australian Security Intelligence Organisation;
- (e) the Australian Secret Intelligence Service;
- (f) the Australian Defence Force;
- (g) the part of the Department of Defence known as the Defence Imagery and Geospatial Organisation;
- (h) the part of the Department of Defence known as the Defence Intelligence Organisation;



- (i) the part of the Department of Defence known as the Defence Signals Directorate;
- (j) the Office of National Assessments established by the *Office of National Assessments Act 1977*;
- (k) the police force of a State or Territory;
- (l) any other agency prescribed by the regulations for the purposes of this definition.

***operationally sensitive information*** means:

- (a) information about information sources or operational activities or methods available to a law enforcement or security agency; or
- (b) information about particular operations that have been, are being or are proposed to be undertaken by a law enforcement or security agency, or about proceedings relating to those operations; or
- (c) information provided by a foreign government, or by an agency of a foreign government, where that government does not consent to the public disclosure of the information.

***responsible Minister***, in relation to a review of a matter, means the Minister (including a State or Territory Minister) responsible for the agency concerned in relation to the matter.

***secrecy provision*** means:

- (a) a provision of a law of the Commonwealth, of a State or of a Territory, being a provision that purports to prohibit; or
  - (b) anything done, under a provision of a law of the Commonwealth, of a State or of a Territory, to prohibit;
- the communication, divulging or publication of information, the production of, or the publication of the contents of, a document, or the production of a thing.

**Part 2** Independent National Security Legislation Monitor

**Division 1** Establishment, functions and powers of Independent National Security Legislation Monitor

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**Part 2—Independent National Security Legislation Monitor**

**Division 1—Establishment, functions and powers of Independent National Security Legislation Monitor**

**5 Independent National Security Legislation Monitor**

There is to be an Independent National Security Legislation Monitor.

**6 Functions of the Independent National Security Legislation Monitor**

- (1) The Independent National Security Legislation Monitor has the following functions:
  - (a) to review, on his or her own initiative, the operation, effectiveness and implications of:
    - (i) Australia's counter-terrorism and national security legislation; and
    - (ii) any other law of the Commonwealth to the extent that it relates to Australia's counter-terrorism and national security legislation;
  - (b) to consider, on his or her own initiative, whether any legislation mentioned in paragraph (a):
    - (i) contains appropriate safeguards for protecting the rights of individuals; and
    - (ii) remains proportionate to any threat of terrorism or threat to national security, or both; and
    - (iii) remains necessary;
  - (c) if a matter relating to counter-terrorism or national security is referred to the Monitor by the Prime Minister—to report on the reference;

- (d) to assess whether Australia's counter-terrorism or national security legislation is being used for matters unrelated to terrorism and national security.
- (1A) If a matter is referred to the Independent National Security Legislation Monitor by the Committee on Intelligence and Security, the Monitor may perform the function set out in paragraph (1)(a) or (b) in relation to the matter.
- (2) To avoid doubt, the following are not functions of the Independent National Security Legislation Monitor:
- (a) to review the priorities of, and use of resources by, agencies that have functions relating to, or are involved in the implementation of, Australia's counter-terrorism and national security legislation;
  - (b) to consider any individual complaints about the activities of Commonwealth agencies that have functions relating to, or are involved in the implementation of, Australia's counter-terrorism and national security legislation.
- (3) The Independent National Security Legislation Monitor has the power to do all things necessary or convenient to be done for or in connection with the performance of the Monitor's functions.

## **7 References to the Independent National Security Legislation Monitor by the Prime Minister**

- (1) The Prime Minister may refer a matter relating to counter-terrorism or national security to the Independent National Security Legislation Monitor, either at the Monitor's suggestion or on his or her own initiative.
- (2) The Prime Minister may alter the terms of a reference.
- (3) The Prime Minister may give the Independent National Security Legislation Monitor directions about the order in which he or she is to deal with references.

**Part 2** Independent National Security Legislation Monitor

**Division 1** Establishment, functions and powers of Independent National Security Legislation Monitor

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**7A References to the Independent National Security Legislation Monitor by the Committee on Intelligence and Security**

- (1) The Committee on Intelligence and Security may refer to the Independent National Security Legislation Monitor a matter that the Committee:
  - (a) becomes aware of in the course of performing its functions under subsection 29(1) of the *Intelligence Services Act 2001*; and
  - (b) considers should be referred to the Monitor.
- (2) It is a function of the Committee on Intelligence and Security to refer the matter to the Independent National Security Legislation Monitor.

**8 Regard to be had to international obligations and constitutional arrangements**

When performing the Independent National Security Legislation Monitor's functions, the Monitor must have regard to:

- (a) Australia's obligations under international agreements (as in force from time to time), including:
  - (i) human rights obligations; and
  - (ii) counter-terrorism obligations; and
  - (iii) international security obligations; and
- (b) arrangements agreed from time to time between the Commonwealth, the States and the Territories to ensure a national approach to countering terrorism.

**9 Emphasis to be given to counter-terrorism and national security legislation that has been applied or considered recently**

When performing functions relating to Australia's counter-terrorism and national security legislation in a particular financial year, the Independent National Security Legislation Monitor must give particular emphasis to provisions of that legislation that have been applied, considered or purportedly applied by employees of agencies that have functions relating to, or

are involved in the implementation of, that legislation during that financial year or the immediately preceding financial year.

### **10 Consultation with agencies etc.**

- (1) When performing functions relating to Australia's counter-terrorism and national security legislation, the Independent National Security Legislation Monitor must have regard to:
  - (a) the functions of agencies that have functions relating to, or are involved in the implementation of, that legislation; and
  - (b) 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.
  
- (2) When performing functions relating to Australia's counter-terrorism and national security legislation, the Independent National Security Legislation Monitor may consult with:
  - (b) the Ombudsman; or
  - (c) the Inspector-General of Intelligence and Security; or
  - (ca) the Human Rights Commissioner; or
  - (cb) the Privacy Commissioner; or
  - (cc) the head of an agency established by a law of the Commonwealth or of a State or Territory; or
  - (d) a person mentioned in paragraph (1)(b);as the Monitor considers necessary.

## **Division 2—Appointment of Independent National Security Legislation Monitor**

### **11 Appointment**

- (1) The Independent National Security Legislation Monitor is to be appointed by the Governor-General by written instrument, on a part-time basis.
- (2) Before a recommendation is made to the Governor-General for the appointment of a person as the Independent National Security Legislation Monitor, the Prime Minister must consult with the Leader of the Opposition in the House of Representatives.
- (3) A person must not be appointed as the Independent National Security Legislation Monitor unless the person is, in the Governor-General's opinion, suitable for appointment because of the person's qualifications, training or experience.
- (4) A person's appointment as the Independent National Security Legislation Monitor is not invalid because of a defect or irregularity in connection with the person's appointment.

### **12 Term of appointment**

- (1) The Independent National Security Legislation Monitor holds office for the period specified in the instrument of appointment. The period must not exceed 3 years.
- (2) The Independent National Security Legislation Monitor is eligible for reappointment once only.

### **13 Remuneration and allowances**

- (1) The Independent National Security Legislation Monitor is to be paid such remuneration as is determined by the Remuneration Tribunal. If no determination of that remuneration is in operation, the Monitor is to be paid such remuneration as is prescribed by the regulations.

- (2) The Independent National Security Legislation Monitor is to be paid the allowances that are prescribed by the regulations.
- (3) This section has effect subject to the *Remuneration Tribunal Act 1973*.

#### **14 Leave of absence**

The Prime Minister may grant leave of absence to the Independent National Security Legislation Monitor on the terms and conditions that the Governor-General determines in writing.

#### **15 Outside employment**

The Independent National Security Legislation Monitor must not engage in any paid employment that conflicts or may conflict with the proper performance of his or her duties without the Prime Minister's written consent.

#### **16 Disclosure of interests to the Prime Minister**

The Independent National Security Legislation Monitor must give written notice to the Prime Minister of all interests, pecuniary or otherwise, that the Monitor has or acquires and that conflict or could conflict with the proper performance of his or her functions.

#### **17 Other terms and conditions**

The Independent National Security Legislation Monitor holds office on such terms and conditions (if any) in relation to matters not provided for by this Act as are determined, in writing, by the Governor-General.

#### **18 Resignation**

- (1) The Independent National Security Legislation Monitor may resign by giving to the Governor-General a signed notice of resignation.
- (2) The resignation takes effect on the day on which it is received by the Governor-General or, if a later day is specified in the resignation, on that later day.

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**19 Termination of appointment**

- (1) The Governor-General may terminate the appointment of the Independent National Security Legislation Monitor for misbehaviour or physical or mental incapacity.
- (2) The Governor-General must terminate the appointment of the Independent National Security Legislation Monitor:
  - (a) if the Monitor:
    - (i) becomes bankrupt; or
    - (ii) applies to take the benefit of any law for the relief of bankrupt or insolvent debtors; or
    - (iii) compounds with his or her creditors; or
    - (iv) makes an assignment of his or her remuneration for the benefit of his or her creditors; or
  - (b) if the Monitor fails, without reasonable excuse, to comply with section 16; or
  - (c) if the Monitor engages, except with the Prime Minister's written consent, in paid employment that conflicts or may conflict with the proper performance of the Monitor's duties; or
  - (d) if the Monitor is absent, except on leave of absence granted under section 14, for 7 consecutive days or for 14 days in any 12 months.

**20 Acting Independent National Security Legislation Monitor**

- (1) The Prime Minister may appoint a person to act as the Independent National Security Legislation Monitor:
  - (a) during a vacancy in the office of the Monitor (whether or not an appointment has previously been made to the office); or
  - (b) during a period, or during all periods, when the Monitor:
    - (i) is absent from duty or from Australia; or
    - (ii) is, for any reason, unable to perform the duties of the office;so long as the period, or the total of all periods, is not more than 12 months.



Note: A person may not act for more than 12 months: see paragraphs 33A(1)(ba) and (c) of the *Acts Interpretation Act 1901*.

- (2) Anything done by or in relation to a person purporting to act under an appointment is not invalid merely because:
- (a) the occasion for the appointment had not arisen; or
  - (b) there is a defect or irregularity in connection with the appointment; or
  - (c) the appointment had ceased to have effect; or
  - (d) the occasion to act had not arisen or had ceased.

Note: See sections 20 and 33A of the *Acts Interpretation Act 1901*.

## **Part 3—Information gathering powers**

### **21 Independent National Security Legislation Monitor may hold hearings**

- (1) The Independent National Security Legislation Monitor may hold a hearing for the purposes of performing his or her functions under this Act.
- (2) A hearing, or a part of a hearing:
  - (a) may be held in private if the Independent National Security Legislation Monitor so directs; and
  - (b) must be held in private for any time during which a person is giving evidence that discloses operationally sensitive information.Otherwise, a hearing must be held in public.
- (3) A hearing may otherwise be conducted in such a manner as the Independent National Security Legislation Monitor thinks fit.
- (4) The Independent National Security Legislation Monitor must ensure that a record of a hearing is made.
- (5) A direction given under paragraph (2)(a) is not a legislative instrument.

### **22 Independent National Security Legislation Monitor may summon person**

- (1) The Independent National Security Legislation Monitor may, by notice in writing, summon a person to attend a hearing at a time and place specified in the notice:
  - (a) to give evidence; or
  - (b) to produce documents or things specified in the notice.Note: Failure to comply with a notice is an offence: see section 25.
- (2) The notice must:

- (a) be in writing and be signed by the Independent National Security Legislation Monitor; and
  - (b) be served on the person required to attend a hearing.
- (3) A time specified in a notice must be at least 14 days after the day on which the notice is given.
- (4) A person summoned to appear as a witness at a hearing is entitled to be paid by the Commonwealth any allowances for travelling and other expenses that are prescribed by the regulations.

### **23 Evidence on oath or by affirmation**

- (1) At a hearing, the Independent National Security Legislation Monitor may:
- (a) require a witness to either take an oath or make an affirmation; and
  - (b) administer an oath or affirmation to the witness.

Note 1: Failure to take an oath or make an affirmation is an offence: see section 25.

Note 2: This means that a hearing is a judicial proceeding for the purposes of Part III of the *Crimes Act 1914*, which creates various offences in relation to judicial proceedings.

- (2) The oath or affirmation is an oath or affirmation that the evidence the person will give will be true.
- (3) The Independent National Security Legislation Monitor may allow a person attending a hearing who has been sworn, or who has made an affirmation, to give evidence by tendering a written statement and verifying it by oath or affirmation.

### **24 Independent National Security Legislation Monitor may request production of a document or thing**

- (1) For the purposes of performing his or her functions under this Act, the Independent National Security Legislation Monitor may request, by written notice, a person:
- (a) to give the Monitor the information referred to in the notice;
- or

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- (b) to produce to the Monitor the documents or things referred to in the notice.

Note: Failure to give the information, or produce the documents or things, is an offence: see section 25.

- (2) The notice must:
  - (a) be in writing; and
  - (b) specify the period within which the person must comply with the notice.
- (3) The period specified in a notice must end at least 14 days after the day on which the notice is given.

## 25 Offences

### *Failure to attend hearing*

- (1) A person commits an offence if:
  - (a) the person is served with a notice to attend a hearing; and
  - (b) the person fails to attend as required by the notice.

Penalty: Imprisonment for 6 months or 30 penalty units, or both.

### *Failure to swear an oath, make an affirmation or answer a question*

- (2) A person commits an offence if:
  - (a) the person is served with a notice to attend a hearing; and
  - (b) either:
    - (i) the person fails to be sworn or to make an affirmation at the hearing; or
    - (ii) the person fails to answer a question at the hearing that the Independent National Security Legislation Monitor requires the person to answer.

Penalty: Imprisonment for 6 months or 30 penalty units, or both.

### *Failure to produce a document or thing*

- (3) A person commits an offence if:
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- (a) the person receives a notice to produce a document or thing specified in the notice; and
- (b) the person fails to produce the document or thing that the person was required to produce.

Penalty: Imprisonment for 6 months or 30 penalty units, or both.

*Failure to provide information*

- (4) A person commits an offence if:
  - (a) the person receives a notice to provide information specified in the notice; and
  - (b) the person fails to provide the information that the person was required to provide.

Penalty: Imprisonment for 6 months or 30 penalty units, or both.

*Exception—reasonable excuse*

- (5) This section does not apply if the person has a reasonable excuse.

Note: A defendant bears an evidential burden in relation to the matter in subsection (5) (see subsection 13.3(3) of the *Criminal Code*).

- (6) It is a reasonable excuse for a person to fail to:
  - (a) answer a question; or
  - (b) produce a document or thing; or
  - (c) provide information;

on the ground that to do so might tend to incriminate the person or expose the person to a penalty.

## **26 No criminal or civil liability under secrecy provisions**

A person who is served with a notice under section 22 or 24 does not commit an offence, and is not liable to any penalty, under a secrecy provision because the person:

- (a) answers a question at a hearing that the Independent National Security Legislation Monitor requires the person to answer; or
- (b) provides information that the person is required to provide in accordance with the notice; or

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- (c) produces a document or thing that the person is required to produce in accordance with the notice.

**27 Independent National Security Legislation Monitor may retain documents or things**

- (1) Subject to section 28, if a document or thing is produced to the Independent National Security Legislation Monitor in accordance with section 22 or 24, the Monitor:
  - (a) may take possession of, and make copies of, the document or thing, or take extracts from the document; and
  - (b) may retain possession of the document or thing for such period as is necessary for the performance of the Monitor's functions under this Act.
- (2) While the Independent National Security Legislation Monitor retains the document or thing, the Monitor must allow a person who would otherwise be entitled to possession of the document or thing, or a person authorised by that person:
  - (a) reasonable access to the document for the purposes of inspecting and making copies of, or taking extracts from, it; and
  - (b) reasonable access to the thing.

**28 Protection of information and documents**

- (1) This section applies if documents having a national security classification or containing operationally sensitive information are provided by an agency to the Independent National Security Legislation Monitor.
- (2) The Independent National Security Legislation Monitor must:
  - (a) make arrangements with the head of the agency for the protection of those documents while they remain in the Monitor's possession; and
  - (b) ensure that the documents are returned to the agency as soon as possible after the Monitor has examined them.

## Part 4—Reporting requirements

### 29 Annual report

- (1) The Independent National Security Legislation Monitor must prepare and give to the Prime Minister a report (an *annual report*):
  - (a) relating to the performance of the Monitor's functions as set out in paragraphs 6(1)(a) and (b); and
  - (b) containing such details relating to the performance of the Monitor's function as set out in paragraph 6(1)(c) as the Monitor considers appropriate.
- (2) The annual report must be given to the Prime Minister as soon as practicable after 30 June in each financial year and, in any event, by the following 31 December.
- (2A) If the Independent National Security Legislation Monitor considers that the annual report contains information of the kind referred to in subsection (3), the Monitor must also prepare and give to the Prime Minister, at the same time as the annual report, a version of the report which does not contain that information (a *declassified annual report*).
- (3) The information specified by this subsection is information of the following kind:
  - (a) any operationally sensitive information; or
  - (b) any information that would or might prejudice:
    - (i) Australia's national security or the conduct of Australia's foreign relations; or
    - (ii) the performance by a law enforcement or security agency of its functions; or
  - (c) any information that, if included in the report, would or might endanger a person's safety; or
  - (d) any information obtained from a document prepared for the purposes of a meeting of:

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- (i) the Cabinet, or of a Committee of the Cabinet, of the Commonwealth or of a State; or
    - (ii) the Australian Capital Territory Executive or of a committee of that Executive; or
    - (iii) the Executive Council of the Northern Territory or of a committee of that Executive Council; or
  - (e) any information that would disclose the deliberations or decisions of:
    - (i) the Cabinet, or of a Committee of the Cabinet, of the Commonwealth or of a State; or
    - (ii) the Australian Capital Territory Executive or of a committee of that Executive; or
    - (iii) the Executive Council of the Northern Territory or of a committee of that Executive Council.
- (4) In determining whether an annual report contains information of the kind referred to in subsection (3), the Independent National Security Legislation Monitor may consult the responsible Minister or responsible Ministers concerned.
- (5) The Prime Minister must cause a copy of:
- (a) each annual report; or
  - (b) if an annual report contains information of the kind referred to in subsection (3)—the corresponding declassified annual report;
- to be presented to each House of the Parliament within 15 sitting days of that House after the day on which he or she receives the report.
- (8) Section 34C of the *Acts Interpretation Act 1901* does not apply in relation to a report given to the Prime Minister under this section.

**30 Report on a reference by the Prime Minister**

- (1) The Independent National Security Legislation Monitor must report to the Prime Minister on a reference made under section 7.
- (2) The Independent National Security Legislation Monitor may, before giving his or her report on a reference, give an interim



report to the Prime Minister on the Monitor's work on the reference.

- (3) The Prime Minister may, before the Independent National Security Legislation Monitor gives his or her report on a reference, direct the Monitor to give an interim report to the Prime Minister on the Monitor's work on the reference.
- (4) If the Independent National Security Legislation Monitor considers that a report to the Prime Minister under subsection (1) or (3) contains information of the kind referred to in subsection 29(3), the Monitor must also prepare and give to the Prime Minister, at the same time as the report, a version of the report which does not contain that information (a *declassified report*).
- (5) In determining whether a report contains information of the kind referred to in subsection 29(3), the Independent National Security Legislation Monitor may consult the responsible Minister or responsible Ministers concerned.
- (6) The Prime Minister must cause a copy of:
  - (a) each report under subsections (1) and (3); or
  - (b) if a report contains information of the kind referred to in subsection 29(3)—the corresponding declassified report;to be presented to each House of the Parliament within 15 sitting days of that House after the day on which he or she receives the report.

## Part 5—Miscellaneous

### 31 Immunity from legal action

No action, suit or proceeding may be brought against a person who is, or has been, the Independent National Security Legislation Monitor in relation to anything done, or omitted to be done, in good faith by the Monitor:

- (a) in the performance, or purported performance, of his or her functions; or
- (b) in the exercise, or purported exercise, or his or her powers.

### 32 Regulations

The Governor-General may make regulations prescribing matters:

- (a) required or permitted by this Act to be prescribed; or
- (b) necessary or convenient to be prescribed for carrying out or giving effect to this Act.

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*[Minister's second reading speech made in—  
Senate on 25 June 2009  
House of Representatives on 17 March 2010]*

(67/09)

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