

**SUPPLEMENTARY SUBMISSION OF THE CIVIL LIBERTIES COUNCILS ACROSS AUSTRALIA TO THE
PARLIAMENTARY JOINT COMMITTEE ON INTELLIGENCE AND SECURITY INQUIRY INTO THE
NATIONAL SECURITY LEGISLATION AMENDMENT BILL (NO 1) 2014**

These supplementary comments from the combined civil liberties councils across Australia¹ are made in response to a request from The Parliamentary Joint Committee on Intelligence and Security (PJCIS) to Dr Lynch and Mr William Rowlings at the public hearing on the 18th August 2014.

In our submission of 7th August 2014 on the National Security Legislation Amendment Bill (No 1) 2014 (The Bill), we indicated we had concerns about the proposed new cooperative arrangements between ASIO and ASIS but had not been able to provide detailed comment in the short time frame. We now offer comments on two issues.

**1. NEW GROUNDS FOR MINISTERIAL AUTHORISATION INTELLIGENCE SERVICES ACT
AGENCIES**

The Bill proposes to add a new ground for Ministerial authorisation for an IS Act agency to produce intelligence on an Australian person whose activities *'pose a risk, or are likely to pose risk, to the operational security of ASIS'*.

It is proposed to define 'operational security of ASIS' as: *'the protection of the integrity of operations undertaken by ASIS from:*

- a) Interference by a foreign person or entity; or*
- b) Reliance on inaccurate or false information²*

Currently the Act has grounds for Ministerial authorisation including: *'activities that are, or are likely to be, a threat to security'*;³

The CCLs concern with this proposal arises from the lack of persuasive justification that the extension of grounds is necessary. The generic 'threat to security' would seem to encompass the operational security of ASIS.

¹ New South Wales Council for Civil Liberties, Liberty Victoria, Queensland Council for Civil Liberties, South Australia Council for Civil Liberties, Australian Council for Civil Liberties, Civil Liberties Australia)

² Proposed Section 3

³ Section 6 subparagraph 9(1A)(a)(iii)

This was an issue in the 2012 Inquiry, but we still do not have a clear argument or tangible example of actions that would not be covered by the 'threat to security' ground. We also note that the wording of the proposed ground is different from that recommended by the PJCS:

'that a person is, or is likely to be, involved in intelligence or counter-intelligence activities in circumstances where such an investigation would not currently be within the operational authority of the agency' (R 38)⁴

It would seem from this definition that the PJCS was possibly having difficulty identifying a tangible activity not currently covered by the existing grounds.

We note that the IGIS in her submission to this Inquiry concedes considerable overlap between this new ground and the existing threat to security ground:

'There would seem to be significant overlap between this proposal and the existing grounds for authorisation relating to activities that 'are or are likely to be a threat to security' in s9(1A)(a)(iii) of the Intelligence Services Act 2001 (ISA). For example, where the integrity of an ASIS operation is potentially undermined by actions of a terrorist organisation or the intelligence service of a foreign country this would generally fall within the existing security grounds.'⁵

The IGIS does not oppose the amendment on this basis. Her focus is on the operational implications for her oversight roles:

This of itself is not a problem from an oversight perspective as there are numerous circumstances where the facts of a particular case could fit into more than one category in s9(1A)(a).⁶

The CCLs do not support extensions of powers or weakening of safeguards for intelligence agencies unless the necessity is demonstrated. In this case the need for the new ground is not demonstrated. We are alive to the possibility that this may allow an expansion of powers for the IS Act agencies in relation to the production of intelligence on Australian persons.

The CCLs do not consider a persuasive case has been made to support the proposed addition of a new ground for Ministerial authorisation for an IS Act agency to produce intelligence on an Australian person whose activities 'pose a risk, or are likely to pose risk, to the operational security of ASIS'.

2. REMOVAL OF MINISTERIAL AUTHORISATION FOR ASIS ACTIVITIES TAKEN IN RELATION TO ASIO (Proposed s13B)

⁴ PJCS Report of the Inquiry into Potential Reforms of Australia's National Security Legislation May 2013 (PJCS Report 2013) Recommendation 38

⁵ IGIS Submission to the PJCS Inquiry into the National Security Legislation Amendment Bill (No1) 2014, 4/8/14. (IGIS PJCS submission 2014) P17

⁶ *ibid*

The CCLs have significant concerns with the proposed removal of Ministerial authorisation for the production of intelligence on Australian persons or a class of Australian persons outside of Australia by ASIS when asked to do so by ASIO to support it in the performance of its functions.

Currently all IS Act foreign intelligence agencies must have Ministerial authorisation before undertaking any activity for the purpose of producing intelligence on an Australian person. The proposed shift from ministerial to internal ASIO authorisation is a major weakening of the existing safeguard.

The proposed criteria needed to permit an ASIS activity in support of ASIO are very broad:

- the purpose is to produce intelligence on an Australian person or class of Australian persons
- The activity will be undertaken outside Australia
- The activity or series of activities will be undertaken to support ASIO in the performance of its functions
- a written notification from the DG of Security or authorised person to ASIS that ASIO requires this⁷

The loosening of safeguards is exacerbated by the additional proposal to allow ASIS to conduct such an activity **without** prior authorisation, if the ASIS staff member 'reasonably believes that it is not practicable in the circumstances for ASIO to notify ASISbefore undertaking the activity'.⁸

In this context, there is a post-hoc reporting requirement. ASIS must, as soon as practicable, notify ASIO and the IGIS in writing of the activity'.⁹

The CCLs note and agree with the IGIS view that:

*'The legislation would not prevent requests from authorised ASIO employees or ASIO affiliates being cast in very broad terms or prevent ASIS authorising a broad category of staff to act on their own initiative when they reasonably believe that it is not practicable in the circumstances for ASIO to be contacted first.'*¹⁰

We find this shift to very broad criteria disturbing.

This major shift in accountability is justified as necessary to improve ASIS's ability to cooperate with ASIO in support of its performance.

It might be slightly less onerous on ASIO in that it bypasses the step of seeking prior Ministerial authorisation. However, the CCLs do not accept that seeking a warrant or authorisation from the appropriate external authority (in this case the Minister) should be discarded on the basis of inconvenience when the privacy of Australian persons outside of Australia is at stake.

No argument is put forward as to any significant problem in the current Ministerial authorisation process which damages or constrains the capacity of the two agencies to cooperate effectively-

⁷ Proposed subsection 13B(1)

⁸ Proposed Subsection 13B (3)

⁹ Proposed Subsection 13B(4)

¹⁰ IGIS PJCIS Submission 2014 p 18

beyond the lack of common legislative parameters. In our view, there are sound reasons for the different statutory frameworks and indeed for the agencies being and remaining separate.

The CCLs consider that excellent cooperation between the agencies is possible without discarding the existing safeguard of prior Ministerial authorisation for undertaking any activity by ASIS for the purpose of producing intelligence on an Australian person overseas.

Given this absence of tangible evidence to the contrary the CCLs do not support the proposed s13B amendment.

Should the proposed new ASIS activities to support ASIO be legislated, the CCLs consider it essential that they require prior external authorisation from the relevant Minister(s).

We thank the PJCIS for the opportunity to make these supplementary comments.

With regards

Dr Lesley Lynch
Secretary
NSW Council for Civil Liberties

26/8/14