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The Committee Secretary
Parliamentary Joint Committee on Intelligence and Security
Parliament House
Canberra ACT 2600

7 November 2014

Re: Submission to Inquiry into *Counter-Terrorism Legislation Amendment Bill (No 1) 2014*

Thank you for the opportunity to provide a submission to the Parliamentary Joint Committee on Intelligence and Security Inquiry into the *Counter-Terrorism Legislation Amendment Bill (No 1) 2014.*

This submission focuses on selected aspects of the Bill drawn from Schedule 1- Criminal Code Act 1995 and Schedule 2 – Intelligence Services Act 2001.

The abbreviated time frame for submissions as closing 5pm Monday 10 November 2014 (as acknowledged in the Media Alert of 30 October 2014 and in the e-mail from the Inquiry Secretary of 31 October 2014 which then invited submissions) has meant that it has not been possible in this submission to comment comprehensively on all aspects of this Bill.

I will now proceed to an analysis of some key aspects of the Bill, as well as recommended changes.

Schedule 1 Criminal Code Act 1995

The amendments proposed add two additional sets of grounds for the seeking of an interim control order – covering circumstances where the control order requested "would substantially assist in preventing the provision of support for or the facilitation of a terrorist act"[1] or where there is a suspicion on "reasonable grounds that the person has provided support for or otherwise facilitated the engagement in a hostile activity in a foreign country"[2]

In providing these expanded and additional sets of grounds for the application for and obtaining of a control order, the request process of the Attorney General's consent made by the senior AFP member is then abbreviated by the proposed amendments – see amendments proposed to ss 104.2 (3) and 104.2 (4) of the *Criminal Code*, presumably to minimise the preparation of documentation by the AFP to put before the Attorney General, as part of the consent process to making an application request for an interim control order.

This measure again seems to be part of a Government pre-occupation with "efficiencies" – which whilst appropriate in some portfolio areas – in the present context threatens and may seriously undermine carefully constructed balances and accountability measures in the legislation:

> The amendments to the control order regime will also streamline the application process by reducing the volume of material that must be provided to the Attorney General when seeking consent to request an interim control order, and extend the time for obtaining the Attorney-General's consent when making an urgent request to an issuing court without first obtaining the Attorney General's consent[3]

Consequently, the majority of the present draft request requirements in the existing ss 104.2 (3) and 104.2 (4) are removed by the amendment. Some of these requirements are then re-located to the point where the Attorney General having given consent to the application process for an interim control order, the senior AFP member then requests of the issuing court the interim control order.[4]

Important constitutional issues and practical matters in observing those constitutional issues arise in relation to these proposed amendments. In *Thomas v Mowbray* (2007) 233 CLR 307, the control orders scheme was upheld by a majority of the High Court of Australia as falling within the s.51 (vi) Commonwealth Constitution defence power. Issues relating to the threat or application of force domestically (in the form of terrorism) were considered by a majority of the High Court to be a purpose within the present scope of the s.51 (vi) defence power.

Importantly, the s.51 (vi) defence power is a purposive power, meaning that for legislation to be constitutionally valid through support of that head of power, the legislation must implement a purpose or purpose presently within the s.51 (vi) defence power. That power is elastic in nature given external factual circumstances. Whether the relevant legislation implements such a purpose or purposes is ordinarily tested (in the absence of notorious facts of which judicial notice can be taken) by the application of a proportionality test- for example whether the challenged law can be seen as

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[1] Paragraph (c) amendment to s.104.2 (2) of the *Criminal Code* (Cth)
[2] Paragraph (d) amendment to s.104.2 (2) of the Criminal Code (Cth)
[3] Attorney General Second Reading Speech Counter-Terrorism Legislation Amendment Bill (No 1) 2014 *Senate Hansard* 29 October 2014, 63-64.
[4] S.104.3 (c) amendment to the *Criminal Code* (Cth)

reasonably appropriate and adapted to achieving a defence purpose. This is a judgment entrusted to the High Court of Australia.

The proposed amendments raise a couple of issues. First, is a **practical issue of a weakening of the internal accountability measures, including political accountability in the functions of the Attorney General,** in the obtaining of consent to make an application for an interim control order and in the making of the application itself. The process of obtaining of consent from the Attorney General, prior to the making of an application to an issuing court, is proposed to be stripped of the following processes[5]:

(b) the following:

(i) a statement of the facts relating to why the order should be made;

(ii) if the member is aware of any facts relating to why the order should not be made—a statement of those facts;

(c) the following:

(i) an explanation as to why each of the obligations, prohibitions and restrictions should be imposed on the person;

(ii) if the member is aware of any facts relating to why any of those obligations, prohibitions or restrictions should not be imposed on the person—a statement of those facts; and

(d) the following:

(i) the outcomes and particulars of all previous requests for interim control orders (including the outcomes of the hearings to confirm the orders) in relation to the person;

(ii) the outcomes and particulars of all previous applications for variations of control orders made in relation to the person;

(iii) the outcomes of all previous applications for revocations of control orders made in relation to the person;

(iv) the outcomes and particulars of all previous applications for preventative detention orders in relation to the person;

(v) information (if any) that the member has about any periods for which the person has been detained under an order made under a corresponding State preventative detention law;

Accordingly, the existing arrangements enable *the politically accountable figure for control orders – the Attorney General - to obtain a full background to the application,* in particular a statement of facts as to why the order should be made.

This is an important check and balance in a system that has only so far operated in two instances – David Hicks and Jack Thomas – and then on the more narrow existing grounds with a direct nexus to terrorism – substantial assistance in the prevention of a terrorist act, or the provision, receipt of, or participation in, training from a listed terrorist organisation.

The existing arrangements more readily ensure, at an earlier stage, that the subject matter and subject of the control order from the point of the existence of reasons and evidence satisfy the reasonable grounds listed criteria, by the fact that such information has to be presented by the senior AFP

[5] Presently in s.104.2 3 (b), (c) and (d) of the *Criminal Code* (Cth)

member to the first law officer – the Attorney General - for his or her consent, being the office holder who will have direct access to the national security information upon which the application is based.

In contrast, the proposed amendments reduce the content of what is provided to the Attorney General in the seeking of consent for the making of an application for an interim control order to (and do so with considerably expanded, and more tentative grounds, as the rationale for the interim control order):

(a) a draft of the interim control order to be requested;
(b) information (if any) that the member has about the person's age; and
(c) a summary of the grounds on which the order should be made

(3A) To avoid doubt, paragraph (3)(c) does not require any information to be included in the summary if disclosure of that information is likely to prejudice national security (within the meaning of the *National Security Information (Criminal and Civil Proceedings) Act 2004*)

Accordingly, the existing arrangements also more readily ensure that the actual application of the terrorism control orders regime is necessary and proportional in each individual case by ensuring that the application (backgrounded by *the extensive listed information above*) is consented to by the Attorney General, who has direct access to national security information.

In contrast in the proposed amendments, the listed information above is now only provided at the actual application stage for the interim control order to the issuing court – see proposed s.104.3 (c), (d), (e) and (f).

This re-alignment of the point where such information is first provided appears to formally adhere (in a technical and linguistic sense) to the constitutionality requirements of the s.51 (vi) defence power regarding subject matters answering the description of a defence purpose – see the amendments to s.104.4 (1)(c)(ii) of the *Criminal Code* by the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* (Cth) (being subject matter paragraphs (ii), (iii), (iv) and (v)- with the addition of paragraphs (vi) and (vii) by the present Bill- with the interim control order then prefaced on proposed s.104.4(1)(d) that

(d) the court is satisfied on the balance of probabilities that the order is reasonably necessary, and reasonably appropriate and adapted, for the purpose of:
  (i) protecting the public from a terrorist act; or
  (ii) preventing the provision of support or the facilitation of a terrorist act;or
  (iii) preventing the provision of support for or the facilitation of the engagement in a hostile activity in a foreign country

S.104.4 (1) (d) attempts to meet the proportionality test implicit in the s.51 (vi) defence power as discussed in *Thomas v Mowbray*.

However, two points of differentiation on this issue arguably place the revised control order regime in the Bill on less solid constitutional ground than the original legislation tested in *Thomas v Mowbray*.

The first point has been mentioned – the Attorney general is no longer provided with the full suite of information to take into account in considering whether to consent to the making of an application for an interim control order. This may mean that certain particularly sensitive information is never provided to the issuing court, invoking the inter-operation of proposed s.104.2 (3) (c), s.104.2 (3A),

s.104.3 (b) and s.104.3 (f), it being withheld or deleted from the record provided to the issuing court through the inter-operation of those sections.

This issue is compounded by the amended arrangements for urgent interim control orders under Subdivision C of s.104 of the *Criminal Code* – the s.104.6 (2) provision that the Attorney General's consent is not required before the request for an urgent interim control order is made, is retained, but the requirement for subsequent consent by the Attorney General is trebled from the existing four hours to twelve hours- see s.104.10 (1) and s.104.10 (2) of the amendments.

It is difficult to understand in an era of multiple modern instantaneous communication media and devices that there is any justification for legislatively re-configuring what constitutes an "urgent" interim control order application from proceeding from a period of four hours without the Attorney-General's consent to a period of twelve hours without the Attorney-General's consent.

The second point is that there is also a subtle change in the proposed amendment about the way the issuing court assesses proportionality. Existing s.104.4 (1) (d) (as examined by the High Court in *Thomas v Mowbray*) requires that "the court is satisfied on the balance of probabilities that each of the obligations, prohibitions and restrictions to be imposed on the person is reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the public from a terrorist act".

In contrast, the Bill proposes a test *that is far less specific and appears to lend something of a stronger endorsement to the Chapter III issuing court simply picking up and adopting the AFP draft of the interim control order* – that is signalling a preference for the executive interest. Proposed s.104.4 (1)(d) reads:

(d) the court is satisfied on the balance of probabilities *that the order* is reasonably necessary and reasonably appropriate and adapted, for the purpose of:

(i) protecting the public from a terrorist act; or
(ii) preventing the provision of support for or the facilitation of a terrorist act; or
(iii) preventing the provision of support for or the facilitation of the engagement in a hostile activity in a foreign country

Consistent with this approach, the discretion of the Chapter III issuing court is then expressed in the default and in the negative in proposed s.104.4 (3) of the *Criminal Code*:

(3) The court need not include in the order an obligation, prohibition or restriction that was sought by the senior AFP member if not including the obligation, prohibition or restriction in the order would allow the court to become satisfied

On two levels therefore, the proposed test in the *Counter-Terrorism Legislation Amendment Bill (No 1) 2014* operates potentially differently and in a subtly more executive orientated manner.

This raises some possible issues about whether the control order measures responding to a defence purpose within s.51 (vi) of *Commonwealth Constitution* will necessarily always be within constitutional power; and secondly, to what extent, if any, the revised regime (if legislated) will engage Chapter III separation of powers issues, noting that Hayne J in *Thomas v Mowbray* in part dissented on the Chapter III point in relation to the extant legislative arrangements regarding control orders and the question of their consistency with the exercise of judicial power under Chapter III, involving questions of incompatibility with Chapter III separation of powers.

Schedule 2 Intelligence Services Act

Schedule 2 of the *Counter-Terrorism Legislation Amendment Bill (No 1) 2014* proposes various amendments to the *Intelligence Services Act 2001*. However, the relevant extracts of the second reading speech of the Attorney General as providing certain rationales for the amendments, **are at odds with the imprecise terms, broadening of the affected groups and lack of subject matter clarity in the proposed amendments, which exceed the stated purpose:**

> There is an urgent need to make amendments to the ISA to ensure that intelligence agencies can undertake relevant activities in support of the ADF's operations in Iraq against the Islamic State terrorist organisation.
>
> These activities are anticipated to include the collection of intelligence in relation to Australian persons who are known or suspected participants in the hostilities, and particularly those who are known or suspected of fighting with or alongside the IS terrorist organisation. Such intelligence is likely to prove instrumental to these operations, including in protecting ADF personnel, members of other defence forces, and civilians from death or serious harm as a result of terrorist or other hostile acts committed in the course of the conflict...
>
> First, the primary purpose of the amendments is to better facilitate ASIS providing timely assistance to the ADF in support of military operations, and its cooperation with the ADF on intelligence matters. The proposed amendments make explicit that such support and cooperation is a function of ASIS, consistent with explicit functions to this effect conferred upon the other two ISA agencies, the Australian Signals Directorate (ASD) and the Australian Geospatial-Intelligence Organisation (AGO)[6]

The first point is that the existing co-operative functions of the ASD (formerly Defence Signals Directorate) and AGO (formerly Defence Intelligence Geospatial Organisation) – respectively in s.7(d) and s.6B(g) of the *Intelligence Services Act 2001* [7] arose because both organisations were part of the Defence Department, under the ministerial responsibility of the Defence Minister, and largely externally focused in their production of intelligence. In contrast, ASIS, was, and is, part of the Department of Foreign Affairs and under the ministerial responsibility of the Minister for Foreign Affairs.

The absence of an existing ASIS co-operative function with the ADF reflects both this ministerial separation and longstanding conventions based on democratic traditions and civilian control of the military, that military force, including that informed by civilian agency intelligence gathering, is not deployed against the Australian civilian population, except in the more prescribed circumstances of Part IIIAAA of the *Defence Act 1903* (Cth). Yet the exact same function as exists for ASD and AGO is copied over and mandated for ASIS in the amendments – see amending paragraph s.6(1)(b) of the Bill "to provide assistance to the Defence Force in support of military operations and to cooperate with the Defence Force on intelligence matters".

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[6] Attorney General Second Reading Speech Counter – Terrorism Legislation Amendment Bill (No 1) 2014 *Senate Hansard* 29 October 2014 , 62

[7] Both sections state 'to provide assistance to the Defence Force in support of military operations and to cooperate with the Defence Force on intelligence matters"

The legislative amendments proposed appear to breach that general assumption by, permitting ASIS under ministerial authorisation to undertake activities to produce intelligence on one or more members of a class of Australian persons in the course of providing assistance to the Defence Force in support of military operations,[8] and to undertake activities in the course of providing assistance to the Defence Force in support of military operations, an activity, or series of activities that will, or is likely to, have a direct effect on one or more members of a class of Australian persons.[9]

The difficulties emerge because of the breadth and imprecision of the language, and a lack of definition of key terms, which appear linked to a reliance on the broad discretion in the Ministerial authorisation process in s.9 of the *Intelligence Services Act 2001*.

These difficulties illustrate that if the legislation is amended by the present form of the *Counter-Terrorism Legislation Amendment Bill (No 1) 2014*, **it will significantly exceed the stated purposes in the second reading speech of the Attorney General, relevantly extracted above.**

Key Matters requiring changes to the Bill:

. **"in support of military operations"** – s.6(1)(ba) (functions of ASIS) and s.8(1)(a)(ia) and (ib) (Ministerial directions requiring authorisation under section 9, 9A or 9B before undertaking production of intelligence on one or more members of a class of Australian persons or before undertaking an activity or series of activities that will or is likely to, have a direct effect on one or more members of a class of Australian persons)- this phrase remains undefined, in the *Counter-Terrorism Legislation Amendment Bill (No 1) 2014*, in the existing *Intelligence Services Act 2001* and in the *Defence Act 1903* (Cth).

Being undefined, it conceivably includes all forms of military operations, both external to, and internal to the Commonwealth of Australia, and those which both do, and do not, involve the direct or indirect application of the use of force. It may, for example, extend to domestic based training exercises. It could clearly encompass situations where Part IIIAAA of the *Defence Act 1903* is invoked in a Australian domestic setting to call out and directly utilise ADF personnel and assets to protect Commonwealth interests and States and self-governing territories.

The Bill needs to be amended to confine "military operations" to the sort of military operations referred to by the Attorney General in his second reading speech, namely ISIS style operations involving terrorist acts or terrorism offences, offshore, external to the Commonwealth of Australia.

. **"an activity or series of activities, that will or is likely to, have a direct effect on one or more members of a class of Australian persons"** – s.8(1)(a)(ib) – the "direct effect"on one or more members of a class of Australian persons, where the assistance is provided in the conduct of military operations, is undefined needs clarification in the legislation itself. – does this include targeted military activity, involving the application of lethal or non lethal force, producing such direct effect on one or more members of a class of Australian persons? – if not, the exclusion of such activity assistance in such circumstances needs to be legislatively spelt out by amending s.6 (4) of the *Intelligence Services Act 2001*.

S.6(4) of the *Intelligence Services Act 2001* states:

In performing its functions, ASIS must not plan for, or undertake activities that involve:

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[8] Amending s.8(1)(a)(ia) of the *Intelligence Services Act 2001* (Cth)
[9] Amending s.8(1)(a)(ib) of the *Intelligence Services Act 2001* (Cth)

(a) paramilitary activities; or
(b) violence against the person; or
(c) the use of weapons;
(d) by staff members or agents of ASIS

Note 1: This subsection does not prevent ASIS from being involved with the planning or undertaking of activities covered by paragraphs (a) to (c) by other organisations provided that staff members or agents of ASIS do not undertake those activities.

These scenarios above vastly exceed the claimed rationale for the need of the ASIS assistance power in the Attorney General's second reading speech.

The amendments need to be re-drafted to confine the provision of that ASIS assistance capability only to offshore, external situations where the ADF is engaged in military operations against an organisation or entity that is a declared terrorist organisation within s.102.1A of the Criminal Code.

Alternatively, the amendments need to be re-drafted to confine the provision of that ASIS assistance capability only to offshore, external situations in a declared area where the ADF is engaged in military operations and it is reasonably believed that Australians are involved in the activities of a declared terrorist organisation within that declared external area.

. **"one or more members of a class of Australian persons"** – s.8(1)(a)(ia) and s.8(1)(a)(ib); "class of Australian persons" – s.9(1A)(a) and s.9(1A)(b); "classes of Australian persons who are, or are likely to be involved in an activity or activities that are, or are likely to be, a threat to security"- s.9(1AA). The singular Australian person is now changed in the Bill and expanded to include classes of Australian persons, who are then the target group for ASIS (and also AGO and ASD authorisations) ministerial authorisations in the provision of assistance to the ADF in the support of military operations, by the production of intelligence, or the undertaking of unspecified ASIS activities with, or likely to have a direct effect on one or more members of the targeted class of Australian persons.

Who then might be identified under the legislation as being a "class of Australian persons"? Significantly, the class of Australian persons is loosely defined, far exceeding the claimed rationale for the need for the ASIS assistance power in the Attorney General's second reading speech.

. There is a considerable Ministerial flexibility and discretion in who might actually constitute the classes of Australian persons for the application of s.8(1)(a)(ia) and s.8(1)(a)(ib) amendments of the *Intelligence Services Act 2001* ;

. For the ASIS minister to authorise these activities under s.8(1)(a)(ia) and s.8(1)(a)(ib)- the Defence Minister must request the authorisation in writing – (amending s.9(1)(d)) of the Bill)

. The ASIS minister *must also then be satisfied* that the Australian person or class of persons mentioned in that subparagraph is, or is likely to be, involved in one or more of a range of activities (NB – these are list activities numbered (i) to (vii), **not all of which necessarily involve terrorism offences, terrorist acts, or foreign fighter activity**)- (s.9(1A)(a) (i) to vii))

. The list activities of s.9(1A)(a) (i) to (vii) is then made contingent on the obligation of the relevant agency Minister to obtain the agreement of the ASIO minister in the terms of s.9(1A)(b):

> (b) if the Australian person or class of persons is, or is likely to be, involved in an activity or activities that are, or are likely to be, a threat to security (whether or not covered by another subparagraph of paragraph (a) in addition to subparagraph (a) (iii) (activities that are, or are likely to be, a threat to security) - obtain the agreement of the Minister responsible for administering the *Australian Security Intelligence Organisation Act 1979*

. The Bill's amendments then effect three very significant and liberalising changes to the working of these provisions. **These three items need to be much more precisely confined to reflect the stated purposes of the second reading speech of the Attorney General on the Bill.**

(1) **Subsection 9 (1B) is repealed**.- see the Bill, Item 15, page 14. The existing S.9 (1B) had previously ensured that the meaning of "security" in the s.9(1A)(a)(iii) and its linkage to the operation of s.9(1A)(b) was confined to "the same meaning as in the *Australian Security Intelligence Organisation Act 1979*".

This repeal will mean that the definition of "security" is at large, conferring a capacity to self-define what security is – in turn, enlarging the capacity of the ASIS minister to grant an authorisation in relation to a Australian person or class of persons in relation to s.8(1)(ia) or s.8(1)(ib) provision of ASIS intelligence or ASIS activity in the course of providing assistance to the ADF in support of military operations.

(2) **Emergency authorisation arrangements** - The power in s.9(1A)(b) of the ASIO Minister to provide agreement that an Australian person or class or persons is, or is likely to be involved in an activity or activities that are, or are likely to be, a threat to security – for the purpose of relating to an authorisation for an activity in s.8(1)(a)(ia) and s. 8(1)(ib) – is able in an "emergency", – in this case through the head of ASIS - to be given without obtaining the agreement of the ASIO minister, with the agreement of the Director-General of Security (unless the agency head is satisfied that the Director General of Security is not readily available or contactable): see S.9C of the Bill.

. There is no definition of "emergency" in S.9 C of the Bill. The substitute authorisation (freed from a definition of security in the legislation, the capacity existing for the agency to self-define and self-determine what constitutes security) enables the head of ASIS in these circumstances to agree that an Australian person or class of Australian persons is, or are likely to be, a threat to security.

. There is no apparent time limit on such a substitute agreement, made in the absence of the ASIO Minister and potentially in the absence of the Director General of Security. References to time limits appear to be only as – obligations to advise the ASIO Minister within 48 hours after an authorisation is given under S 9A or 9B (S.9C (5)(a) of Bill) and in the amended s.9(4) as the Ministerial authorisation (including activities of the kind mentioned in s.8(1)(a)(ia) and (ib) is stated that it must not exceed 6 months (S.9(4) of the Bill)

(3) **The ASIS Ministerial authorisation and subsequent ASIO Minister agreement provision of s.9(1A) is then referenced or glossed** by the Bill's amending s.9(1AA) and s.9(1AB) as follows (recalling also that the definition of security is now at large) and able to be self determined by an agency):

Agreement of Minister administering the Australian Security Intelligence Organisation Act 1979

(1AA) Without limiting paragraph (1A)(b), the minister responsible for administering the *Australian Security Intelligence Organisation Act 1979* may, in writing:

(a) specify classes of Australian persons who are, or are likely to be, involved in an activity or activities that are, or a likely to be, a threat to security; and
(b) give his or her agreement in relation to any Australian person in that specified class

The language of this provision (1AA) "without limiting paragraph (1A(b))" defers to the broader ASIS minister discretion for providing agreement in that earlier provision. It enables (not compels) the specification of classes of persons of actual or likely security risk (undefined) and provides for ASIO ministerial specification for persons from that list:

(1AB) An agreement given in accordance with subsection (1AA) may:

(a) relate to an authorisation for an activity, or a series of activities, of a kind mentioned in subparagraph 8(1)(a)(i), (ia), (ib) or (ii); and
(b) Specify the period during which the agreement has effect

The agreement/specification of the ASIO minister then so provided creates the basis for invoking the provision of assistance for military operations by the ADF - in the form of ASIS production of intelligence or the undertaking of activities having a direct effect on the class or identified persons from that class under s.8(1)(a)(ia) and s.8(1)(a)(ib).

Again, with the removal of the definition of "security", the reach of these provisions can potentially far exceed any class of Australian persons or a person within an identified class as having a connection to a terrorism offence, a terrorist act, foreign fighter activity or associations, links or membership etc of a declared terrorist organisation. The Bill should be amended to adhere to the specificity of the need for these increased powers as set out in the Attorney General's second reading speech.

. **Emergency Authorisation Arrangements** by oral authorisation

. In providing for a series of *emergency* Ministerial authorisations by oral authorisations (though excluding an activity or series of activities in paragraphs 8(1)(a) (ia) or (ib)), where a Ministerial direction under s.8(1) requires the agency to obtain an authorisation under section 9, 9A or 9B before undertaking that activity or series of activities – the Bill provides in amending s.9A (3) that the responsible agency Minister, or if that minister is not readily available or contactable – any of four alternative Ministers may orally give the authorisation.

The major difficulty here is that this extraordinary power does not define what constitutes the necessary precondition – "an emergency situation".

. That definition is important, as the oral authorisation so provided remains in place for 48 hours – see s.9A (4)(b).

. That definition is also important as there is a further default provision in the Bill- s.9B, which provides for an individual agency head to provide an authorisation in an emergency situation if "the agency head is satisfied (amongst other things) that none of the Ministers specified in subsection 9A(3) are readily available or contactable"- though such authorisation must apparently be in writing – as s.9B (3) (b) makes the authorisation subject to the requirements of subsections 9(3) and (4A).

. The bill should accordingly be **amended to provide a clear and comprehensive definition of what constitutes an emergency situation, as applicable to s.9A and 9B in the Bill.**

Further, s.9C of the Bill again engages the concept of an emergency authorisation, linked to the authorisations sought under s.9A and 9B of the Bill – in this instance, where the agreement of the ASIO Minister is required to be obtained under paragraph 9(1A)(b). This point is covered in the analysis above, under the second paragraph following the line "The Bill's amendments then effect three very significant and liberalising changes to how these provisions work".

I would be pleased to provide the Parliamentary Joint Committee on Intelligence and Security with further information in relation to this submission.

Yours faithfully

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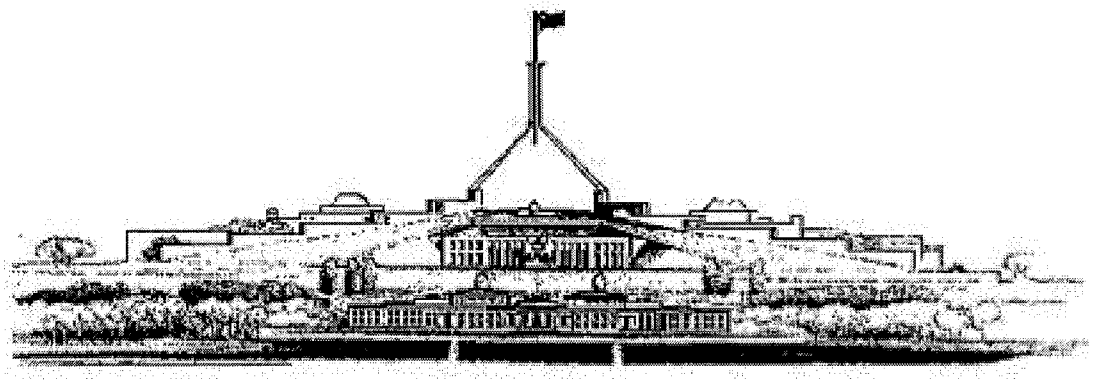
Appendix: Senate Hansard 29 October 2014 Attorney General Second Reading Speech *Counter Terrorism Legislation Amendment Bill (No 1) 2014*

COMMONWEALTH OF AUSTRALIA

PARLIAMENTARY DEBATES



THE SENATE

PROOF

BILLS

Counter-Terrorism Legislation Amendment Bill (No. 1) 2014, Civil Law and Justice Legislation Amendment Bill 2014

Second Reading

SPEECH

Wednesday, 29 October 2014

BY AUTHORITY OF THE SENATE

SPEECH

Date Wednesday, 29 October 2014 **Source** Senate
Page 62 **Proof** Yes
Questioner **Responder**
Speaker Brandis, Sen George **Question No.**

Senator BRANDIS (Queensland—Deputy Leader of the Government in the Senate, Vice-President of the Executive Council, Minister for Arts and Attorney-General) (15:40): I present the explanatory memoranda related to the bills and move:

That these bills be now read a second time.

I indicate that I have today referred the Counter-Terrorism Legislation Amendment Bill (No. 1) 2014 to the Parliamentary Joint Committee on Intelligence and Security for inquiry and report by 17 November 2014. I seek leave to have the second reading speech incorporated in *Hansard.*

Leave granted.

The speeches read as follows—

COUNTER TERRORISM LEGISLATION AMENDMENT BILL (NO. 1) 2014

The Bill contains a package of amendments to the Intelligence Services Act 2001 (IS Act) and the Criminal Code 1995 (Code).

The amendments address three key areas:

facilitating the Australian Secret Intelligence Service (ASIS) supporting and cooperating with the Australian Defence Force (ADF) on military operations;

enhancing the arrangements for the provision of emergency Ministerial authorisations to IS Act agencies to undertake activities in the performance of their statutory functions; and

enhancing the control order regime to allow the Australian Federal Police (AFP) to seek control orders in relation to a broader range of individuals of security concern and to streamline the application process.

The Bill will also implement a final recommendation of the Parliamentary Joint Committee on Intelligence and Security in relation to the Counter Terrorism Legislation Amendment (Foreign Fighters) Bill 2014.

These proposed amendments are being brought forward in a separate Bill to the two major tranches of national security legislation the Government has introduced in the Spring sittings – the National Security Legislation Amendment Bill (No 1) (which passed the Parliament on 1 October and received the Royal Assent on 2 October); and the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill (introduced on 24 September and is presently before the Parliament).

The measures in the Bill have been included as a result of instances of operational need identified by relevant agencies subsequent to the introduction of the previous two tranches of legislation. In the case of the proposed IS Act amendments, the need for amendment is urgent, as a result of recent developments in the security environment, primarily due to the Government's decision to authorise the ADF to undertake operations against the Islamic State (IS) terrorist organisation in Iraq.

The Government has brought forward these measures in a separate Bill, to ensure that the Parliamentary Joint Committee on Intelligence and Security (PJCIS) has an opportunity to conduct a review of them, and report to the Parliament on its findings.

I have today referred the Bill to the PJCIS for inquiry and report by 17 November, so that its analysis can inform the Parliamentary debate of the Bill in the final fortnight of the Spring sittings.

Intelligence Services Act amendments

There is an urgent need to make amendments to the ISA to ensure that intelligence agencies can undertake relevant activities in support of the ADF's operations in Iraq against the Islamic State (IS) terrorist organisation.

These activities are anticipated to include the collection of intelligence in relation to Australian persons who are known or suspected participants in the hostilities, and particularly those who are known or suspected of fighting with or alongside the IS terrorist organisation. Such intelligence is likely to prove instrumental to these operations, including in protecting ADF personnel, members of other defence forces, and civilians from death or serious harm as a result of terrorist or other hostile acts committed in the course of the conflict.

The proposed amendments are directed to two key areas.

ASIS activities in support of, and in cooperation with, the ADF

First, the primary purpose of the amendments is to better facilitate ASIS providing timely assistance to the ADF in support of military operations, and its cooperation with the ADF on intelligence matters. The proposed amendments make explicit that such support and cooperation is a function of ASIS, consistent with explicit functions to this effect conferred upon the other two ISA agencies, the Australian Signals Directorate (ASD) and the Australian Geospatial-Intelligence Organisation (AGO).

These measures also make a small number of amendments to facilitate the timely performance by ASIS of this function. These concern the provision of Ministerial authorisation by the Minister responsible for ASIS in relation to a class of Australian persons, and enabling the Attorney-General as the Minister responsible for ASIO to provide agreement to an authorisation in respect of individuals falling within a specified class of Australian persons. All of the existing safeguards in the ISA will apply to the performance of the new function. These include the statutory thresholds for the granting of authorisations, Ministerial reporting requirements, and the independent oversight of the Inspector-General of Intelligence and Security (IGIS).

Emergency Ministerial authorisations

Secondly, the proposed amendments also remedy practical limitations identified in the arrangements for emergency ministerial authorisations which apply to ASIS, ASD and AGO.

The amendments make provision for the contingency that the relevant Ministers may be temporarily uncontactable when there is an urgent, previously unforeseen need to collect vital intelligence. Presently, there is no legal basis on which agencies can undertake activities in these circumstances, meaning that critical intelligence collection opportunities may be missed. The amendments will address this, by enabling an agency head to grant a limited emergency authorisation, subject to rigorous and extensive safeguards and oversight mechanisms.

These authorisations are strictly limited to 48 hours maximum and cannot be renewed. Additional issuing criteria apply to authorisations by agency heads, including express consideration of whether the relevant Minister would have been likely to grant the authorisation, on the basis of the existing statutory criteria. Further, to ensure it is only available in an extreme emergency, the agency head must also be satisfied that, if the activity was not authorised, security would be seriously prejudiced or there would be a serious risk to a person's safety. The Minister must be notified as soon as practicable within 48 hours, and is under a positive obligation to make a decision about whether it should continue within the 48 hour maximum, or be cancelled or replaced with a Ministerial authorisation. The IGIS must also be notified as soon as practicable within three days.

The amendments also provide for contingency arrangements in the event that the Attorney-General is not readily available or contactable to provide his or her agreement to the making of an emergency Ministerial authorisation, where such agreement is required because the authorisation concerns the undertaking of activities in relation to an Australian person who is, or who is likely to be, engaged in activities that are, or are likely to be, a threat to security.

The amendments address an unintended limitation in the ability of Ministers to issue emergency authorisations. Presently, no provision is made for Ministers to issue these authorisations orally, with a written record to be made of that decision. This is incompatible with the circumstances of urgency in which emergency authorisations are designed to operate, and with the longstanding approach to other forms of emergency authorisation – including search warrants, telecommunications interception warrants, surveillance devices warrants and, more recently, the authorisation by the Attorney-General of special intelligence operations by the Australian Security Intelligence Organisation. The proposed amendments bring the emergency Ministerial authorisation process in the ISA into line with this approach.

Criminal Code amendments

The amendments to the Criminal Code will further strengthen the control order regime and enhance the capacity of law enforcement agencies to protect the public from terrorist acts. The amendments will allow the AFP to request, and an issuing court to make, a control order in relation to those who "enable" and those who "recruit". Although such individuals may not directly participate in terrorist acts, their conduct in supporting and facilitating terrorism through the provision of funds and equipment, or by recruiting vulnerable young people to champion their cause – and even to die for it – is instrumental to carrying out terrorist conduct. The expansion of the control order regime to cover such individuals will help disrupt terrorism at an earlier stage, keeping Australia and Australians safe and secure.

The amendments to the control order regime will also streamline the application process by reducing the volume of material that must be provided to the

Attorney General when seeking consent to request an interim control order, and extend the time for obtaining the Attorney General's consent when making an urgent request to an issuing court without first obtaining the Attorney General's consent.

Finally, the implementation of the Parliamentary Joint Committee on Intelligence and Security's recommendation will require the Attorney General to advise the Committee before amending a regulation that lists a terrorist organisation by adding an alias or removing a former name and to allow the Committee to review any proposed change during the disallowable period.

Concluding remarks

The measures in the Bill will ensure that our intelligence and law enforcement agencies have the necessary capability to operate effectively in the contemporary security environment. They will be of particular utility in circumstances of urgency presented by the activities of Australians who participate in foreign conflicts, including fighting with, or otherwise supporting the violent activities of, terrorist organisations.

CIVIL LAW AND JUSTICE
LEGISLATION AMENDMENT BILL 2014

Introduction

The Civil Law and Justice Legislation Amendment Bill 2014 is an omnibus bill which will amend sections of the *Bankruptcy Act 1966,* the *Copyright Act 1968,* the *Court Security Act 2013,* the *Evidence Act 1995*, the *Family Law Act 1975,* the *International Arbitration Act 1974,* andthe *Protection of Movable Cultural Heritage Act 1986.* The bill will make minor and technical amendments to provide more clarity to the legislation, correct legislative oversights and amend obsolete provisions. The combined effect of these amendments will improve the efficiency and operation of the justice system administered by the Attorney-General's portfolio.

Body

The government is determined to reduce regulation and make Commonwealth laws clear and accessible. Some of the provisions in this bill go directly towards implementing the government's deregulation agenda. For example, the amendments to the Copyright Act will reduce the impact of the legal deposit scheme on publishers. At present, publishers of certain literary, dramatic, musical or artistic works must deliver copies of their works in print format. The amendments will provide for publishers to submit their works electronically, which will reduce the time and cost burden on the industry.

The government aims to make all Commonwealth legislation coherent, readable and accessible to the widest possible audience. To this end, the Court Security Act will be amended to clarify the process by which court security orders can be varied and revoked. Minimising confusion creates a fairer and more accessible justice system. The Court Security Act amendments will also address court management issues by extending the authority to hold and dispose of unclaimed dangerous items.

Amendments to the Evidence Act will increase consistency with the Uniform Evidence Bill for greater cross-jurisdictional compliance.

The bill will also amend the International Arbitration Act to clarify its application, providing certainty for private parties who entered into arbitration agreements before the International Arbitration Act was last amended in 2010.

Minor, technical amendments contained in the bill will improve the operation of the Family Law Actby correcting errors and ensuring the use of consistent language. The bill will also amend the Family Law Act to explicitly permit the provision of certain information relating to family law proceedings to child welfare authorities. This amendment will ensure that child welfare authorities have access to any relevant material to enable them to better protect children.

The amendments to the Bankruptcy Act will ensure that assistance received under the National Disability Insurance Scheme is not distributed to a bankrupt's creditors. The amendments also modernise the drafting of offences under the Act and ensure that they have kept up with modern technology. Additionally the amendments will enhance the Australian Financial Security Authority's capacity to act as a special trustee for other government agencies. In its special trustee role the Australian Financial Security Authority seizes and sells property pursuant to a Court order in relation to a debt owed to the Commonwealth or a Commonwealth agency.

The bill will add currency and ease of application to the legal system as it stands today. Significantly, the bill will facilitate the removal of obsolete and redundant clauses. For example, the bill will amend the Family Law Act to remove obsolete requirements for annual publication of certain information, as well as to repeal an obsolete definition. And the bill will amend the Evidence Act to remove obsolete provisions and references to the operation of the Evidence Act in relation to the Australian Capital Territory.