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The Parliament of the Commonwealth of Australia

# Advisory Report on the National Security Legislation Amendment Bill (No. 1) 2014

Parliamentary Joint Committee on Intelligence and Security

September 2014  
Canberra

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## Membership of the Committee

Chair Mr Dan Tehan MP

Deputy Chair Hon Anthony Byrne MP

Members Mr Andrew Nikolic MP

Senator David Bushby

Hon Tanya Plibersek MP

Senator the Hon Stephen Conroy

Hon Philip Ruddock MP

Senator the Hon John Faulkner

Hon Bruce Scott MP

Senator David Fawcett

Senator the Hon Penny Wong





## Terms of reference

On 16 July 2014, the National Security Legislation Amendment Bill (No. 1) 2014 was referred to the Committee by the Attorney-General.



## List of abbreviations

AIC	Australian Intelligence Community
ASIO	Australian Security Intelligence Organisation
ASIO Act	<i>Australian Security Intelligence Organisation Act 1979</i>
ASIS	Australian Secret Intelligence Service
APS	Australian Public Service
Crimes Act	<i>Crimes Act 1914</i>
Criminal Code	<i>Criminal Code Act 1995</i>
DIGO	Defence Imagery and Geospatial Organisation
IGIS	Inspector-General of Intelligence and Security
IGIS Act	<i>Inspector-General of Intelligence and Security Act 1986</i>
IS Act	<i>Intelligence Services Act 2001</i>
NSLA Bill	National Security Legislation Amendment Bill (No. 1) 2014
PID Act	<i>Public Interest Disclosure Act 2013</i>
PJCIS	Parliamentary Joint Committee on Intelligence and Security
SIO	Special Intelligence Operation



# List of recommendations

## 3 Key issues and analysis

### Recommendation 1

The Committee recommends that the Explanatory Memorandum to the National Security Legislation Amendment Bill (No. 1) 2014 be amended to clarify that the term 'ASIO affiliate' is intended to be restricted to natural persons.

### Recommendation 2

The Committee recommends that the intent of proposed sections 86 and 87 contained in the National Security Legislation Amendment Bill (No. 1) 2014 be clarified to make explicit that a person on secondment shall be required to work wholly on behalf of the host organisation, and under the host organisation's legal framework.

### Recommendation 3

The Committee recommends that consideration be given to amending the Explanatory Memorandum or the Attorney-General's Guidelines issued under section 8A of the *Australian Security Intelligence Organisation Act 1979* to clarify that a computer access warrant may only authorise access to a computer (which would include a network) to the extent that is necessary for the collection of intelligence in respect of a specified security matter.

### Recommendation 4

The Committee recommends that the Government initiate a review of the Attorney-General's Guidelines issued under section 8A of the *Australian Security Intelligence Organisation Act 1979*, including examining requirements to govern ASIO's management and destruction of information obtained on persons who are not relevant, or no longer relevant, to security matters.

### Recommendation 5

The Committee recommends that the Director-General of Security be required to include details of any instances of material disruption of a computer, or non-routine access to third party computers or premises, in the reports on the execution of each warrant provided to the Attorney-General under section 34 of the *Australian Security Intelligence Organisation Act 1979*.

### Recommendation 6

The Committee recommends that the Australian Security Intelligence Organisation be required to notify the Attorney-General and the Inspector-General of Intelligence and Security within 24 hours of any incident in which force is used against a person by an ASIO officer, and for a written report on the incident to be provided within 7 days.

The Committee further recommends that the Director-General of Security be required to include details of any use of force against a person by ASIO officers in the reports on the execution of each warrant provided to the Attorney-General under section 34 of the *Australian Security Intelligence Organisation Act 1979*.

### Recommendation 7

The Committee recommends that the IGIS provide close oversight of the design and execution of training for ASIO officers who may be required to use force during the execution of warrants issued under the *Australian Security Intelligence Organisation Act 1979*.

### Recommendation 8

The Committee recommends that the IGIS provide close oversight of any application of the proposed powers to authorise the use of force against persons by ASIO officers to ensure those powers are used only in exceptional circumstances, and to the extent reasonable and necessary to carry out a warrant.

### Recommendation 9

The Committee recommends that Schedule 3 to the National Security Legislation Amendment Bill (No. 1) 2014 be amended to require that approval must be obtained from the Attorney-General before a special intelligence operation is commenced, varied or extended beyond six months by the Australian Security Intelligence Organisation.

### Recommendation 10

The Committee recommends that additional requirements be introduced into the National Security Legislation Amendment Bill (No. 1) 2014 to enhance the Inspector-General for Intelligence and Security (IGIS)'s oversight of the proposed Special Intelligence Operations scheme, including:

- a requirement for the Australian Security Intelligence Organisation (ASIO) to notify the IGIS when a special intelligence operation is approved
- a requirement for ASIO to advise the IGIS of any special intelligence operation that is intended to continue beyond six months
- a requirement for ASIO to notify the Attorney-General and the IGIS, as part of the six-monthly reports proposed in clause 35Q of the Bill, of any injury, loss or damage caused to a person or property in the course of a special intelligence operation, and
- a requirement for the IGIS to periodically, and at least annually, inspect ASIO's records relating to current special intelligence operations.

### Recommendation 11

The Committee recommends that additional exemptions be included in the offence provisions relating to disclosure of information on special intelligence operations in proposed section 35P of the National Security Legislation Amendment Bill (No. 1) 2014 to explicitly enable

- disclosure of information for the purpose of obtaining legal advice
- disclosure of information by any person in the course of inspections by the Inspector-General of Intelligence and Security (IGIS), or as part of a complaint to the IGIS or other pro-active disclosure made to the IGIS
- communication of information by IGIS staff to the IGIS or other staff within the Office of the IGIS in the course of their duties.

### Recommendation 12

The Committee recommends that the National Security Legislation Amendment Bill (No. 1) 2014 be amended or, if not possible, the Explanatory Memorandum of the Bill be clarified, to confirm that the Commonwealth Director of Public Prosecution must take into account the public interest, including the public interest in publication, before

initiating a prosecution for the disclosure of a special intelligence operation.

#### **Recommendation 13**

The Committee further recommends that, to make clear the limits on potential prosecution for disclosing information about special intelligence operations, Section 35P of the National Security Legislation Amendment Bill (No. 1) 2014 be amended to confirm that the mental element (or intent) of the offence is 'recklessness', as defined in the Criminal Code, by describing the application of that mental element to the specific offence created by section 35P.

#### **Recommendation 14**

The Committee recommends that the National Security Legislation Amendment Bill (No. 1) 2014 be amended to confirm that the offence provisions in Schedule 6 to the Bill do not apply to

- information disclosed to the Inspector-General of Intelligence and Security (IGIS) in the course of inspections, or in support of a complaint or other pro-active disclosure, or
- communication of information by IGIS staff to the IGIS or other staff within the Office of the IGIS in the course of their duties.

#### **Recommendation 15**

The Committee recommends that the Office of the Inspector-General of Intelligence and Security's annual budget be supplemented to the extent required to provide for the new oversight requirements associated with the National Security Legislation Amendment Bill (No. 1) 2014, including periodic reviews of special intelligence operations and oversight of the use of force during the execution of warrants.

Supplementation of the Office of the Inspector-General of Intelligence and Security's budget should also take other proposed measures to expand the powers of intelligence agencies into account.

#### **Recommendation 16**

The Committee recommends that the Government appoint an Independent National Security Legislation Monitor as soon as practicable.

#### **Recommendation 17**

The Committee recommends that, following consideration of the recommendations in this report, the National Security Legislation Amendment Bill (No. 1) 2014 be passed by the Parliament.

