

National security legislation

The need for further accountability

Submission to Joint Committee on Intelligence and Security

Inquiry into *National Security Legislation Amendment Bill (No. 1) 2014*
(Cth)

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WHO WE ARE

The Australian Lawyers Alliance is a national association of lawyers, academics and other professionals dedicated to protecting and promoting justice, freedom and the rights of the individual.

We estimate that our 1,500 members represent up to 200,000 people each year in Australia. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief.

The Australian Lawyers Alliance started in 1994 as the Australian Plaintiff Lawyers Association, when a small group of personal injury lawyers decided to pool their knowledge and resources to secure better outcomes for their clients – victims of negligence.

We are represented in every state and territory in Australia. More information about us is available on our website.¹



INTRODUCTION

The Australian Lawyers Alliance ('ALA') welcomes the opportunity to provide a submission to the Joint Committee on Intelligence and Security in its inquiry into the *National Security Legislation Amendment Bill (No. 1) 2014* (Cth) ('the Bill').

We are concerned that the Bills will inappropriately curtail current protections on freedom of expression and reporting on issues in the public interest.

We are also concerned at the growing lack of accountability of Australia's intelligence operations.

We note that the Bill has been introduced following the Report of Potential Reforms to National Security Legislation.

From the outset, the Report acknowledged that any reform must strike a delicate balance between protecting Australians rights and safety:

'These intrusive powers must always be balanced by appropriate safeguards for the privacy of individuals and the community recognising that Australia is a democratic nation which values personal freedom and places limits on the Power of the State.'²

We submit that the proposed legislation does not strike the appropriate balance of safeguards to individual rights.

DISCLOSURE OF INFORMATION

Clause 35P of the Bill proposes creating a new offence punishable by five years in jail for 'any person' who discloses information relating to 'special intelligence operations'.

A person could be liable for a 10-year term if the disclosure would 'endanger the health or safety of any person or prejudice the effective conduct of a special intelligence operation', or if the person intends the disclosure to 'endanger the health or safety of any person or prejudice the effective conduct of a special intelligence operation'.³

Exceptions include if the disclosure was:

'(a) in connection with the administration or execution of this Division; or

(b) for the purposes of any legal proceedings arising out of or otherwise related to this Division or of any report of any such proceedings; or

(c) in accordance with any requirement imposed by law; or
(d) in connection with the performance of functions or duties, or the exercise of powers, of the Organisation.⁴

These exceptions are narrow and weighted heavily towards intelligence operatives. There is no exception providing for the public interest, the national interest or the legitimate role of the media.

We are concerned that the reforms will have a prejudicial impact on journalists reporting on intelligence operations, which may lead to prosecution and imprisonment of journalists who receive disclosures about such matters and report them.

This is an unprecedented clause which would capture the likes of Wikileaks, the Guardian, the New York Times, and any other media organisation that reports on such material.

We note that the penalties exacted upon whistle-blowers in such circumstances would be unduly harsh.

CASE STUDY: TIMOR LESTE

If reporting on adverse activities undertaken by ASIO is restricted, it is certainly questionable as to what checks and balances will ensure that ASIO's actions and operations are in accordance with basic principles of fairness, independence and protection of individual rights.

Last year, proceedings were initiated in the International Court of Justice ('ICJ') with Timor Leste alleging that that former foreign minister Alexander Downer dispatched a team of ASIS officers to East Timor's capital, Dili, to bug the government's cabinet room and Prime Minister's office in 2004.⁵

The raiding of the office of ACT lawyer Bernard Collaery by ASIO, authorised by Attorney-General George Brandis, [while proceedings were underway in the International Court of Justice ('ICJ')], demonstrated a powerful conflict of interest.

At the time, Mr Collaery said that ASIO had also detained in Australia a whistle-blower who had led the Australian Secret Intelligence Service operation to bug the cabinet room in East Timor.

"How dare they," Mr Collaery said. "These tactics are designed to intimidate the witness and others from coming forward. It's designed to cover up an illegal operation in 2004 by ASIS."⁶

Under the new clause 35P, it is questionable as to whether reporting on the ASIO raids on Mr Collaery's offices would have constituted an offence. Similarly, whistleblowing or even reporting on the alleged bugging of Timor Leste's government cabinet room, may also have constituted an offence.

Isolating potentially serious abuses of government power from public scrutiny is dangerous and liable to abuse.

The ICJ subsequently ordered that Australia cease spying on Timor Leste and its legal advisers, in a landmark decision by the International Court of Justice relating to the bitter dispute between the two countries over \$40 billion of oil and gas reserves in the Timor Sea.⁷

The court also ruled that the Australian government must seal documents and data seized in the ASIO raid in December.⁸

While the case is not expected to conclude for 12 months, it must be questioned as to what structures, laws and mechanisms currently constrict ASIO from engaging in activities that breach domestic or international law; notifying public agencies or authorities regarding such breaches and mechanisms by which ASIO is held accountable.

It appears that matters have progressed to a stage in which the International Court of Justice must make orders to constrain Australia's intelligence operations from unlawful engagement.

However, the truth remains that the many individuals likely to be impacted by the expansion in ASIO's powers, will not be engaged in high profile international litigation before the ICJ. Therefore, it may be questioned as to how their rights will be protected, the unlawful activities of intelligence operations examined, and how the public will be informed – or whether abuse of power will in future occur without anyone knowing.

ACCOUNTABILITY

In the Second Reading Speech for the Independent Reviewer of Terrorism Laws Bill 2008 (Cth), Senator Judith Troeth noted that:

'Obviously, our response to the threat of terrorism cannot simply be more and more stringent laws, more police, and more intelligence personnel. Rather, we need to provide adequate safeguards to ensure scrutiny, accountability, and transparency.'⁹

We note that Senator Brandis, in his second reading speech regarding the Bill noted that:

‘The Attorney-General has this week returned from a visit to the UK, where discussions highlighted that the primary national security concern of common interest is the threat posed by returning foreign fighters. This is the most significant risk to Australia’s domestic security that we have faced in many years.’¹⁰

However, we note that in the UK, crucial accountability mechanisms exist to safeguard human rights.

In the UK, counter-terrorism legislation is subject to review against the *Human Rights Act 1998* (UK), which implements the UK’s obligations under the European Convention for the Protection of Human Rights and Fundamental Freedoms. In addition to the human rights instrument, the UK Office of the Independent Reviewer was created in the mid-1980s to review laws designed in response to terrorist violence.

There is a distinct lack of similar protections in Australia, with no federal human rights legislation and soon, no independent review mechanism to assess national security legislation.

Australia’s Independent National Security Legislation Monitor (‘INSLM’), which is similar to the UK Office of the Independent Reviewer, has played a vital role in the monitoring of national security.

However, the INSLM has been slated for abolition in the form of the *Independent National Security Legislation Monitor Repeal Bill 2014* [Provisions] (Cth). The Senate Legal and Constitutional Affairs Committee is currently conducting an inquiry into the Bill, and due to report on 19 August 2014, following an extension from 2 June 2014.

Professor Clive Walker, an expert in anti-terrorism law at the University of Leeds (UK) noted in his submission to the Senate Legal and Constitutional Affairs Committee that:

‘The proposal to terminate the office in Australia of the Independent National Security Legislation Monitor (‘INSLM’) would in my opinion be significantly counter-productive in terms of the effectiveness and fairness of anti-terrorism laws in Australia. Every country must make its own choices within its unique constitutional framework as to suitable mechanisms of accountability and governance. However, the first point which should be taken into account by the Senate Standing Committees on Legal and Constitutional Affairs is that the Australian INSLM model of independent review is more thoroughly and appropriately designed than equivalents



elsewhere, including the system in the United Kingdom...'¹¹

We note that the Bill has not been referred to the INSLM for inquiry and report.

PARLIAMENTARY COMMITTEES

We note that parliamentary committees, in undertaking inquiries into anti-terrorism and amendments to intelligence legislation are, in and of themselves, inadequate to appropriately assess the voluminous content, and contentious legal issues encountered within anti-terrorism laws. This is due to the lack of specialist expertise in anti-terrorism law, lack of time and the fact that they do not exist independent of the Parliament.

We acknowledge the limitations of the current inquiry, in that the Bill was referred for inquiry and report on 16 July 2014, with reporting due by 6 August 2014. Such a short time period is inadequate to sufficiently address the many legal issues which have potential to significantly undermine individuals' rights and the rule of law in Australia.

Given that the *National Security Legislation Amendment Bill (No. 1) 2014* is intended as 'just the first step in the Government's commitment to maintaining and, where necessary, improving Australia's already strong national security laws,'¹² it is deeply concerning as to what further steps may be taken without adequate scrutiny or accountability.



REFERENCES

¹ Australian Lawyers Alliance (2012) <www.lawyersalliance.com.au>

² Parliament of Australia, Parliamentary Joint Committee on Intelligence and Security, Report of Potential Reforms to National Security Legislation, (June 2013) at vii. Accessed at [http://www.aph.gov.au/Parliamentary Business/Committees/House of Representatives Committees?url=pjcis/nsl2012/report.htm](http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=pjcis/nsl2012/report.htm)

³ See clause 35P(2), *National Security Legislation Amendment Bill 2014* (No. 1) Cth

⁴ Clause 35P(3)

⁵ 'ASIO raids office of lawyer Bernard Collaery over East Timor spy claim,' *Sydney Morning Herald*, December 3 2013. Accessed at <http://www.smh.com.au/federal-politics/political-news/asio-raids-office-of-lawyer-bernard-collaery-over-east-timor-spy-claim-20131203-2yoxq.html>

⁶ 'ASIO raids office of lawyer Bernard Collaery over East Timor spy claim,' *Sydney Morning Herald*, December 3 2013. Accessed at <http://www.smh.com.au/federal-politics/political-news/asio-raids-office-of-lawyer-bernard-collaery-over-east-timor-spy-claim-20131203-2yoxq.html>

⁷ 'Australia ordered to cease spying on East Timor by International Court of Justice,' 4 March 2014. Accessed at <http://www.smh.com.au/federal-politics/political-news/australia-ordered-to-cesspying-on-east-timor-by-international-court-of-justice-20140304-hvfya.html#ixzz39ZZDlrin>

⁸ 'Australia ordered to cease spying on East Timor by International Court of Justice,' 4 March 2014. Accessed at <http://www.smh.com.au/federal-politics/political-news/australia-ordered-to-cesspying-on-east-timor-by-international-court-of-justice-20140304-hvfya.html#ixzz39ZZDlrin>

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http://www.aph.gov.au/~media/wopapub/senate/committee/legcon_ctte/completed_inquiries/2008_10/terrorism/report/c01_pdf.ashx

¹⁰ Senator George Brandis, National Security Legislation Amendment Bill (No. 1) 2014 (Cth), Second reading speech, Wednesday 16 July 2014. Accessed at [http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=BillId_Phrase%3As969%20Title%3A%22second%20reading%22%20Content%3A%22I%20move%22%7C%22and%20move%22%20Content%3A%22be%20now%20read%20a%20second%20time%22%20\(Dataset%3Ahansard%20%7C%20Dataset%3Ahansards\);rec=0](http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=BillId_Phrase%3As969%20Title%3A%22second%20reading%22%20Content%3A%22I%20move%22%7C%22and%20move%22%20Content%3A%22be%20now%20read%20a%20second%20time%22%20(Dataset%3Ahansard%20%7C%20Dataset%3Ahansards);rec=0)

¹¹ Professor Clive Walker, Submission to the Senate Standing Committee on Legal and Constitutional Affairs, Inquiry into Independent National Security Legislation Monitor Repeal Bill, at 1. Accessed at <http://www.aph.gov.au/DocumentStore.ashx?id=dea7b015-5a0e-4330-bb9f-7527633909a0&subId=252401>

¹² Senator Brandis, above n 10.