AUSTRALIAN SENATE

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

Dear Committee Members,

I have a number of concerns with the National Security Legislation Amendment Bill (No. 1) 2014. I would appreciate the Committee addressing these concerns in its considerations and recommendations.

The Bill restricts the liberties of Australians. It adds to the powers of intelligence agencies and reduces restrictions on them. It creates new offences and increases penalties applicable to all Australians.

The Government has not outlined benefits to outweigh these costs. Notwithstanding the secrecy surrounding national security operations, the Government ought to provide credible examples of harmful activities that only the Bill can discourage. It would be irresponsible to simply rely on general assertions from insiders.

The restrictions on liberties in this Bill come on top of restrictions built up over the past dozen years. The one-way nature of changes to national security legislation suggests that this law is biased and not in keeping with changes in circumstances. For instance, the case for restrictions on liberties would seem weaker now compared to the period following September 11 and whilst large contingents of the Australian Defence Force were stationed in Iraq and Afghanistan.

To counteract this ratchet effect, sunset clauses should be attached to any provisions that are to proceed in this Bill.

The Bill represents a complex amendment to already complex national security law. As such, it is imperative that the Bill is reviewed by experts such as the Independent National Security Legislation Monitor. Such a review would require the Government to appoint or re-appoint a Monitor, and to request a review of the Bill. Consistent with other reviews by the Monitor, such a review should consider whether the Bill contains appropriate safeguards for protecting the rights of individuals, is proportionate to any threat of terrorism or threat to national security or both, and is necessary.

I outline some more specific concerns in the attachment.

Yours sincerely

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ATTACHMENT

Returning foreign fighters

The Government has promoted its Bill by raising concerns about returning fighters pursuing violent acts in Australia. This argument has included references to:

- the history of Australians fighting with the Taliban in Afghanistan then planning terrorist acts in Australia upon their return;
- Australians fighting in current conflicts in Iraq and Syria; and
- people who participate in conflict becoming desensitised to atrocity.

There seem to be some problems and gaps with this argument.

Firstly, the Bill does not directly relate to the issue of returning fighters.

Secondly, existing laws were sufficient to thwart the terrorist acts planned by returning Taliban fighters.

Thirdly, it is not clear that people returning from fighting in Iraq and Syria would have the same attitude to Australia as returning Taliban fighters. Taliban fighters may be significantly more antagonistic to Australia given the fact that the Australian Government and the Australian Defence Force were in direct conflict with it. A case has not been made in relation to Australians fighting in Iraq and Syria.

Finally, suggestions that participating in conflict causes people to become desensitised to atrocity seem overly simplistic. We have long required Australian Defence Force personnel to participate in conflict and do not consider them to be insensitive to atrocity.

ASIS function

A defining feature of ASIS, set out in Section 6(4) of the Intelligence Services Act 2001, is that the organisation must not undertake activities that involve paramilitary activities, violence against the person or the use of weapons by ASIS agents.

There are only limited exceptions to the prohibition on weapons use:

- ASIS staff are authorised to use a weapon when overseas to protect ASIS staff or someone cooperating with ASIS; and
- ASIS staff are authorised to use a weapon to train other ASIS staff.

However, the Bill seeks to authorise ASIS to cooperate with foreign authorities in undertaking training in the use of weapons. No definition is provided of foreign authorities.

The Bill also seeks to authorise ASIS to provide weapons and weapons training, for self-defence purposes, to an officer of a foreign authority with which ASIS is cooperating.

The proposals would seem to fundamentally change the nature of ASIS. For example, while ASIS agents would still be prevented from undertaking paramilitary activities, the provisions may facilitate ASIS agents in providing weapons and training to underpin those paramilitary activities. Covert support for paramilitary activities does not have a good track record and should not be facilitated.

Given Section 6(4), ASIS should have no particular expertise in weapons and weapons training anyway.

The submission of the Attorney-General's Department suggests that the purpose of the provision may be to facilitate weapons training to agencies of the United States, United Kingdom, Canada and New Zealand. As such, if provisions regarding weapons training were to proceed, they should be limited so that training may only be provided to agencies from these countries.

Disclosure

The Bill seeks to introduce an offence of disclosing information relating to an ASIO 'special intelligence operation'.

If someone comes to learn about an ASIO operation, particularly if they did not go out of their way to learn about the operation, it is an unjust burden to prohibit that person from communicating what they know. Keeping secrets is ASIO's job – it is not the job of everyday Australians.

Communicating information about ASIO may even represent a public service where ASIO practices are questionable.

Concerns about this new offence are not alleviated by the continuing operation of the Public Interest Disclosure Act 2013 and the Inspector-General of Intelligence and Security Act 1986. These Acts only authorise very specific disclosures of intelligence information — namely disclosures:

- of a limited range of intelligence information (i.e. not including information on intelligence policy or expenditure),
- by public officials,
- to the intelligence agency in question or the Inspector-General of Intelligence and Security.

The prohibition on disclosure seems particularly broad. For instance, the offence would cover disclosures of information originally disclosed by the Government or ASIO leadership, and disclosures unrelated to the identities of ASIO agents or current operations. Moreover, there appears to be little to prevent the bulk of ASIO operations being classed as special intelligence operations. The Committee could investigate whether there is any precedent in liberal democracies for this broad approach.

The Bill is based on provisions in the Crimes Act 1914. However the provisions in the Crimes Act 1914 include an exception for disclosures relating to misconduct and corruption. The Committee could consider whether a similar exception could be included in the Bill.

Regarding the setting of penalties for disclosure, the Committee could consider whether penalties should reflect the consequences of disclosure for the Australian public (rather than simply the Australian Government). Consequences can be both adverse and advantageous, and can range from life-threatening to merely embarrassing.

The Committee could consider the relativities between penalties for people unassociated with ASIO, and penalties for people associated with ASIO. Arguably the former penalties should be markedly lower than the latter penalties. After all, it is the role of ASIO to serve the public, not the role of the public to serve ASIO.

Computer

The Bill amends the definition of a computer so that a warrant authorising ASIO to access data from a particular computer serves to authorise ASIO to access data from one or more computers, one or more computer systems, and one or more computer networks. This represents an unnecessary abuse of language. The Committee could consider addressing network issues by further amending the warrant provisions, rather than by amending the definition of a computer. If the definition of computer needed to be changed, consideration could be given to amending the amendment so that only 'local' networks were captured.

The Bill also authorises ASIO to make additions, deletions or changes to communications in transit and to third party computers, in order to access data in a target computer. ASIO would be given this power even if less-intrusive methods for accessing the data had not been exhausted. A very solid justification for this should be required.

The Committee could also consider whether deletions represent an unjust acquisition of property, and whether alterations to communications in transit could serve to misrepresent a person.