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LAWYERS
FOR
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Committee Secretary
Senate Finance and Public Administration Committees
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Dear Committee Secretary

Inquiry into the Intelligence Services Amendment (Enhanced Parliamentary Oversight of Intelligence Agencies) Bill 2018

Australian Lawyers for Human Rights (**ALHR**) is grateful for the opportunity to provide this submission in relation to the Committee's current Inquiry into ('**the Bill**').

We refer to the submissions by The Hon Margaret Stone, Inspector-General of Intelligence and Security and by Liberty Victoria¹, and to the Second Reading Speech by Senator Patrick².

1. Summary

We support the general concept that oversight of intelligence matters should be maximised, and therefore:

- we support the removal of limitations on matters that can be considered by the Parliamentary Joint Committee on Intelligence and Security (PJCIS or 'the Committee');
- we do not agree that court oversight should be excluded in relation to any exercise of Ministerial function (proposed section 29A(3)); and
- we support the submission by the IGIS that mandatory functions should not be imposed on the office of the IGIS because of the fundamental concept that the IGIS must both act independently and be seen to be acting independently.

2. ALHR's Concerns

2.1 Pursuant to the principle of legality, Australian legislation and judicial decisions should adhere to international human rights law and standards, unless legislation contains clear and unambiguous

¹ https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Finance_and_Public_Administration/IntelligenceServices/Submissions

² *Hansard*, Tuesday, 14 August 2018, p 43.

language otherwise. Furthermore, the Australian parliament should properly abide by its binding obligations to the international community in accordance with the seven core international human rights treaties and conventions that it has signed and ratified, according to the principle of good faith.

- 2.2 ALHR endorses the views of the Parliamentary Joint Committee on Human Rights (PJCHR) expressed in Guidance Note 1 of December 2014³ as to the nature of Australia's human, civil and political rights obligations, and agree that the inclusion of human rights 'safeguards' in Commonwealth legislation is directly relevant to Australia's compliance with those obligations.
- 2.3 Australia is a contracting party to the ICCPR which was signed by the Australian government on 18 December 1972 and ratified on 13 August 1980. Pursuant to Article 26 of the 1969 Vienna Convention on the Law of Treaties, Australia is obliged to the international community to implement, uphold, protect and respect all of the rights contained in the ICCPR.
- 2.4 Generally, behaviour should not be protected by Australian law where that behaviour itself infringes other human rights. There is no hierarchy of human rights – they are all interrelated, interdependent and indivisible. Where protection is desired for particular behaviour it will be relevant to what extent that behaviour reflects respect for the rights of others.
- 2.5 It is only through holding all behaviours up to the standard of international human rights that one can help improve and reform harmful and discriminatory practices.
- 2.6 Legislation should represent an **appropriate and proportionate response** to the problems and harms being dealt with by the legislation, and adherence to international human rights law and standards is an important indicator of proportionality.⁴
- 2.7 We note that the Inspector-General comments at page 3 of her submission that 'The overarching purpose of the IGIS's activities is to ensure that each intelligence agency acts legally and with propriety, complies with ministerial guidelines and directives, and respects human rights.'
- 2.8 We agree with Senator Patrick that 'While Australia's intelligence community has grown rapidly over the past two decades, the mechanisms of accountability and review overseeing those agencies have received much less attention, resources and authority' and that existing restrictions upon PJCIS oversight should generally be removed.⁵

3. What the Bill would do

- 3.1 Proposed subsections 29A(6) and (7) of the Bill would require the Inspector-General to conduct a review of a Ministerial certificate referred to her by the PJCIS within 30 days of that referral. We support the submission by the IGIS that the PJCIS should instead be empowered to request IGIS to 'conduct an inquiry into the legality and propriety of particular operational activities of the National Intelligence Community agencies, and to provide a report to the PJCIS, Prime Minister and the responsible Minister.'
- 3.2 Proposed subsection 29A(3) would exempt decisions of the Minister from review by the courts. We agree with Liberty Victoria that such an exemption is "unnecessarily and unjustifiably

³ Commonwealth of Australia, Parliamentary Joint Committee on Human Rights, *Guidance Note 1: Drafting Statements of Compatibility*, December 2014, available at <http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Guidance_Notes_and_Resources>, see also previous *Practice Note 1* which was replaced by the Guidance Note, available at <<https://www.humanrights.gov.au/parliamentary-joint-committee-human-rights>>.

⁴ See generally Law Council of Australia, "Anti-Terrorism Reform Project" October 2013, <<http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/Oct%202013%20Update%20-%20Anti-Terrorism%20Reform%20Project.pdf>> .

⁵ op cit.

contrary to the rule of law” which requires that government decisions must be open to judicial review. To the extent that relevant decisions of the Minister are exempted from review, the Bill fails to provide any adequate check on the exercise of executive power.

- 3.3 We support the proposed replacement section 29(3) in so far as it removes many existing restrictions on matters which can be considered by PJCS. However we do not agree with the retention of two existing paragraphs which will be renumbered by the Bill to read as follows:
- “(a) reviewing information provided by, or by an agency of, a foreign government where that government does not consent to the disclosure of the information; or
 - (b) conducting inquiries into individual complaints about the activities of ASIO, ASIS, AGO, DIO, ASD, ONA, AFP or the Immigration and Border Protection Department.”

In the interests of transparency and oversight we do not support these restrictions. Surely it should be for the Committee, like the Inspector-General, to conduct such inquiries as it thinks fit, and to make such decisions about information provided by foreign governments or particular complaints as it thinks appropriate.

- 3.4 We note that whether or not the proposed replacement section 29(3) of the Bill is retained, or section 29(3) is deleted entirely, in either case the existing section 29(4) will become irrelevant and should also be removed.

4. Conclusion

- 4.1 Given that Australians are alone amongst Western democracies in not having a federal Human Rights Act to expressly legally protect their rights, all oversight of the extensive intelligence powers that have been expanded over recent years is to be encouraged. In general terms we support the Bill, subject to the points raised above.

If you would like to discuss any aspect of this submission, please email me

Yours faithfully

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President
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ALHR

ALHR was established in 1993 and is a national association of Australian solicitors, barristers, academics, judicial officers and law students who practise and promote international human rights law in Australia. ALHR has active and engaged National, State and Territory committees and specialist thematic committees. Through advocacy, media engagement, education, networking, research and training, ALHR promotes, practices and protects universally accepted standards of human rights throughout Australia and overseas.

Any information provided in this submission is not intended to constitute legal advice to be a comprehensive review of all developments in the law and practice or to cover all aspects of the matters referred to. Readers should obtain their own legal advice before applying any information provided in this document to specific issues or situations.