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Committee Secretary
Parliamentary Joint Committee on Intelligence and Security

by email to pjcis@aph.gov.au

Dear ,

Thankyou for your letter of 6 March 2018 inviting me to make a further short submission to the Committee in respect of its inquiry into proposed amendments to various Acts as part of the establishment of the Ministry of Home Affairs.

Please convey this letter to the Committee as my submission.

I respectfully request a short extension of the time provided for lodgment of my submission of about one hour (ie that my submission be received by 1.10 pm on 13 March 2018).

I note that I am an Australian lawyer in private practice. I make this submission on my own account as a matter of public interest. The opinions expressed are my own. I am available to appear before the Committee in person if required.

This submission is in a form suitable to be published on the internet.

The Home Affairs and Integrity Agencies Legislation Amendment Bill 2017

I thank the Committee for the work done to produce its Report of 26 February 2018 and its recommendations 1, 2 and 3 in that Report, which I apprehend are intended to reduce the possibility and appearance that the independence of the Inspector-General of Intelligence and Security could be impaired or the Inspector-General be directed to carry out political investigations and to more clearly secure the role of the Attorney-General in respect of the Independent National Security Monitor and the authorising of surveillance warrants under the ASIO and telecommunications interception legislation.

However, I submit that the creation of this super ministry at all is a grave error inimical to our democracy.

This super ministry gives one Minister unprecedented powers and effectively unreviewable discretions over the use of police, border control, citizenship, 'multicultural affairs', critical transport infrastructure and multiple intelligence agencies including human intelligence, cyber information, financial information and signals intelligence, particularly the use of listening devices (which modern technology makes readily available in every home and business in Australia).

I urge the Committee to recommend against passage of the Bill in any form as giving effect to Phase 2 of the implementation of the Home Affairs portfolio.

The Bill and the Ministerial arrangement will have the effect of

- concentrating the powers reposed in one person
- increasing the degree of secrecy attached to the exercise of the powers reposed and reducing the opportunity for checks and scrutiny, including between agencies and by other Ministers
- accelerating the militaristic reorganisation of public services; and
- chilling public debate on issues within the Minister's portfolio.

Additional safeguards

While I do not believe that any safeguard could make this super ministry reasonably safe for our democracy, if it does proceed I ask the Committee to recommend amendments to the Bill that would provide some measure of protection. I submit that these should include:

- a limitation on the term for which a Minister or assistant Minister may serve in the portfolio as not more than 15 months and that a Minister or assistant Minister may not serve as Attorney-General or in the Attorney-General's portfolio within a period of four years before or after serving in the Home Affairs portfolio
- a limitation on the term for which a Department Secretary may serve as not more than 3 years
- in accordance with its extraordinary concentration of powers, appointment of the Minister, assistant Ministers and Department Secretary be subject to an extraordinary process requiring confirmation by a two thirds majority of the House of Representatives and the Senate following public confirmation hearings in which not less than 20 minutes questioning time is allocated to each Opposition or cross-bench member wishing to ask questions of each prospective Minister, assistant Minister and Department Secretary
- guaranteeing an appropriate budget allocation for the Inspector-General of Intelligence and Security, the Independent National Security Legislation Monitor and the Committee to ensure their oversight roles cannot be limited by being starved of sufficient funds and resources to conduct their work.

The proposed additional amendments

The proposed additional amendments should be limited so as to enhance the Attorney-General's oversight role and better separate the oversight decisions from the day to day functions of the super ministry.

For example,

- the Attorney-General should continue to be the certifying authority under s 38(2) of the Australian Security Intelligence Organisation Act 1979 to decide whether notice of an adverse security assessment of a person should be withheld from that person (viz the proposed amendments to ss 38A and 39B Administrative Appeals Tribunal Act 1975 should not proceed, s 43AAA of that Act should be amended to refer to both the Minister for Home Affairs and the Attorney-General).
- the Attorney-General should continue to be the minister empowered to give notices to the minister responsible for social security payments under the Social Security Act 1991, family assistance payments under section 57 GJ of the A New Tax System (Family Assistance) Act 1999 and the Paid Parental Leave Act 2010, to better protect against the appearance or reality that cessation or diversion of social security payments, family assistance or parental leave payments could be used (or threatened) to place pressure on persons to cooperate with operations in any of the Home Affairs portfolio agencies or responsibilities, to punish persons who did not so cooperate or otherwise for political purposes.

The Attorney-General should continue to have the primary responsibility for proposing and issuing legislative instruments determining that offences against Australian or foreign laws are "national security offences" (eg the proposed amendment to s 6A Australian Citizenship Act 2007 should not be made). While the advice of the Minister of Home Affairs would be a valuable contribution to this decision, the legislative responsibility should rest with the Attorney-General as an important check and oversight on the day to day functioning of the super ministry. The proposed amendments allowing the Minister for Home Affairs to issue such legislative instruments risk unintended 'mission creep' and expansion of the reach of the Minister's powers across a range of activities and areas otherwise ordinarily outside his or her portfolio.

Further consideration should be given to whether and why it is desirable that the Minister for Home Affairs should have a rule-making function for regulations within areas of responsibility of the Australian Federal Police (for example, the Criminal Code Act 1995, the Crimes (Biological Weapons) Act 1976, the Crimes (Currency) Act 1981, the Crimes (Traffic in Narcotic Drugs and Psychotropic Substances) Act 1990 etc). That is, given the substantial consolidation of the powers to undertake the day to day operations of a broad range of policing and intelligence functions, it may better secure Australian democracy to now separate the operational and legislative functions of the relevant ministerial offices. This consideration is particularly urgent with respect to the Criminal Code Act 1995 and the Criminal Code thereunder.

In my submission, it is most undesirable that the Minister for Home Affairs should have the power to be a rule-maker for the Criminal Code Act, which should be a key responsibility of the Attorney-General as Australia's First Law Officer. This function should remain with the Attorney-General to provide better coherence of legislative measures, especially coherence of the criminal law, and proper restraint on and oversight of the actions and policies of the Minister for Home Affairs.

Further, if the Minister for Home Affairs is now to assume the functions and powers of the Attorney-General for authorising applications for detention and control orders, a new regime facilitating oversight by the Attorney-General should be introduced requiring, at least, a monthly report by the Minister to the Attorney-General of the occasions on which those powers have been exercised and power for the Attorney-General to intervene in proceedings in which the orders are sought.

The Minister responsible for the Proceeds of Crime Act 1978 and the Proceeds of Crime Act 2002 should be the Attorney-General. It is not necessary or desirable that the minister with responsibility for police and intelligence operations to the broad extent of the new super ministry also have powers in respect of the confiscation and disposal of property subject to a forfeiture order. Separation of these functions will give better oversight and appropriate appearance of independence of the asset forfeiture regime from the policing function.

It is a reasonable arrangement, given the stated policy intention of the Government, that the Minister for Home Affairs be the responsible minister under Part III of the Public Order (Protection Of Persons And Property) Act 1971. However, it is not reasonable, and it is inimical to our democracy, that the Minister also have responsibility under Part I of that Act (over assembly of citizens generally) and under Part II in respect of investigative tribunals, authorities or persons having power under a law of the Commonwealth to require the production of documents or the answering of questions. These functions should be expressly given to the Attorney-General to administer. To the extent that these functions require the day to day conduct of operations by the Australian Federal Police, given that the conduct of the AFP should be and be seen to be independent of political influence in any event, any necessary ministerial authority should be granted by revocable delegation by the Attorney-General to the Minister and subject to continuing oversight by the Attorney-General.

Further consideration needs to be given to the introduction of appropriate oversight measures for the use of the Home Affairs Minister's powers under the Telecommunications Act 1997 in light of the consolidation of diverse powers in the super ministry and the proposed further amendments to that Act under the Telecommunications and Other Legislation Amendment Act 2017. Consideration should be given to establishing an independent office to review and report on ministerial actions under this Act. Most importantly, the Attorney-General should be the minister who may obtain information from carriers, carriage

service providers and intermediaries and not, directly, the Minister for Home Affairs.

For some of the proposed amendments, it is unclear whether immediate change to portfolio responsibilities is intended or whether they simply allow for even greater accretion of power by the Home Affairs Minister in the future. The proposed changes to the Crimes Act 1914 and the Surveillance Devices Act 2004 suggest that it is desirable that there be amendments to the Judiciary Act 1903, Administrative Appeals Tribunal Act 1975 and the Law Enforcement Integrity Commissioner Act 2006, for example, to clarify that the only Minister responsible for the administration of those Acts may be the Attorney-General and that the Attorney-General may not at the same time be the Minister for Home Affairs or an assistant Minister for Home Affairs.

The short time-frame for review of these important changes does not allow for full consideration of the effects of the proposals or to truly understand their significance in the scheme of all of the related proposals for amendment.

I ask that the Committee also recommend further review of the responsibilities of the Home Affairs portfolio and opportunities for better oversight and transparency of the functions consolidated in that ministry. In particular, I submit that the Australian Law Reform Commission should be asked to review and report on the powers, structure and operation of the new ministry and the potential for the appearance or actuality of the abuse of ministerial or bureaucratic powers and additional means to secure proper review and transparency in the functioning of the ministry.

yours faithfully,

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