

**Castan Centre for Human Rights Law
Monash University**

**Supplementary Submission to the Senate Legal and
Constitutional Affairs Committee**

***Inquiry into the Intelligence Services Legislation
Amendment Bill 2011***

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This supplementary submission concerns the Intelligence Services Legislation Amendment Bill 2011 (Cth) (hereafter, the Bill). It briefly addresses the points made in the Attorney-General's Department's supplementary submission.

1. Definition of foreign intelligence under the ASIO Act [Item 3]

The Attorney-General's Department's supplementary submission does not seem to make any additional points in relation to this matter that are not made already in the EM to the Bill. It does not address the particular concern expressed in the Castan Centre's submission that the non-state threats to which the Department refers would typically be captured by the existing definition of "foreign intelligence", which refers to foreign political organisations. Nothing either in the EM or in the Department's supplementary submission explains what threat is posed to Australia by foreign individuals or organisations that are *not* foreign political organisations.

2. Foreign intelligence warrants under the ASIO Act [Item 7]

The Attorney-General's Department's supplementary submission does not address the particular concerns raised by the Castan Centre's submission, either about the potential the amendment has to open up spying on a wider range of Australians, such as those involved in non-political foreign organisations whose activities might have implications for Australia's foreign relations or economic wellbeing (of which possible examples might be the Wikileaks organisation,¹ or foreign firms competing with Australian firms, respectively).

The Department makes the point that ASIO's activities are confined to Australia. That is true but does not address the concerns raised in the Castan Centre submission. Australians who are located overseas from time to time correspond with people and organisations in

¹ The Castan Centre submission mentioned the possibility that these amendments could expose those who are involved with Wikileaks – including Australians – to ASIO's intelligence gathering. This possibility has been reiterated in the previous section of this supplementary submission. This use of Wikileaks as an example is not based on any knowledge of the motivations or processes of the government or Department. Nor does either the original submission or this supplementary submission impute such a motivation. It is the case, rather, that Wikileaks is a very obvious example of a foreign but non-political organisation whose activities have the potential to affect Australia's foreign relations. (It was, in fact, the first such example that occurred to the author of the Castan Centre submission, within thirty seconds or so of him turning his mind to the question of examples.)

Australia. That correspondence, which currently would not be subject to interception by ASIO, might become so under these amendments. Also, Australians who work for or with foreign non-political organisations from time to time return to Australia. Currently, while in Australia they would not generally be subject to ASIO spying upon them. Under these amendments, that could well change if by spying on them ASIO could collect intelligence concerning the organisation for which such a person works.

3. Principles that should govern the activities of Australian intelligence services

It is understandably not the role of the Department to defend government policy. The Department's supplementary submission, however, does not seem to articulate a clear principle behind government policy in relation to this particular Bill. This is evident in three ways.

First, the Department does not address the potential these amendments have for involving ASIO directly in economic or industrial espionage. This appears to be a significant change in ASIO's functions, which seems to need justification. If, instead, it is the view of the government that ASIO already has such a function, and the amendments would simply make this more explicit in the legislation, that reasoning should at least be clearly set out.

Second, the Department does not address the point made in the Castan Centre submission that, under these amendments, the threshold that regulates ASIO's scrutiny of Australians who work overseas or are connected to non-political overseas organisations² would be weaker than that which applies to agencies under the *Intelligence Services Act 2001*. That Act requires the relevant Minister to be satisfied of a range of matters before granting authorisation for the collection of intelligence pertaining to an Australian overseas.³ That the person is engaged in activity that would merely affect Australia's foreign relations, or economic wellbeing, is not one of those grounds. Under these amendments, however, ASIO could collect intelligence within Australia that pertains to Australians overseas, or to Australians with connections to non-political foreign organisations, without having to satisfy the same criteria.

² As explained in the Castan Centre submission, and further in section 2 of this supplementary submission.

³ Sections 8, 9.

This lowering of the standards governing the potential for spying by Australia upon Australians is concerning in itself, given that in general a democratic government should interact with its citizenry openly rather than by clandestine means. It also sets a worrying precedent for the future dilution of the standard set out in the *Intelligence Services Act 2001* – and this worry is not purely hypothetical, given the appeal to uniformity made both in the EM for this Bill and the Department’s supplementary submission.

This leads to the third respect in which the Department’s submission fails to articulate a clear policy on the role and limits of intelligence gathering. At pages 1 and 2 the supplementary submission states that, without the amendments, there would be potential gaps in Australia’s intelligence coverage. Undoubtedly that is true. The whole purpose of the regulation of ASIO and like agencies is to limit both the means and the targets of intelligence collection. In particular, both the *Australian Security Intelligence Act 1979* and the *Intelligence Services Act 2001* place limits on the collection of intelligence from or about Australians. *These limits are well-motivated.* The ‘gaps’ are there for a reason. Although these limits of necessity are stated in the dry and technical language of statutes, they express the important principle that the Australian state should not, without good reason, spy upon its own citizens. The amendments threaten the dilution of this principle, by very significantly expanding ASIO’s capacity to collect intelligence about Australians in the ways described in the Castan Centre’s submission, and reiterated in this supplementary submission. The ‘gaps’ that the amendments would remove are aspects – perhaps modest aspects, but aspects nevertheless – of *liberty and democracy.*

4. Immunity provisions in the IS Act and Criminal Code [Items 19 and 26]

The Department, in its supplementary submission, suggests that the function of items 19 and 26 is not to entrench the existing immunity provisions, but rather to guide any future interpretation of their operation.

If the principle in *Saraswati v R*⁴, to which the Department refers, applies, then the amendment would seem simply to be an abundance of caution, as the relevant interpretive principle already provides that a general future enactment will not override a specific existing

⁴ (1991) 100 ALR 193, 204 (per Gaudron J).

statutory immunity. It is still not clear that, as the Department puts it at page 4, the amendments “would ensure that any such limitation [of the immunity] cannot be done inadvertently”, as the application of an interpretive principle will always depend upon the details of the particular legislative provisions being interpreted. The Department is correct, however, when it says at page 4 that the amendments “may operate to affect the question of precedence between overlapping provisions in relevant cases”.