



3 May 2011

Ms Julie Dennett
Committee Secretary
Senate Standing Committees on Legal and Constitutional Affairs
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By email: LegCon.Sen@aph.gov.au

Dear Ms Dennett

INTELLIGENCE SERVICES LEGISLATION AMENDMENT BILL 2011

Thank you for inviting the Law Council to make a submission to the Senate Legal and Constitutional Affairs Committee Inquiry into the *Intelligence Services Legislation Amendment Bill 2011*.

The Law Council has concerns about items 3, 7 and 13 of the Bill as outlined below.

Section 27A of the *Australian Security Intelligence Organisation Act 1979* ("the ASIO Act") currently authorises the Attorney-General to issue a warrant to ASIO (such as a search warrant, computer access warrant or listening device warrant) for the purposes of obtaining "foreign intelligence" where he or she is satisfied that the collection of that foreign intelligence is important in relation to the defence of the Commonwealth or to the conduct of the Commonwealth's international affairs.

Similarly, section 27B of the ASIO Act currently allows the Attorney-General to issue a general authorisation to ASIO to obtain foreign intelligence on a particular matter where he or she is satisfied that the collection of that foreign intelligence is important in relation to the defence of the Commonwealth or to the conduct of the Commonwealth's international affairs.

Foreign intelligence is currently defined in section 4 of the ASIO Act as '*intelligence relating to the capabilities, intentions or activities of a foreign power*'. A 'foreign power' is defined as '*a foreign government, an entity that is directed or controlled by a foreign government or governments, or a foreign political organisation*'.

It is proposed (see item 3 of the Bill) to repeal this definition and substitute a new definition as follows '*foreign intelligence means intelligence about the capabilities, intentions or activities of people or organisations outside Australia*'.

It is further proposed to amend sections 27A and 27B (see items 7 and 13 of the Bill) so that a warrant or authorisation to obtain foreign intelligence is available where the

Attorney-General is satisfied that its collection is “*in the interests of Australia’s national security, Australia’s foreign relations or Australia’s national economic well-being*”.

The Law Council opposed similar amendments made to the *Telecommunications (Interception and Access) Act* last year. For the same reasons, the Law Council does not support the amendments proposed in this Bill.

The Law Council submits that the proposed amendments to the definition of “foreign intelligence”, coupled with the further proposed amendment to the test in sections 27A and 27B, will mean that search warrants, computer access warrants and surveillance and listening device warrants are available to ASIO in a very broad range of circumstances. The proposed changes will almost render meaningless the threshold test that must be met by ASIO in order to obtain a warrant or authorisation to collect intelligence under 27A and 27B. A warrant or authorisation will be able to be obtained to gather information about the activities of *any* person or group outside Australia whenever those activities are considered to be somehow relevant to Australia’s national security, Australia’s foreign relations or Australia’s national economic well-being.

Even if it is accepted that the current definition and test need revision in light of the changing nature of threats to Australia, it does not follow that the new definition and test must necessarily be reframed in such broad terms.

The new definition and test will afford the Minister and the agency almost unfettered discretion to determine when and how ASIO’s powers may be used to gather information about people’s activities, communications and relationships abroad.

The threshold test for obtaining a warrant in relation to domestic matters is significantly more stringent by comparison. Before issuing a search warrant under section 25 of the ASIO Act or a computer access warrant under section 25A, the Minister must be satisfied that there are reasonable grounds to believe that it “*will substantially assist the collection of intelligence in respect of a matter that is important in relation to security.*”

Security is defined in section 4 of the Act as:

“(a) the protection of, and of the people of, the Commonwealth and the several States and Territories from:

- (i) espionage;*
- (ii) sabotage;*
- (iii) politically motivated violence;*
- (iv) promotion of communal violence;*
- (v) attacks on Australia’s defence system; or*
- (vi) acts of foreign interference;*

whether directed from, or committed within, Australia or not; and

(aa) the protection of Australia’s territorial and border integrity from serious threats; and

(b) the carrying out of Australia’s responsibilities to any foreign country in relation to a matter mentioned in any of the subparagraphs of paragraph (a) or the matter mentioned in paragraph (aa).

Before issuing a listening device warrant under section 26 of the ASIO Act or a tracking device warrant under 26B the Minister must be satisfied that

“(a) that person (being targeted) is engaged in, or is reasonably suspected by the Director-General of ASIO of being engaged in, or of being likely to engage in, activities prejudicial to security; and

(b) the use by ASIO of the listening device or tracking device will or is likely to assist ASIO in carrying out its function of obtaining intelligence relevant to security.”

These threshold tests are important. If they are framed too broadly they provide no safeguard against the misuse or overuse of ASIO's powers. Further, the effectiveness of the oversight function of the Inspector General of Intelligence and Security is seriously undermined because, ultimately, the ASIO Act provides the framework against which that Office assess the lawfulness and appropriateness of ASIO's activities.

For these reasons, the Law Council submits that the Committee should recommend that the amendments proposed by items 3, 7 and 13 be removed from the Bill.

Yours sincerely

Bill Grant
Secretary-General