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

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

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This Submission concerns the Intelligence Services Legislation Amendment Bill 2011 (Cth) (hereafter, the Bill).

The submission addresses two aspects of Schedule 1 of the Bill. It expresses concern about the expansionary potential of items 3 and 7, which would increase the scope of ASIO's powers in respect of the collection of foreign intelligence. And it notes a potential constitutional complication that arises in respect of items 19 and 26.

1. Items 3 and 7

Item 3 would alter the definition of "foreign intelligence" in the *Australian Security Intelligence Organisation Act 1979* (Cth). Currently, in that act "foreign intelligence" means

intelligence relating to the capabilities, intentions or activities of

(a) a foreign government;

(b) an entity that is directed or controlled by a foreign government or governments; or

(c) a foreign political organisation.¹

Item 3 would redefine "foreign intelligence" to mean

intelligence about the capabilities, intentions or activities of people or organisations outside Australia.

The Explanatory Memorandum to the Bill states that "The amended definition will reflect the changing nature of threats to Australia, since activities undertaken by non-State actors, whether individually or as a group, can also threaten Australia's national interest."²

Item 7 would expand the grounds on which the Attorney-General may issue an ASIO special powers warrant in respect of foreign intelligence. The current grounds are

¹ Section 4.

² At 4.

that collecting the foreign intelligence in question be important in relation to the defence of the Commonwealth or to the conduct of the Commonwealth's international affairs.³

The new grounds would be

that collecting the foreign intelligence in question be in the interests of Australia's national security, Australia's foreign relations or Australia's national economic well-being.

The Explanatory Memorandum to the Bill states that "The new conditions [governing the issuing of foreign intelligence special powers warrants] recognise the broader nature of the contemporary threat environment."⁴

This submission does not wish to contest the claims made in the Explanatory Memorandum about the broad and changing nature of contemporary threats to Australian security. It does, however, wish to express concern about the expansionary implications of these amendments. Under the existing law, the collection of foreign intelligence is confined to the collection of intelligence concerning the activities of foreign governments, organisations that they control, and foreign political organisations, for the purposes of the defence of Australia or the conduct of Australia's international affairs. The amendments would permit ASIO to investigate a far wider range of individuals and organisations, even where Australia's defence interests and international relations are not at stake.

By referring to the potential threats posed by non-state actors, the Explanatory Memorandum may appear to suggest that the current foreign intelligence provisions are inadequate in respect of investigating the activities of such actors. However, most non-state organisations that threaten the security of Australia would be captured by the existing notion of "foreign political organisation". And both individuals and organisations that are linked to threats or acts of politically-motivated violence, even if the violence has nothing to do with Australia, would fall under the current definition of security, which includes all offences

³ *Australian Security Intelligence Organisation Act 1979* (Cth) s 27A(1).

⁴ At 5.

against Part 5.3 of the *Criminal Code* (Cth),⁵ meaning that ordinary special powers warrants would be available in respect of them.

The amendments, therefore, appear to be unnecessary in respect of the collection of intelligence pertaining to non-state actors that threaten Australia's security. What they would do, however, is permit ASIO to investigate a range of other individuals and organisations who currently would not be subject to investigation by ASIO.

Thus, for example, the amendments would permit ASIO a much wider scope to investigate the activities of Australians who are overseas, and whose activities do not pose any threat to Australia's security, but perhaps do have implications for Australia's foreign relations or economic interests. This could include Australians involved in non-violent political activities abroad, which while posing no threat to Australia's security, and not involving any foreign political organisations, might nevertheless be seen as having implications for Australia's foreign relations (for example, because they would be perceived adversely by the government of the country in which such activities were taking place). An example of such activities might include the release of secret government information by an Australian living abroad, such as has been the case in respect of Julian Assange and Wikileaks. Currently, information about Wikileaks probably would not constitute foreign intelligence – because Wikileaks is (arguably) not a foreign political organisation, and its activities do not threaten Australia's security (as defined in section 4 of the *Australian Security Intelligence Organisation Act 1979* (Cth)). But Wikileaks is an organisation, and Mr Assange is a person, outside Australia, and their activities evidently do have implications for Australia's foreign relations. This example shows how the notion of “person or organisation outside Australia”, combined with the notion of “Australia's foreign relations”, very considerably expands the scope of ASIO's potential activities.

Another example can be given by combining the notion of “intelligence pertaining to organisations outside Australia” with the notion of “Australia's national economic well-being”. This suggests that the amendments would permit ASIO to engage in certain forms of

⁵ *Australian Security Intelligence Organisation Act 1979* (Cth) s 4, definitions of “security”, “politically motivated violence” and “terrorism offences”. Australia's terrorism offences under Part 5.3 of the *Criminal Code* all operate entirely extraterritorially in relation both to individuals and to organisations: *Criminal Code* (Cth) ss 100.1(1) (definition of “organisation”), 100.1(4), 101.1(2), 101.2(4), 101.4(4), 101.5(4), 101.6(3), 102.9, 103.3.

economic or industrial espionage, including in relation to Australians working for overseas firms that are major rivals to key Australian industries.

The *Intelligence Services Act 2001* (Cth), which deals with a number of agencies which have primary responsibility for collecting overseas intelligence, requires that the Minister having oversight of those agencies be satisfied of a range of matters before granting authorisation for the collection of intelligence pertaining to an Australian overseas.⁶ That the person is engaged in activity that would merely affect Australia's foreign relations, or economic wellbeing, is not one of those grounds. This is further demonstration of the very expansive effect that items 3 and 7 would have in relation to ASIO's intelligence-gathering powers.

Given that, as explained above, the only specific threats identified in the Explanatory Memorandum – namely, non-state actors – are threats in respect of which ASIO already has the power to collect intelligence, should such actors pose a threat to Australian security; and given the obvious undesirability, everything else being equal, of a government spying on its own citizens whether at home or abroad; this submission therefore urges that items 3 and 7 not be enacted unless some more detailed reason can be given as to why ASIO's capabilities need to be expanded in the ways for which these items provide.

2. Items 19 and 26

Each of these provisions, if enacted, would purport to provide that certain immunities conferred upon Australian intelligence agents by Commonwealth law “have effect despite anything in a law of the Commonwealth or of a State or Territory, whether passed or made before or after the commencement of this subsection, unless the law expressly provides otherwise.” That is, each of these provisions purports to entrench those immunities, protecting them from implied repeal.

As far as State and Territory legislation, this is constitutionally unproblematic. Commonwealth legislation operates to exclude the operation of inconsistent State or Territory legislation, under sections 109 and 122 of the *Constitution* respectively.

⁶ Sections 8, 9.

As far as Commonwealth legislation is concerned, however, this is more controversial. While there is scholarly support for the notion that the Commonwealth Parliament enjoys the power to require its own legislation to be amended, if at all, only by express words,⁷ there are contrary opinions. Some commentators take the view that a consequence of the Commonwealth Parliament's plenary legislative power (as stated in section 51 of the *Constitution*, and of course subject to the *Constitution* itself) is that the Parliament *cannot* deprive itself of the power of implied repeal by provisions such as those that items 19 and 26 would introduced into the law.

The Explanatory Memorandum to the Bill, in discussing these items, states that their purpose “is to make express the legislative intent that [each of the immunity-conferring statutory provisions] has broad application and cannot be overridden by other Commonwealth ... laws, unless that law expressly states otherwise”.⁸ The Committee may therefore wish to consider whether that legislative purpose might be achieved even if the correct view is that this form of entrenchment of Commonwealth legislation is not constitutionally permissible – perhaps, for example, by an appropriately-drafted interpretive provision.

⁷ See, for example, Jeffrey Goldsworthy, *Parliamentary Sovereignty: Contemporary Debates* (Cambridge: Cambridge University Press, 2010) 114–15, 182, 195, 200.

⁸ At 7, 9.