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# Counter-Terrorism Legislation Amendment Bill (No. 1) 2014

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## **Parliamentary Joint Committee on Intelligence and Security**

**11 November 2014**

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## Introduction

1. The Law Council of Australia welcomes the opportunity to assist the Parliamentary Joint Committee on Intelligence and Security (the Committee) in its inquiry into the Counter-Terrorism Legislation Amendment Bill (No. 1) 2014 (the Bill).
2. The Law Council acknowledges the critical responsibility of the Australian Parliament to ensure the security of Australia and its people. In this regard, it is vital that our security and law enforcement agencies have appropriate powers to detect, prevent, and prosecute terrorist activities to protect the Australian community. Such powers must, however, be a necessary and proportionate response to potential threats and not unduly impinge on the values and freedoms on which our democracy is founded – and which Australians rightly expect Parliament to protect at the same time.
3. The Bill is directed toward assisting the Australian Federal Police (AFP) to better monitor Australians who provide support for, or otherwise facilitate, a terrorist act or hostile activity in a foreign country. The Bill also enables the Australian Security and Intelligence Service (ASIS) to assist the Australian Defence Force (ADF) in its deployment to Iraq.<sup>1</sup> However, the Law Council considers that a number of aspects of the Bill are not necessary and proportionate to achieving these legitimate objectives.
4. The Law Council recommends that certain provisions of the Bill not be passed. In addition, the Law Council makes a number of recommendations relating to improving the Bill's safeguards if it is to proceed.

## Summary of recommendations

### **PJCIS review of changes to terrorist organisation listings**

5. **Recommendation:** The Parliamentary Joint Committee on Intelligence and Security review of changes to terrorist organisation listings is supported.

### **Expanding the grounds for which control orders can be obtained**

6. **Recommendations:**
  - (a) The proposed extended grounds for the issuing of control orders should not be progressed.
  - (b) If the grounds for issuing control orders are to be extended, the Law Council recommends that:
    - (i) the Bill be amended to clarify the activities that would be covered by the terms 'supports' and 'facilitates'; and
    - (ii) proposed subparagraph 104.4(1)(c)(vi) should be amended to require that the person has provided support for or otherwise facilitated a terrorist act.

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<sup>1</sup> Explanatory Memorandum to the Bill, p. 2.

## Amendments to the way a control order can be obtained

### 7. Recommendations:

- (a) The proposed reduction in the information required to be provided to the Attorney-General in relation to an interim control order request should not be pursued. If legislated, the Law Council recommends that the AFP should be also required to provide to the Attorney-General a summary of the evidence (if any) that may suggest that a control order should *not* be made.
- (b) Amendments to the current control order regime which would remove the requirement for an AFP member and the issuing court to consider each of the obligations, prohibitions or restrictions on a person should be removed from the Bill.
- (c) The extension from 4 hours to 12 hours for material to be provided to the Attorney-General where a request for an urgent interim control order has been made to an issuing court should be reduced to a shorter period, such as an additional 2 hours.

## Intelligence Services Act 2001 (Cth) (ISA) amendments

### 8. Recommendations:

- (a) The ISA be amended to specifically prohibit torture, in accordance with Australia's obligations under the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*.<sup>2</sup>
- (b) The new class authorisation scheme in the ISA that relates to ASIS's assistance to ASIO in support of its functions should be repealed. If this is not accepted by the Committee, the Law Council recommends that:
  - (i) the *Independent National Security Legislation Monitor Act 2010* (Cth) be amended to require the Independent National Security Legislation Monitor to review and report on the operation of the 'class of Australian persons' provisions, and
  - (ii) the ISA be amended to include the types of permissible classes of Australian persons to which a class authorisation may apply. Such classes should be carefully and narrowly defined.
- (c) The class authorisation scheme proposed in the Bill be removed. If this is not accepted by the Committee, the Law Council recommends that:
  - (i) the *Independent National Security Legislation Monitor Act 2010* (Cth) be amended to require the Independent National Security Legislation Monitor to review and report on the operation of the 'class of Australian persons' provisions established by the Bill.
  - (ii) the Bill be amended to clarify what types of activities could be approved for the purpose of: producing intelligence on one or more

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<sup>2</sup> Australia ratified the Convention on 8 August 1989. The Convention came into force for Australia on 7 September 1989.

members of a class of Australian persons; or that will, or is likely to, have a direct effect on one or more members of a class of Australian persons. While the Bill or Explanatory Memorandum would not need to provide an exhaustive list of examples of what activities could be approved further legislative guidance for the public would be beneficial.

- (iii) the Bill be amended to identify the types of permissible classes of Australian persons to which a class Ministerial authorisation may apply. Such classes should be carefully and narrowly defined. For example, restrictions to members of a listed terrorist organisation under the Criminal Code may be appropriate.
- (iv) the annual budget of the office of the Inspector-General of Security and Intelligence's (the IGIS) be supplemented to the extent required to provide for the new oversight requirements associated with the Bill.

## **Emergency authorisations under the ISA**

### **9. Recommendations:**

- (a) The Bill should be amended to require that an emergency Ministerial authorisation, including an oral emergency Ministerial authorisation, must contain certain matters (similar to the controlled operations scheme oral authorisation scheme) which are then also to be contained in the written record under proposed subsection 9A(5).
- (b) The Bill be amended so that section 9A only applies – whether to a written or oral emergency authorisation – if the ISA agency head and the relevant Minister reasonably believe that each of the following applies:
  - (i) there is an imminent risk to a person's safety, or that security (within the meaning of the ASIO Act) will be seriously prejudiced;
  - (ii) undertaking the activity or series of activities is immediately necessary for the purpose of dealing with that risk;
  - (iii) the circumstances are so serious and the matter is of such urgency that the undertaking of the activity or series of activities is warranted; and
  - (iv) it is not practicable in the circumstances to obtain an authorisation under section 9 before undertaking that activity or series of activities.
- (c) The provisions in the Bill which would enable an ISA agency head to authorise an activity or series of activities in an emergency situation (such as the proposed new section 9A) should be removed from the Bill.
- (d) The Law Council's suggested approach is that section 9A of the ISA could instead be amended to permit other senior cabinet Ministers – such as the Deputy Prime Minister – to be included as alternative chains of authorisation when one of the four primary Ministers (that is, the Prime Minister, the Minister for Defence, the Minister for Foreign Affairs and the Attorney-General) are not able to be contacted.

- (e) If (c) and (d) are not accepted by the Committee, the Bill should be amended to outline the situations that would result in any of the four relevant Ministers – that is, the Prime Minister, the Minister for Foreign Affairs, the Minister for Defence or the Attorney-General – not being readily available or contactable. The types of activities that can be approved in an emergency situation should also be defined in the Bill.
- (f) Section 9C of the Bill enabling the Director-General to agree to an authorisation in an emergency in certain circumstances should be removed. The Law Council's suggested approach would be that another senior cabinet Minister, such as the Prime Minister, Minister for Defence, Minister for Foreign Affairs (other than that which is issuing the emergency Ministerial authorisation) must provide agreement which can include taking into account the advice of ASIO's Director-General of Security.

## PJCIS review of changes to terrorist organisation listings

10. The Law Council supports the proposed amendments to the way the Committee reviews the listing of terrorist organisations as per Schedule 1, Item 1 of the Bill. This seeks to give effect to a prior recommendation made by the Committee in relation to the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* (the Foreign Fighters Act). That is, that the Attorney-General notify the Committee of any proposed regulation to alter the listing of a terrorist organisation by adding or removing a name or alias and that it have the power to determine if it wishes to review any proposed changes to listings.<sup>3</sup>
11. **Recommendation:** The Parliamentary Joint Committee on Intelligence and Security review of changes to terrorist organisation listings is supported.

## Expanding the grounds for which control orders can be obtained

12. Items 6-7 of Schedule 1 of the Bill expand the purposes for which control orders can be obtained. The Bill proposes to extend the grounds on which a control order can be obtained to *preventing* the provision of support for or the facilitation of:
  - a terrorist act; and
  - the engagement in a hostile activity in a foreign country.
13. Items 11-12 of Schedule 1 of the Bill expand the grounds for which a control order can be issued by the Federal Court of Australia, the Family Court of Australia or the Federal Circuit Court of Australia<sup>4</sup> to include circumstances where the court is satisfied, on the balance of probabilities, that:

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<sup>3</sup> Parliamentary Joint Committee on Intelligence and Security, Advisory Report on the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014, Recommendation 8.

<sup>4</sup> Subsection 100.1(1) of the Criminal Code.

- making the order would substantially assist in *preventing* the provision of support for or the facilitation of a terrorist act (emphasis added); or<sup>5</sup>
  - the person has provided support for or otherwise facilitated the engagement in a hostile activity in a foreign country;<sup>6</sup> and
  - the proposed terms of the control order are reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the public from a terrorist act; or for preventing the provision of support for or the facilitation of a terrorist act or for preventing the provision of support for or the facilitation of a the engagement in a hostile activity in a foreign country.<sup>7</sup>
14. The amendments contained in the Bill have the potential to significantly restrict a person's liberty where no criminal conduct may have occurred and where there may be no actual provision of support for or facilitation of a terrorist act.
15. The Explanatory Memorandum notes that these amendments of the Bill:
- reflect the importance of being able to place appropriate controls on all individuals assessed as representing a threat to the security of Australia by not only engaging in terrorism themselves, but also engaging in facilitating or supporting conduct that could result in the commission of a terrorist act.*<sup>8</sup>
16. The Law Council acknowledges that this is a legitimate objective. Legislation may properly restrict human rights to protect national security, or to protect the rights of other citizens, provided that the restrictions meet the requirements of necessity and proportionality.
17. The Office of the High Commissioner for Human Rights has recently stated:
- [A] limitation must be necessary for reaching a legitimate aim, as well as in proportion to the aim and the least intrusive option available. Moreover, the limitation placed on the right (an interference with privacy, for example, for the purposes of protecting national security or the right to life of others) must be shown to have some chance of achieving that goal. The onus is on the authorities seeking to limit the right to show that the limitation is connected to a legitimate aim. Furthermore, any limitation to the right ... must not render the essence of the right meaningless and must be consistent with other human rights, including the prohibition of discrimination. Where the limitation does not meet these criteria, the limitation would be unlawful and/or the interference with the right to privacy would be arbitrary.*<sup>9</sup>
18. These remarks can apply with as much force to the limitation of other rights in the *International Convention on Civil and Political Rights*.<sup>10</sup>

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<sup>5</sup> Proposed subparagraph 104.4(1)(c)(vi) of the Criminal Code.

<sup>6</sup> Proposed subparagraph 104.4(1)(c)(vii) of the Criminal Code.

<sup>7</sup> Proposed paragraph 104.4(1)(d) of the Criminal Code.

<sup>8</sup> Explanatory Memorandum to the Bill, at [88].

<sup>9</sup> Office of the United Nations High Commissioner for Human Rights, *The Right to Privacy in the Digital Age* UN Doc A/HRC/27/37 (2014), [23].

<sup>10</sup> See UNHRC *General Comment 31* (2004) CCPR/C/21/Rev.1/Add. 13, [6]; UNHRC, *General Comment 16* (1988), UNHCR *General Comment 27* (1999) CCPR/C/21/Rev.1/Add.9; UN Doc. HRI/GEN/1/Rev.1; UNHCR *Draft General Comment 35* (2014), CCPR/C/GC/R.35/Rev.3.



19. The Law Council considers that these amendments, which seek to broaden the circumstances under which a control order can be obtained, have not been shown to be necessary, reasonable and proportionate in pursuit of their legitimate objective.
20. Accordingly, the Law Council does not support the expansion of the control order regime as contained in the Bill and recommends that it not be progressed.

### **Expansion unnecessary**

21. The Explanatory Memorandum explains that it is appropriate to expand the control order regime in the manner proposed by the Bill because:

*the provision of support and the facilitation of terrorist acts represent a real threat to the safety and security of Australians because without that support and facilitation, it may be impossible for the intended perpetrator to undertake the terrorist act.*

*...[and]*

*...a person who has actually provided support or facilitated a hostile activity in a foreign country has not only a demonstrated ability but also a demonstrated propensity to engage in conduct in support or facilitation of conduct akin to a terrorist act.<sup>11</sup>*

22. In the Law Council's view, while the support and facilitation of terrorist acts and hostile activity obviously constitutes a real threat to the safety and security of Australians, it is concerned that the Explanatory Memorandum does not explain why individuals who are engaged in such activities should not be simply arrested, charged and prosecuted. The Law Council therefore questions the necessity for these expanded powers, particularly in light of the:

- preparatory terrorism offences currently prescribed by the *Criminal Code Act 1995* (Cth) (Criminal Code);
- recently expanded foreign incursion offences which create offences for entering a foreign country with the intention to engage in hostile activity, or preparing to do so; or entering or remaining in a declared area without a legitimate purpose;
- new 'advocating terrorism' offence;
- recent lowering of the arrest threshold for terrorism offences under the Foreign Fighters Act to reasonable suspicion, rather than belief. This adds to the AFP's powers under Part 1C of the *Crimes Act 1914* (Cth) (the Crimes Act) to detain and question people without charge if they suspect a person may have information relevant to a terrorist investigation;
- recent amendments to ensure that foreign evidence may be more easily adduced under the Foreign Fighters Act; and
- broad investigative and surveillance powers which are also available to support the investigation of possible terrorism offences, including the new delayed notification search warrant scheme.

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<sup>11</sup> Explanatory Memorandum to the Bill, p. 21.



23. The Parliamentary Joint Committee on Human Rights has noted that the:

*control orders regime involves very significant limitations on human rights. Notably, it allows the imposition of a control order on an individual without following the normal criminal law process of arrest, charge, prosecution and determination of guilty beyond a reasonable doubt.*<sup>12</sup>

24. The former Independent National Security Legislation Monitor (INSLM) described control orders as ‘not effective, not appropriate and not necessary’ for persons who have not been convicted of terrorist offences;<sup>13</sup> and noted that police should instead rely on their established powers to take action against suspected criminals through the traditional law enforcement approach of arrest, charge and prosecution. He further commented to this Committee that:

*At the moment the control order provisions require things to be proved which are so close to that which is good enough for a prosecution brief to launch criminal proceedings directed towards a conviction and sentencing that nobody has been able to show me, either during my investigations or since, any practical reason to have these things on the books...*

*I would remind everyone that, before conviction, people will have been investigated, almost certainly arrested and almost certainly remanded in custody following charge. These are steps which have people off the street, if I may call it that, literally and therefore much more effectively than the average control order.*<sup>14</sup>

25. The traditional criminal justice approach of arrest, charge and prosecution offers the community a level of assurance that an individual will be punished after a process which follows established fair trial safeguards. By contrast, the control order regime is inconsistent with the right to be presumed innocent until proven guilty, as well as undermining other key safeguards.<sup>15</sup>

### **Invasive nature of control orders demands limited use (if any)**

26. Control orders have been part of Australian anti-terrorism legislation since December 2005. Currently a control order can be issued by the Federal Court of Australia, the Family Court of Australia or the Federal Circuit Court of Australia<sup>16</sup> (at the request of the AFP) to allow a number of obligations, prohibitions and restrictions to be imposed on a person, for the limited purpose of protecting the public from a terrorist act.<sup>17</sup> For a court to issue a control order it must be satisfied, on the balance of probabilities, that:

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<sup>12</sup> Parliamentary Joint Committee on Human Rights, ‘Examination of legislation in accordance with the Human Rights (Parliamentary Scrutiny) Act 2011: Bills introduced 30 September - 2 October 2014, Legislative Instruments received 13 – 19 September 2014: Fourteenth Report of the 44th Parliament’, 28 October 2014, p. 17.

<sup>13</sup> Independent National Security Legislation Monitor, Declassified annual report 20 December 2012, p. 4 at [http://www.dpnc.gov.au/INSLM/docs/INSLM\\_Annual\\_Report\\_20121220](http://www.dpnc.gov.au/INSLM/docs/INSLM_Annual_Report_20121220).

<sup>14</sup> Mr Bret Walker SC, oral evidence provided to the Parliamentary Joint Committee on Intelligence and Security’s Inquiry into the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014, Wednesday, 8 October 2014, Hansard, p. 44.

<sup>15</sup> As noted in its submission to this inquiry regarding the Foreign Fighters Act, they also limit the right of the person subject to the order to challenge its legality by restricting access to relevant information, and have inadequate structures for independent review.

<sup>16</sup> Subsection 100.1(1) of the Criminal Code.

<sup>17</sup> Section 104.1 of the Criminal Code.

- making the control order would substantially assist in preventing a terrorist act;<sup>18</sup> or
- the person has provided training to, received training from or participated in training with a listed terrorist organisation; or
- the person has engaged in a hostile activity in a foreign country; or
- the person has been convicted in Australia of an offence relating to terrorism, a terrorist organisation (within the meaning of subsection 102.1(1)) or a terrorist act (within the meaning of section 100.1); or
- the person has been convicted in a foreign country of an offence that is constituted by conduct that, if engaged in in Australia, would constitute a terrorism offence (within the meaning of subsection 3(1) of the Crimes Act); and
- the proposed terms of the control order are reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the public from a terrorist act.<sup>19</sup>

27. These limited purposes recognise the highly invasive nature of control orders which impact upon a variety of basic rights without the need for a person to have been arrested or charged with any criminal offence. As noted by the Parliamentary Joint Committee on Human Rights, rights limited by the control order regime include: the right to security of the person and the right to be free from arbitrary detention; the right to a fair trial; the right to freedom of expression; the right to freedom of movement; the right to privacy; the right to protection of the family; the rights to equality and non-discrimination; and the right to work.<sup>20</sup>

28. While it recently supported an expansion of the grounds upon which control orders may be sought, this Committee also acknowledged community sentiment surrounding such orders by recommending a substantial reduction in their proposed sunset clause extension period, and recommending that two independent reviews of control orders should take place before any further extension should occur.<sup>21</sup>

29. In recognition of the coercive and extraordinary nature of control orders and the former INSLM's views, the Law Council considers that if control orders are to continue to be available, any attempt to broaden the grounds on which a court may order their issue must be approached with caution.

## **Amendments not sufficiently limited**

### Preventing the provision of support for or the facilitation of a terrorist act

30. Under the proposed provisions law enforcement agencies would not need to show that the person has actually engaged in providing support to or facilitated a terrorist act.

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<sup>18</sup> Subparagraph 104.4(1)(c)(i) of the Criminal Code.

<sup>19</sup> Paragraph 104.4(1)(d) of the Criminal Code.

<sup>20</sup> Parliamentary Joint Committee on Human Rights, 'Examination of legislation in accordance with the Human Rights (Parliamentary Scrutiny) Act 2011: Bills introduced 30 September - 2 October 2014, Legislative Instruments received 13 – 19 September 2014: Fourteenth Report of the 44th Parliament', 28 October 2014, p. 15.

<sup>21</sup> Parliamentary Joint Committee on Intelligence and Security Report regarding the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014, p. 58.

Law enforcement agencies would simply need to establish that they 'suspect on reasonable grounds' that a control order would 'substantially assist in *preventing* the provision of support for or the facilitation of a terrorist act'.

31. In the Law Council's view, assisting in prevention of the provision of support for or the facilitation of a terrorist act is too low a threshold to justify a substantial deprivation of liberty, such as house arrest or a tracking device, which could last for 12 months and be renewed for up to 10 years.

Providing support for or facilitating 'engagement in a hostile activity'

32. Under proposed subparagraph 104.4(1)(c)(vii) of the Criminal Code law enforcement agencies would need to show that the person has provided support for or otherwise facilitated the 'engagement in a hostile activity in a foreign country'.
33. The definition of 'engaging in a hostile activity' under subsection 100.1(1) of the Criminal Code<sup>22</sup> includes a broader range of conduct than 'terrorist act'. As currently drafted, proposed subparagraph 104.4(1)(c)(vii) of the Criminal Code may give rise to unintended consequences in the scope of the proposed control orders. For example, the definition of 'engaging in hostile activity' in section 117 includes damage to a public building. An unintended consequence of the drafting may be to inadvertently capture within the scope of the provision a person who supports another engaging in graffiti on a public building in a foreign country. Such conduct, while serious, is not generally regarded as related to foreign incursion or terrorist related activity. The Law Council questions whether such a potentially broad range of grounds for a control order is intended and recommends its removal from the Bill.

### **Lack of clarity of key terms**

34. The terms 'support' and 'facilitate' are not defined in the legislation. In light of the wide range of ordinary meanings of these terms, and the potential interaction with social and other media, the Law Council questions whether there is sufficient legal certainty in the scope of activities that would constitute conduct capable of being captured for the purposes of the control order regime.
35. The Law Council considers that further clarity on the terms 'support' and 'facilitate' would assist people in prospectively knowing the scope of their potential to be the subject of a control order. For example, it is not clear whether a person 'supports' a terrorist act if the person states that they support a terrorist organisation, especially if that organisation is party to a conflict to which Australia is also a party.
36. As a result, there is a lack of clarity surrounding the obligations, prohibitions and restrictions a court may impose on a person to prevent the provision of support for or the facilitation of a terrorist act; or the engagement in a hostile activity in a foreign country.
37. On the face of the Bill, it would appear to enable control orders to be used against a person to prevent, for example, engagement in:
- online media;
  - online banking;

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<sup>22</sup> Cross-reference subsection 117.1(1) of the Criminal Code.

- community or religious meetings; or
- religious activities such as attendance at a mosque.

38. Such restrictions on a person's liberty are substantial and the Law Council considers that if, contrary to its primary recommendation that the control order regime not be expanded in the manner proposed by the Bill, the Bill or Explanatory Memorandum should be amended to clarify the activities that would be covered by the terms 'supports' or 'facilitates'. While the Bill or Explanatory Memorandum would not need to provide an exhaustive list of examples of what activities could be considered as 'support' or 'facilitate' further legislative guidance for the public and judiciary would be beneficial.

**39. Recommendations:**

- (a) the extended grounds proposed for the purposes of and the issuing of control orders should not be progressed.
- (b) if the grounds are to be extended for issuing control orders, the Law Council recommends that:
- (c) the Bill be amended to clarify the activities that would be covered by the terms 'supports' or 'facilitates'; and
- (d) proposed subparagraph 104.4(1)(c)(vi) should be amended to require that the person has provided support for or otherwise facilitated a terrorist act.

## Amendments to the way a control order can be obtained<sup>23</sup>

40. The Law Council considers that the Bill dilutes important safeguards designed to ensure that control orders are only granted in exceptional circumstances, and only after careful regard has been given as to whether each obligation, prohibition and restriction 'is reasonably necessary, and reasonably appropriate and adapted' to achieving the purpose of the order.

41. The proposed change to safeguards is not shown to be necessary or proportionate particularly given the significant expansion of the purposes for which a control order can be sought and the highly restrictive nature of control orders (see above discussion). For these reasons, the Law Council does not support the amendments to the way in which a control order can be obtained and recommends that they be removed from the Bill.

## Information that needs to be provided to the Attorney-General

42. Item 8 of Schedule 1 of the Bill seeks to limit the information that law enforcement agencies must provide to the Attorney-General when requesting his or her consent for the issuing of an interim control order to a draft of the interim control order and information about the person's age and the grounds for the request. This differs from

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<sup>23</sup> As per Schedule 1, Items 9, 15-17, 20, 23, 24, 28 of the Bill.

current provisions which require all material that will eventually be provided to an issuing court to be made available to the Attorney-General.

43. The Explanatory Memorandum notes the rationale for these amendments:

*It is not necessary for the Attorney-General to consider all material when determining whether to consent to such a request. The role of the Attorney-General is to be satisfied that it is appropriate for an application for an interim control to be made, rather than to exercise the same role as the issuing court in considering the application.*

*This amendment provides greater flexibility when seeking the Attorney-General's consent. In the event the information provided to the Attorney-General is not sufficient to satisfy the threshold for providing consent, it is open to the AFP member to provide additional information or documents to ensure the Attorney-General is satisfied that the threshold for giving consent has been met.<sup>24</sup>*

44. The amendments appear to make less effective the supervisory role the Attorney-General's consent plays in control order requests. Limiting the range of information placed before the Attorney-General will mean that the Attorney-General's decision will be based on a reduced pool of evidence. Evidence which may suggest that an order should not be made may not be provided. Requiring only a limited amount of material to be placed before the Attorney-General may result in the Minister making a decision that he or she may not have otherwise made, if aware of all material available to law enforcement agencies.
45. This is particularly concerning given that interim control order applications may be made without having to notify the person concerned of the application,<sup>25</sup> their access to the reasons for the issue of control orders is limited, and decisions made to issue interim control orders are excluded from judicial review under the *Administrative Decisions (Judicial Review) Act 1997*. This reinforces the need for the Minister to act as an independent supervisor at the interim control order stage.
46. If the proposed reduction in information is considered to be justified, the Law Council recommends that the AFP should also be required to provide to the Attorney-General a summary of the evidence (if any) that may suggest that a control order should *not* be made.

## **Information that needs to be provided to the court and the court's determination**

47. The Bill seeks to replace the existing requirement for the AFP member to provide an explanation as to why 'each' obligation, prohibition and restriction should be imposed with a requirement to provide an explanation as to why 'the control order' should be made or varied.<sup>26</sup> The Bill also proposes to replace the existing requirement for the issuing court to be satisfied on the balance of probabilities that 'each' obligation, prohibition and restriction 'is reasonably necessary, and reasonably appropriate and adapted' to achieving one of the objects in section 104.1 with a requirement to be satisfied on the balance of probabilities that 'the control order' to be made or varied 'is

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<sup>24</sup> Explanatory Memorandum to the Bill, p. 19.

<sup>25</sup> Subsection 104.3, *Criminal Code Act 1995* (Cth).

<sup>26</sup> As per Item 9, Schedule 1 of the Bill.

reasonably necessary, and reasonably appropriate and adapted' to achieving one of those objects.<sup>27</sup>

48. The Explanatory Memorandum does not appear to indicate why such amendments are thought to be necessary or appropriate. It simply notes that it would 'reduce the burden' on the AFP member.<sup>28</sup>
49. The proposed amendments would mean that neither the court nor the AFP member is required specifically to turn their mind to whether each obligation, prohibition or restriction on a person is really needed and appropriate to achieve the purpose of the order. While the Bill authorises an issuing court to make, confirm or vary a control order by removing one or more of the requested items,<sup>29</sup> the risk with removing the requirement that each item be fully considered is that some restrictions imposed by the control order will not be carefully assessed. As a result, the order may be granted containing inappropriate or unnecessary restrictions on a person's liberty.
50. The Law Council considers that the current regime which requires an AFP member and the issuing court to consider each of the obligations, prohibitions or restrictions on a person is an important safeguard in ensuring that a person's liberty is only infringed in a proportionate manner. The importance of the AFP member and the court in considering each obligation, prohibition or restriction to be imposed on a person was also accepted by Parliament when the control order regime was introduced by the Anti-Terrorism Bill (No. 2) 2005:

*This allows the issuing court to ensure that each order will be tailored to the particular risk posed by the individual concerned. The more onerous an obligation or stringent a prohibition or requirement, the greater the burden on the AFP member to satisfy the issuing court that the particular obligation, prohibition or restriction sought to be imposed on the person by the order is reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the public from a terrorist act.*<sup>30</sup>

## Urgent requests for interim control orders

51. The Bill would extend the time before the material provided to an issuing court must subsequently be provided to the Attorney-General from 4 hours to 12 hours where a request for an urgent interim control order has been made to an issuing court.<sup>31</sup>
52. The 4 hour time period was initially developed on the basis that 'travel within Australia can in some cases make it difficult to contact the Attorney-General on short notice'.<sup>32</sup> Despite this, the current Bill seeks to extend that period to 12 hours on the basis that:

*it may not always be practical or even possible to seek the Attorney-General's consent within 4 hours of making a request for an urgent interim control order. For example, the Attorney-General may be in transit between the east and west coasts of Australia and unable to be contacted for a period of more than 4 hours.*<sup>33</sup>

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<sup>27</sup> As per Item 12, Schedule 1 of the Bill.

<sup>28</sup> Explanatory Memorandum to the Bill, p. 20.

<sup>29</sup> As per Item 13 of Schedule 1 of the Bill.

<sup>30</sup> Explanatory Memorandum to the Anti-Terrorism Bill (No. 2) 2005, p. 21.

<sup>31</sup> Items 15-17 and 20 of Schedule 1 of the Bill.

<sup>32</sup> Explanatory Memorandum to the Anti-Terrorism Bill (No. 2) 2005, p. 24.

<sup>33</sup> Explanatory Memorandum to the Bill, p. 24.



53. The Law Council accepts that it may not always be practical or even possible to seek the Attorney-General's consent within 4 hours of making a request for an urgent interim control order. However, the Law Council questions whether the extension from 4 hours to 12 hours has been shown to be necessary or reasonable.
54. Prompt consideration of the matter by the Attorney-General is necessary to determine the appropriateness of the parameters of a pre-charge order that may significantly impact upon a person's liberty. Further, a number of public resources would be required to implement an interim control order. Timely consideration of the order is therefore paramount to ensure that public resources are only expended when the Attorney-General has provided his or her consent in relation to the order.
55. This is particularly pertinent given that urgent interim control orders are available when a senior AFP member 'considers it necessary to use such means because of urgent circumstances'. In practice, it is conceivable that the issuing of a control order for the purpose of preventing a terrorist attack would often be considered urgent. This means that both the liberty of a number of Australians may be restricted and public resources expended in a number of cases.

**56. Recommendations:**

- (a) the diminution in the information provided to the Attorney-General in relation to an interim control order request as contained in the Bill is inappropriate and should be removed. If legislated, the Law Council recommends that the AFP should also be required to provide to the Attorney-General a summary of the evidence (if any) that may suggest that a control order should *not* be made.
- (b) amendments to the current control order regime which would remove the requirement for an AFP member and the issuing court to consider each of the obligations, prohibitions or restrictions on a person should be removed from the Bill.
- (c) the extension from 4 hours to 12 hours for material to be provided to the Attorney-General where a request for an urgent interim control order has been made to an issuing court be reconsidered to a shorter period, such as an additional 2 hours.

## ISA amendments

### Ability of ASIS to cooperate with the ADF

57. Under the ISA, ASIS may cooperate with other Commonwealth authorities – including the ADF – in connection with performance of ASIS's own functions.<sup>34</sup> ASIS may also cooperate with a Commonwealth authority – including the ADF – that is prescribed by

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<sup>34</sup> Sections 3 and 13 of the *Intelligence Services Act 2001* (Cth). Section 6 of the ISA sets out the functions of ASIS as including obtaining intelligence about the capabilities, intentions or activities of people or organisations outside Australia; communicating such intelligence; conducting counter-intelligence activities; liaising with intelligence or security services, or other authorities, of other countries; cooperating with and assisting bodies referred to in section 13A; undertaking such other activities as the responsible Minister directs relating to the capabilities, intentions or activities of people or organisations outside Australia.



regulations.<sup>35</sup> In performing its functions, the ISA clarifies that ASIS is not prevented from providing assistance to the ADF in support of military operations.<sup>36</sup>

58. In carrying out these functions of co-operating with and assisting other agencies, such as the ADF, ASIS still has an obligation to obtain Ministerial authorisation under section 8 of the ISA when it undertakes an activity, or series of activities, for the purpose of collecting intelligence on an Australian person or that will, or is likely to, have a direct effect on an Australian person.<sup>37</sup>
59. The Bill proposes to amend the ISA by making explicit that it is a statutory function of ASIS to provide assistance to the ADF in support of military operations, and to cooperate with the ADF on intelligence matters.<sup>38</sup>
60. In the Law Council's view, this amendment is relatively minor and the existing safeguards and accountability mechanisms in the ISA are maintained.
61. There are important limits on the role and functions of ASIS, including in subsection 6(4) which precludes ASIS from planning for or undertaking activities that involve paramilitary activities, violence against the person, or use of weapons by staff members or agents of ASIS. 'Paramilitary activities' is defined to mean activities involving the use of an armed unit or group that is not part of a country's official defence or law enforcement forces.
62. That limitation does not prevent the provision or training in the use of weapons or in self-defence techniques, or the use of such weapons or techniques, by ASIS subject to schedule 2 of the Act, which contains a series of safeguards.
63. The Explanatory Memorandum states that the requirement for these amendments arises out of the different circumstances of Iraq, where the ADF is presently involved in support operations, compared to Afghanistan.<sup>39</sup> It is said that the circumstances in Iraq – presumably the different nature of the conflict – will severely limit ASIS's ability to provide assistance, which were stated to include providing force protection reporting at a tactical level, strategic level reporting on Taliban leadership, being instrumental in saving the lives of Australian soldiers and civilians, and in enabling operations conducted by Australian Special Forces.
64. The amendments are to remedy this deficiency by making explicit that it is a statutory function of ASIS to provide assistance to the ADF in support of military operations, and to cooperate with the ADF on intelligence matters. The amendments in the Act appear to do this, but no more.
65. As is stated in the Explanatory Memorandum, all the existing safeguards in the ISA continue to apply, those safeguards include the independent oversight of the IGIS.
66. In short, the functions that ASIS would provide to the ADF in Iraq are those, or a subset of those, provided in Afghanistan, but because of the different nature of that conflict, these amendments are thought to be necessary.

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<sup>35</sup> Section 13A of the *Intelligence Services Act 2001* (Cth).

<sup>36</sup> Subsection 6(7) of the *Intelligence Services Act 2001* (Cth).

<sup>37</sup> Section 8 of the *Intelligence Services Act 2001* (Cth).

<sup>38</sup> Item 1, Schedule 2 of the Bill.

<sup>39</sup> Explanatory Memorandum to the Bill, paragraphs 8-11.

## **The need for an ISA amendment to resolve ambiguity and prohibit the use of torture**

67. The Law Council considers that there is currently an ambiguity under the ISA, which requires an amendment to make it clear that nothing in the Act permits torture in any form. Such an amendment would improve Australia's ability to prevent torture and other cruel, inhuman or degrading treatment or punishment. It would also assist Australia in fulfilling its obligations under the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT).<sup>40</sup>
68. Under the ISA, it appears that such activities undertaken by ASIS could include intrusive interrogation techniques – such as sensory bombardment, sleep deprivation or duress – so long as they do not involve planning for, or undertaking paramilitary activities, violence against the person, or the use of weapons (other than the provision and use of weapons or self-defence techniques).<sup>41</sup> ASIS staff are, however, permitted to be involved with the planning or undertaking these latter activities by other organisations, provided that ASIS staff members or agents do not undertake those activities.<sup>42</sup>
69. In this context, the Law Council notes that ASIS staff are not subject to any civil or criminal liability for any act done outside Australia if the act is done in the proper performance of a function of the agency.<sup>43</sup> ASIS also has civil and criminal immunity in certain circumstances for acts done inside Australia.<sup>44</sup> Such immunity when combined with the ambiguity of the ISA in relation to torture may give rise to the view that the Act enables ASIS to use certain methods of torture in collecting intelligence on an Australian person without ASIS staff being held accountable though criminal or civil prosecution.
70. The Law Council is confident of the integrity and professionalism of our security agencies, including ASIS. It also notes that the Minister for Foreign Affairs is required to authorise the activity under section 8 of the ISA and that the activities of ASIS are subject to the independent oversight of the IGIS. However, the Law Council considers that the possibility that acts of torture may be permitted under these laws is unacceptable to the Australian community and requires amendment. Such a change would provide the community with a necessary reassurance that ASIS's activities would be in accordance with Australia's obligations under the CAT.

## **Declaration of a class of Australian persons to which a Ministerial authorisation may apply**

71. The Bill would enable the Minister for Foreign Affairs to give an authorisation to undertake activities for the specific purpose or for purposes which include the specific purpose of producing intelligence on a specified class of Australian persons or to undertake activities or a series of activities that will, or is likely to, have a direct effect on a specified class of Australian persons. The arrangements for class authorisations would only apply to support to the ADF following a request from the Defence Minister.

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<sup>40</sup> Australia ratified the Convention on 8 August 1989. The Convention came into force for Australia on 7 September 1989.

<sup>41</sup> Subsection 6(4) of the *Intelligence Services Act 2001* (Cth).

<sup>42</sup> Note 1 to Subsection 6(4) of the *Intelligence Services Act* (Cth).

<sup>43</sup> Subsection 14(1) of the *Intelligence Services Act 2001* (Cth).

<sup>44</sup> Subsection 14(2) of the *Intelligence Services Act 2001* (Cth).

72. The Explanatory Memorandum to the Bill notes the rationale for the Bill's general amendments relating to better cooperation between ASIS and the ADF is:

*to facilitate the timely performance by ASIS of the new function [of providing assistance to the ADF in support of military operations, and to cooperate with the ADF on intelligence matters].<sup>45</sup>*

73. Further:

*differences in the circumstances in Iraq mean that reliance on existing provisions of the ISA in relation to the functions of ASIS (which are not specific to the provision of assistance to the ADF) is likely to severely limit ASIS's ability to provide such assistance in a timely way.<sup>46</sup>*

74. The Law Council recognises the need for timely and effective cooperation between the ADF and ASIS, which is particularly important to counter emerging threats to national security.

75. However, the Explanatory Memorandum to the Bill does not appear to explain why a broad class authorisation is specifically required. The Law Council encourages the Committee to inquire as to why these measures are necessary, and to recommend that the proposed rationale be made publicly available. This would assist the Committee to weigh the proportionality of this proposal, taking into account the Law Council's concerns raised below.

76. This is particularly pertinent as the amendments would mean that ASIS is able to collect intelligence on an Australian person, including using surveillance techniques on that person, or conducting any other activity on that person (potentially methods of torture or duress – see above discussion) simply because that person belongs to a specified class.

77. In the Law Council's view this is a broad power, without sufficient limitations on its exercise. As currently drafted, proposed subparagraphs 8(1)(a)(ia) and (ib) may give rise to unintended consequences in the scope of specifying a class of Australian persons. For example, a 'class' of Australian persons may include all Australian persons:

- adhering to a certain religious belief;
- adhering to a certain political or ideological belief;
- who are a member of a particular association;
- who are engaging in a certain activity;
- who are present within a certain location;
- who have a certain ethnic background.

78. The threshold for the use of the power includes where the Minister is satisfied that persons belonging to that particular class 'are likely to be' a 'threat to security' (as defined in the ASIO Act) so long as the Attorney-General has also provided

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<sup>45</sup> Explanatory Memorandum to the Bill, p. 2.

<sup>46</sup> Ibid.

agreement.<sup>47</sup> This means that ASIS could be authorised to collect intelligence on a class of Australian persons for the purpose of, for example, protecting Australia's territorial and border integrity from serious threats and carrying out of Australia's responsibilities to any foreign country in relation to espionage or sabotage.

79. The Law Council acknowledges that the Minister must be satisfied of the preconditions set out in subsection 9(1) of the ISA. The Minister must also be satisfied that:

- the class relates to support to the Defence Force in military operations as requested by the Defence Minister;<sup>48</sup> and
- all persons in the class of Australian persons is, or is likely to be, involved in one or more of the activities set out in paragraph 9(1A)(a).

80. Nonetheless, the Law Council considers that such an overarching power as class authorisation has the potential to apply intrusive interrogation powers to a group, which do not apply to the broader community. In the Law Council's view, this approach, in contrast to usual methods of targeted investigative techniques based on an individual's conduct:

- is not consistent with the principle of equality before the law;
- does not sit easily with the rule of law principles. For example, the rule of law requires that Executive powers, particularly intrusive intelligence powers are subject to sufficient safeguard mechanisms to protect against overuse or misuse.<sup>49</sup> In the case of intrusive powers to collect intelligence on an Australian person overseas, which are exercised by officers with a general immunity from civil and criminal liability, the Law Council considers that such safeguards and natural justice obligations require Ministerial authorisation to be based on the threat posed by a particular individual, rather than a class of individuals; and
- is inconsistent with traditional rule of law and criminal justice principles by shifting the focus from a person's conduct to his or her associations.<sup>50</sup> In doing so, they may disproportionately affect certain sections of the population who, simply because of their familial, community, ethnic, religious connections or geographical location, may be exposed to intrusive investigative techniques. The risk with the broad class authorisation provisions such as this is that they are available to serve as a hook for the exercise of a wide range of ASIS's intelligence gathering powers.

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<sup>47</sup> Item 14 of Schedule 2 of the Bill seeks to enable the Attorney-General, as the Minister responsible for ASIO, to request ASIS to produce intelligence in relation to a particular class of Australian persons or authorising an activity that will, or is likely to, have a 'direct effect' on a particular Australian person in circumstances where they are, or are likely to be involved in activities that are, or are likely to be, a threat to security. This means, as noted in the Explanatory Memorandum to the Bill (p. 29), that the 'amendment will have broader application than solely where ASIS is providing assistance to the ADF in support of military operations. For example, it might also be relevant in other situations such as a class of Australian persons involved in people smuggling'.

<sup>48</sup> Proposed paragraph 9(1)(d) of the ISA.

<sup>49</sup> Law Council of Australia, *Rule of Law Policy Principles*, Principle 6, p 4, March 2011

<sup>50</sup> Under the rule of law the law should be applied to all people equally and should not discriminate between people on arbitrary or irrational grounds. Everyone is entitled to equal protection before the law. Law Council of Australia, *Rule of Law Policy Principles*, Principle 2, p. 2, March 2011.

81. For these reasons, the Law Council does not support the proposed class authorisation scheme as contained in the Bill.<sup>51</sup>
82. If the Bill is legislated, the Law Council notes that the number of Australian persons ASIS produces intelligence on is likely to increase. IGIS oversight of the production of intelligence on Australian persons by ASIS to meet ADF requirements is also likely to increase, as is the potential for the ADF and ASIS to communicate intelligence on a class of Australian persons to other organisations (foreign and domestic).<sup>52</sup>
83. Therefore, given the intrusive investigative techniques that may be available for a class of Australian persons, the potential for an increase in intelligence collected and shared on Australian persons, the Law Council considers that if the class authorisation scheme is to proceed, it requires a number of further safeguards as follows.

**84. Recommendations:**

- (a) the ISA be amended to specifically prohibit torture, in accordance with Australia's obligations under the CAT.
- (b) the new class authorisation scheme in the ISA that relates to ASIS's assistance to ASIO in support of its functions should be repealed. If this is not accepted by the Committee, the Law Council recommends that:
  - (i) the *Independent National Security Legislation Monitor Act 2010* (Cth) be amended to require the Independent National Security Legislation Monitor to review and report on the operation of the 'class of Australian persons' provisions.
  - (ii) the ISA be amended to include the types of permissible classes of Australian persons to which a class authorisation may apply. Such classes should be carefully and narrowly defined.
- (c) the class authorisation scheme proposed in the Bill be removed. If this is not accepted by the Committee, the Law Council recommends that:
  - (i) the *Independent National Security Legislation Monitor Act 2010* (Cth) be amended to require the Independent National Security Legislation Monitor to review and report on the operation of the 'class of Australian persons' provisions established by the Bill.
  - (ii) the Bill be amended to clarify what types of activities could be approved for the purpose of: producing intelligence on one or more members of a class of Australian persons; or that will, or is likely to, have a direct effect on one or more members of a class of Australian persons. While the Bill or Explanatory Memorandum

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<sup>51</sup> Nor does it support the similar amendments made by the *National Security Legislation Amendment Act (No. 1) 2014* (Cth) to enable ASIS to undertake an activity or series of activities for the purpose of producing intelligence on an Australian person or class of Australian persons outside of Australia in support of ASIO's functions – see for example section 13B of the ISA. Due to the short timeframes involved for this Committee's inquiry into the National Security Legislation Amendment Act, which the Law Council raised as a key concern in its submission to the inquiry, the Law Council acknowledges that this was an issue that it did not raise in its submission to the Committee. Nonetheless, the Law Council now takes the opportunity to raise a number of risks about the current proposal in relation to a class of Australian persons to support ADF operations and previous amendments relating to ASIO.

<sup>52</sup> The Law Council notes that the current privacy rules made under section 15 of the ISA would continue to apply in relation to ASIS and an Australian person within the class of Australian persons.

would not need to provide an exhaustive list of examples of what activities could be approved further legislative guidance for the public would be beneficial.

- (iii) the Bill be amended to include the types of permissible classes of Australian persons to which a class Ministerial authorisation may apply. Such classes should be carefully and narrowly defined. For example, restrictions to members of a listed terrorist organisation under the Criminal Code may be appropriate.
- (iv) the office of the IGIS's annual budget be supplemented to the extent required to provide for the new oversight requirements associated with the Bill.

## **Emergency Ministerial authorisations**

85. The proposed amendments would enable:

- emergency Ministerial authorisations, of up to 48 hours' duration, to be issued orally, followed by a written record;
- if none of the relevant Ministers – that is, the Prime Minister, the Defence Minister, the Foreign Affairs Minister or the Attorney-General – are readily available and contactable, the head of an ISA agency (ASIS, the Australian Signals Directorate or the Australian Geospatial Intelligence Organisation) may issue a limited emergency authorisation; and
- where the Attorney-General's agreement is required to the issuing of an emergency authorisation, and the Attorney-General is not readily available or contactable, the agreement to the issuing of an emergency authorisation must be sought from the Director-General of Security (if readily available or contactable).

86. The Explanatory Memorandum to the Bill notes that:

*Experience in responding to urgent requirements for ministerial authorisations has identified that the existing emergency authorisation arrangements under section 9A of the ISA do not sufficiently address the need for ASIS, ASD and AGO to be able to obtain a Ministerial authorisation in an extreme emergency. The proposed amendments will address limitations identified in this provision.*<sup>53</sup>

87. Further, it states that the existing arrangements for the issuing of emergency authorisations are 'incompatible' with the circumstances of extreme urgency and threaten opportunities to collect vital intelligence.<sup>54</sup>

### Oral authorisations

88. The Law Council does not in principle oppose the granting of oral authorisations in an emergency provided sufficient safeguards are in place to ensure that powers are used appropriately and effectively.

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<sup>53</sup> Explanatory Memorandum to the Bill, p. 2.

<sup>54</sup> Ibid, p. 3.



89. The Law Council considers that the safeguards pertaining to the oral authorisations proposed to be permitted under new subsections 9A(2) and (3) could be improved in a manner consistent with other emergency authorisation or warrant based provisions that permit oral authorisations.

*Conferral of authority*

90. For example, paragraph 15GJ(1)(b) of the Crimes Act permits an authority to *orally* in person, or by telephone or any other means of communication grant an urgent authority for the AFP to conduct a controlled operation. An urgent authority must identify a number of matters such as (the):

- name and rank or position of the person who granted the authority;
- principal law enforcement officer for the controlled operation and, if the principal law enforcement officer is not the applicant for the authority, the name of the applicant;
- nature of the criminal activity (including the relevant suspected offences) in respect of which the controlled conduct is to be engaged in;
- identity of the persons authorised to engage in controlled conduct for the purposes of the controlled operation;
- the nature of the controlled conduct that the law enforcement participants may engage in; and with respect to the civilian participants, the particular controlled conduct (if any) that each such participant may engage in;
- identify (to the extent known) the person or persons targeted;
- any conditions to which the conduct of the operation is subject; and
- the date and time when the authority was granted.

91. An oral authorisation issued by the Attorney-General of a special intelligence operation conducted by ASIO also lists certain matters that must be included in the authorisation which are then also to be contained in a written record.<sup>55</sup>

92. The Law Council acknowledges that other emergency authorisations are not necessarily as prescriptive as the proposed provision. For example, section 28 of the *Surveillance Devices Act 2004* (Cth) permits an oral emergency authorisation for the use of a surveillance device in certain circumstances.

93. The Law Council considers that a more prescriptive approach, however, is appropriate given that under the Bill, ASIS may be authorised to engage in a range of very broad and potentially highly intrusive activities in relation to an Australian person – with its officers generally immune from civil or criminal liability in respect of their overseas activities.<sup>56</sup> Accordingly, the Law Council has made a number of recommendations in this regard (as discussed below).

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<sup>55</sup> Section 35D of the *Australian Security Organisation Act 1979* (Cth).

<sup>56</sup> Authorisations in relation to classes of persons to undertake the activities specified in new subparagraphs 8(1)(A)(ia) and (ib) are excluded from the emergency Ministerial authorisation scheme – see paragraph 9A of the *Intelligence Services Act 2001* (Cth).



*Circumstances in which an emergency authorisation may be issued under proposed section 9A*

94. The proposed threshold for issue of a ministerial emergency authorisation is where:

- an emergency situation arises in which an ISA agency head ‘considers it necessary or desirable to undertake an activity or a series of activities’<sup>57</sup>; and
- a direction issued by the responsible Minister for the relevant agency, under subsection 8(1) exists that requires the agency to obtain an authorisation before undertaking the relevant activity.

95. This is a low threshold and could potentially apply to almost all of ASIS’s activities conducted overseas. It does not accord with the characterisation of this power in the Explanatory Memorandum as reserved for ‘extreme emergencies’. The Law Council considers that an amendment is required as suggested below so that section 9A only applies where there is an imminent risk to a person’s safety or that security (within the meaning of the ASIO Act) will be seriously prejudiced; and undertaking the activity or series of activities is immediately necessary for the purpose of dealing with that risk. This is in recognition that any emergency authorisation should only be obtained in circumstances that constitute an emergency.

**96. Recommendations:**

- (a) the Bill should be amended to require that an emergency Ministerial authorisation, including an oral emergency Ministerial authorisation, to contain certain matters (similar to the controlled operations scheme oral authorisation scheme) which are then also to be contained in the written record under proposed subsection 9A(5), including, for example the:
  - (i) name of the relevant Minister who granted the authority;
  - (ii) principal ISA agency officer who will be responsible for the activity or series of activities to be undertaken;
  - (iii) identity of the person/s authorised to engage in the activity/activities;
  - (iv) nature and purpose of the activity/activities to be undertaken (including any relevant suspected offences) that those participants may engage in;
  - (v) name of the person or persons targeted;
  - (vi) conditions to which the conduct of the operation is subject; and
  - (vii) date and time when the authority was granted.
- (b) the Bill be amended so that section 9A only applies – whether to a written or oral emergency authorisation – if the ISA agency head and the relevant Minister reasonably believe that each of the following applies:
  - (i) there is an imminent risk to a person’s safety, or that security (within the meaning of the ASIO Act) will be seriously prejudiced;

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<sup>57</sup> Ibid.

- (ii) undertaking the activity or series of activities is immediately necessary for the purpose of dealing with that risk;
- (iii) the circumstances are so serious and the matter is of such urgency that the undertaking of the activity or series of activities is warranted; and
- (iv) it is not practicable in the circumstances to obtain an authorisation under section 9 before undertaking that activity or series of activities.

#### ISA agencies permitted to authorise own activities

97. The effect of these amendments is that they will allow ASIS to perform a range of statutory functions – including its ‘new function’ of providing support to the ADF – without having to wait for approval of a senior Minister where they are not readily available or contactable. That is, ISA agencies will in effect have the ability to authorise themselves to conduct, in some circumstances, intrusive activities on an Australian person.
98. The Law Council is confident of the integrity and professionalism of our security agencies, including ASIS. It recognises that there are a number of important safeguards in the Bill in relation to the emergency authorisations, including for example that such authorisations will expire after 48 hours (without any ability to renew), and notification and reporting requirements to the responsible Minister and IGIS. However, the Law Council considers that it is not appropriate for security agencies to be permitted to empower themselves to conduct intrusive activities, even in emergency situations, for which they would usually require a Ministerial authorisation.
99. Imposing clear limitations on the exercise of Executive power – particularly when that power can have pronounced impacts on members of the community, which has little recourse to the criminal or civil law in respect of contraventions of such power – is a key component of the rule of law and reflected in the Law Council’s Rule of Law Principles.<sup>58</sup>
100. The Law Council also notes in this context that when the emergency ministerial authorisation provisions were introduced into the ISA the Explanatory Memorandum to the Intelligence Services Amendment Bill 2005 noted:
- the ministerial authorisation regime will be changed to allow certain other ministers to authorise intelligence collection activities in circumstances where there is a need for emergency collection and the responsible Minister is not readily contactable or available. The group of ministers involved will be the Prime Minister, the Minister for Defence, the Minister for Foreign Affairs and the Attorney-General. This amendment is intended to provide some flexibility to the agencies while maintaining the controls on their activities which are contained in the Act.*<sup>59</sup>
101. The Law Council notes that the current amendments appear to be inconsistent with this primary intention of an emergency *ministerial* authorisation power that would allow flexibility while maintaining a check on the activities of ISA agencies.

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<sup>58</sup> Law Council of Australia, *Policy Statement: Rule of Law Principles*, March 2011.

<sup>59</sup> Explanatory Memorandum to the Intelligence Services Amendment Bill 2005.

102. Given that the legislation does not specify what types of ‘activities’ could be approved, whether they may only occur overseas, there would be scope for the approvals to become quite broad.
103. The Law Council’s suggested approach would be that another senior cabinet Minister – such as the Deputy Prime Minister – be included as alternative chains of authorisation when one of the four relevant Ministers are not able to be contacted.
104. The Explanatory Memorandum accompanying the Bill or the Bill itself, should outline situations that would result in any of the four relevant Ministers – that is, the Prime Minister, the Minister for Foreign Affairs, the Minister for Defence or the Attorney-General – not being readily available or contactable. For example, a Minister should not be considered ‘not readily available’ if, for example, he or she is in a Cabinet or other meeting which can be interrupted. The types of activities that can be approved in an emergency situation should also be defined in the Bill.

ASIO Director-General of Security empowered to authorise an emergency agreement

105. As noted above, the Law Council considers that it is not appropriate for security agencies to be permitted to empower themselves or each other to conduct intrusive activities, even in emergency situations, for which they would usually require a Ministerial authorisation.
106. If legislated, proposed section 9C combined with proposed section 9B would mean that the head of ASIO and the head of ASIS could themselves authorise ASIS to undertake a broad range of activities on an Australian person overseas.
107. The Law Council considers that great care must be taken when seeking to amend the authorisation processes for the use of intrusive intelligence gathering powers. The Law Council’s suggested approach would be that another senior cabinet Minister, such as the Prime Minister, Minister for Defence, Minister for Foreign Affairs (other than that which is issuing the emergency Ministerial authorisation) must provide agreement which can include taking into account the advice of ASIO’s Director-General of Security. Such an approach would provide an appropriate and effective accountability mechanism to reassure the community that the powers being exercised under the ISA are less likely to lend themselves to inadvertent misuse.

108. **Recommendations:**

- (a) the provisions in the Bill which seek to enable an ISA agency head to authorise an activity or series of activities in an emergency situation (such as the proposed new section 9A) should be removed from the Bill.
- (b) if necessary, section 9A of the ISA could instead be amended to permit other senior cabinet Ministers – such as the Deputy Prime Minister – to be included as alternative chains of authorisation when one of the four primary Ministers (that is, the Prime Minister, the Minister for Defence, the Minister for Foreign Affairs and the Attorney-General) are not able to be contacted. If this is not accepted by the Committee:
  - (i) the Explanatory Memorandum accompanying the Bill or the Bill itself be amended to outline the situations that would result in any of the four relevant Ministers – that is, the Prime Minister, the Minister for Foreign Affairs, the Minister for Defence or the Attorney-General – not being readily available or contactable. The types of activities

that can be approved in an emergency situation should also be defined in the Bill.

- (c) section 9C of the Bill enabling the Director-General to agree to an authorisation in an emergency in certain circumstances should be removed. The Law Council's preferred approach would be that another senior cabinet Minister, such as the Prime Minister, Minister for Defence, Minister for Foreign Affairs (other than that which is issuing the emergency Ministerial authorisation) must provide agreement which can include taking into account the advice of ASIO's Director-General of Security.

## Acknowledgement

The Law Council wishes to acknowledge the assistance of its Military Justice Working Group and National Criminal Law Committee in the preparation of this submission.

## **Attachment A: Profile of the Law Council of Australia**

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The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Large Law Firm Group, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- The Large Law Firm Group (LLFG)
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of approximately 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2014 Executive are:

- Mr Michael Colbran QC, President
- Mr Duncan McConnel President-Elect
- Ms Leanne Topfer, Treasurer
- Ms Fiona McLeod SC, Executive Member
- Mr Justin Dowd, Executive Member
- Dr Christopher Kendall, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.