



Submission No 234

Inquiry into potential reforms of National Security Legislation

Organisation: Liberty Victoria



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7 November 2012

Committee Secretary
Parliamentary Joint Committee on Intelligence and Security
Parliament House
Canberra, ACT, 2600

By email

Dear Committee Members

**Further Submission of Liberty Victoria to the Parliamentary Joint Committee on
Intelligence and Security:
Inquiry into potential reforms of National Security Legislation**

Liberty Victoria would like to thank the Committee for the opportunity to appear at the hearing on 5 September 2012.

As noted in our initial submission of 19 August 2012 and at the Committee hearing, Liberty Victoria appreciates the importance of the objectives of the proposed National Security Reforms (**Reforms**). Liberty Victoria's view is that many of these proposals will limit the human right to privacy and those proposals should be advanced on the basis of rigorous evidence and after balancing the benefits of the proposal against the human rights impacts. Liberty Victoria acknowledges that some of these proposals may be justified once this balancing exercise has been undertaken and/or provided certain safeguards are introduced.

At the Committee hearing, the Committee requested further information from Liberty Victoria about:

- how to conduct a proportionality assessment of the reforms, including, in particular, how the Committee could assess whether the proposals are justified from a human rights perspective;
- which of the proposals Liberty Victoria could support; and
- Liberty Victoria's response to evidence put forward by law enforcement and national security agencies in support of the proposals.

This further submission is in response to that request. **Attachment 1** outlines how to conduct a proportionality assessment of the reforms. Liberty Victoria acknowledges that the Committee faces the difficult task of weighing the potential public benefits of the proposals against their impact on human rights. **Attachment 2** sets out Liberty Victoria's

assessment of whether particular proposals contained in the Committee's Terms of Reference are justified from a human rights perspective. Our assessment is based on a consideration of the publicly available evidence submitted by law enforcement and national security agencies (**agencies' submissions**). We note, however, that there remains a significant lack of evidence adduced to support the proposals in the Discussion Paper (**DP**) and the agencies' submissions

We thank the Committee for the opportunity to make this further submission and trust that it is of assistance. Liberty Victoria would like to acknowledge the assistance of the King & Wood Mallesons Human Rights Law Group in preparing this submission. Please contact the President of Liberty Victoria, Professor Spencer Zifcak, through the Liberty Victoria office on 03 9670 6422 or info@libertyvictoria.org.au if we can be of further assistance. This is a public submission and is not confidential.

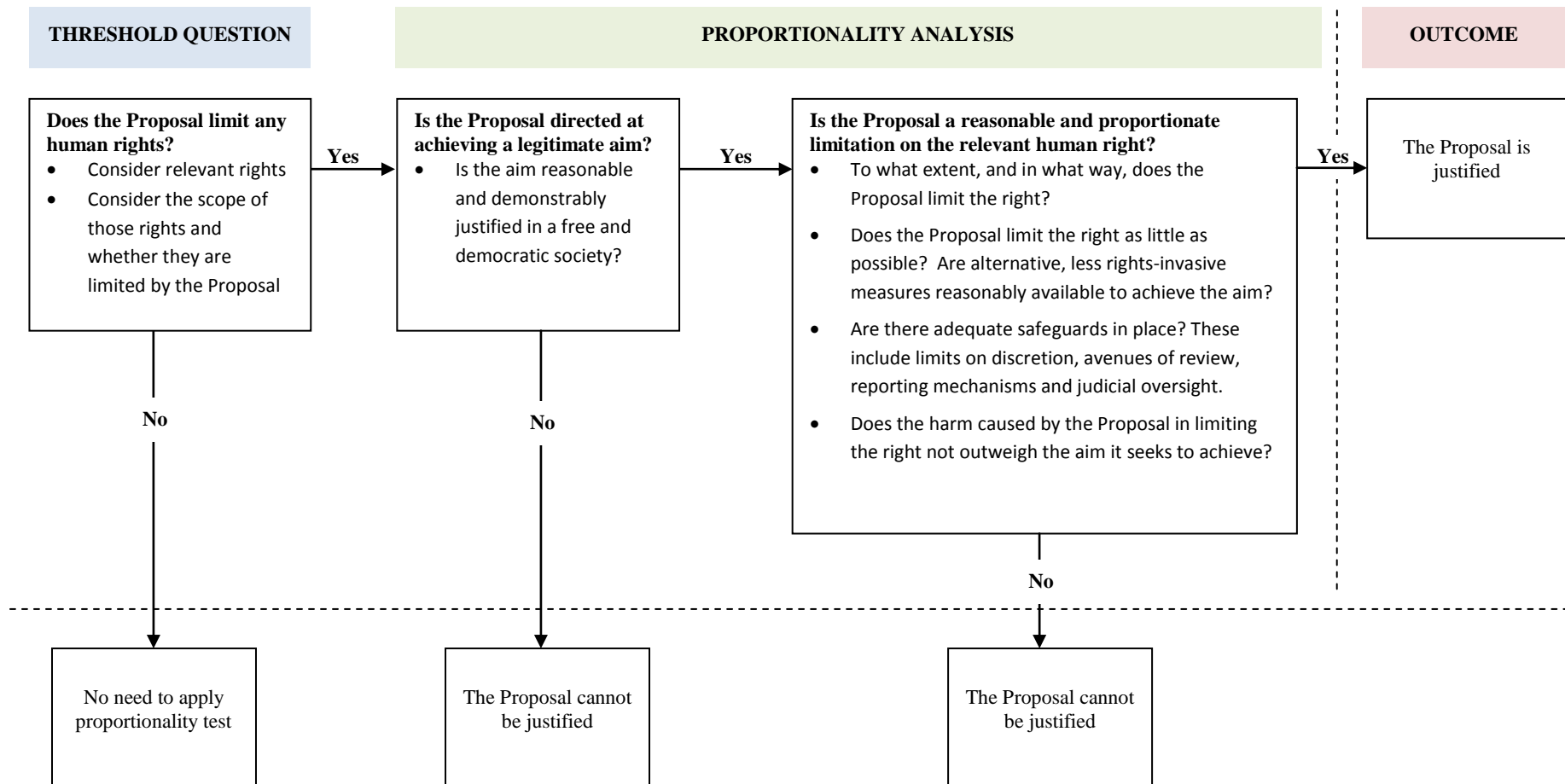
Yours sincerely

Spencer Zifcak
President
Liberty Victoria

Attachment 1: Overview of Proportionality Test

The proportionality test is a tool for assessing the extent to which laws or proposed laws limit human rights and the extent to which that limitation is proportionate to the aims sought to be achieved. The proportionality test may assist the Committee in determining whether the National Security Reforms achieve an appropriate balance between the needs of law enforcement and national security on the one hand, and the protection of the human right to privacy and other human rights, on the other hand.

The diagram below shows the process involved in applying the proportionality test.



Attachment 2: Liberty Victoria's assessment of selected proposals in the Terms of Reference

This attachment applies the framework in Attachment 1 to assess whether selected proposals are supportable from a human rights perspective. This attachment deals only with the proposals in the Terms of Reference that Liberty Victoria engaged with in its earlier submission. We note that a number of the proposals not considered either do not engage human rights or are outside Liberty Victoria's scope of expertise.

In preparing the assessment below, Liberty Victoria has considered the publicly available evidence of law enforcement and national security agencies. Liberty Victoria is concerned at the quality of evidence put forward in the DP and the agencies' public submissions. We note, in particular the following:

- **Lack of evidence:** the DP and agencies' submissions contain many assertions about the need for legislative changes which are not supported by evidence;¹
- **Anecdotal evidence:** where reform proposals are supported by evidence, the evidence tends to be anecdotal and imprecise.² Liberty Victoria acknowledges that some evidence may be sensitive; however, the lack of quantitative details is concerning. It makes it particularly difficult to assess whether the reforms appropriately address a current problem or deficiency; and
- **Lack of alternative proposals:** where agencies do identify specific problems, they rarely propose alternative, less human rights-limiting measures.³

We recognise that the Committee may have access to confidential submissions with additional evidence. The Committee will need to assess whether the confidential evidence is sufficient to overcome the concerns set out above.

¹ See, for example:

- Victoria Police Submission, p 14: Extension of regulatory regime to ancillary service providers: *'Without a mandatory regulatory obligation placed on the providers of these services used in Australia, criminals can continue to communicate without the risk of being exposed to interception. There needs to be legislative parity with the obligations applicable to Australian service providers.'*

² See, for example:

- Victoria Police Submission, p 11: Information-sharing, *'While it is important that there are strict controls over the sharing of information, Victoria Police investigators have on occasion found the legislation to be too restrictive. There have been instances where lawfully intercepted information would be of high important to other organisations providing a function in the service of the community, but Victoria Police is legislatively prevented from providing it.'* (Emphasis added).
- Victoria Police Submission, p 13: Creating a single warrant with multiple TI powers, case study: *'A warrant pursuant to Section 48 was also unable to assist due to both legislative and technical constraints.'* The case study does not explain the nature of the constraints.
- Australian Federal Police Submission, p 11: Creating a single warrant with multiple TI powers: *'Some of the complex provisions in the TIA Act ... cause significant operational difficulty, often in serious and life threatening situations. ... In any one financial year a number of warrants will be issued in good faith and on a sound basis but inconsistencies render them invalid ... This becomes costly for agencies and time consuming for issuing authorities.'* The submission does not quantify the frequency of the problem or how costly and time consuming the current procedures are. (Emphasis added)

³ See, for example:

- Australian Federal Police Submission, p 10: Information-sharing: *'The TIA Act as it currently stands impedes the effective exchange of lawfully obtained communications information and reduces the efficiency of operational partnerships'*. The AFP does not consider how information-sharing could be reformed while ensuring that all, or certain government agencies, are not given access to communications information that they were not previously entitled to.

Term of Reference	Proposal	Is the proposal directed at achieving a legitimate aim?	Is the proposal a reasonable and proportionate limitation on human rights?	Are there adequate safeguards in place?	Liberty Victoria's view / further information required
1. Strengthening the safeguards and privacy protections under the lawful access to communications regime in the TIA	Review the privacy objective, proportionality tests for warrants, record keeping and Ombudsman oversight	Unclear The stated aim is "protecting the privacy of Australian communications from unlawful access" (DP, 23). However, the proposal is so unclear that it is impossible to determine whether it is directed at this aim.	Unclear There is a risk any "review" may limit the right to privacy, especially if it amends the current prohibition on interception, subject to limited exceptions. There is no evidence to support a change to this model.	N/A	Support in principle However, further details about the proposal are required before a proper assessment can take place.
2. Reforming the lawful access to communications regime	(a) Reducing number of eligible agencies	Yes While unclear, it appears the aim is to remove complexities in the existing regime (DP, 24).	Not relevant The proposal is likely to enhance privacy.	Unclear The DP suggests an agency should have a "demonstrated need" to access information. A further threshold should be whether the security benefits of access outweigh the privacy risks.	Support in principle However, more detail is required on how "eligible agencies" will be determined, and what a "demonstrated need" to access information is.
	(b) Standardising interception warrant tests and thresholds	Yes The stated aim is to remove complexity and recognise the growing number of online offences (DP, 24).	Unlikely Formal requirements can be justifiably simplified but "standardisation" does not justify lowering the threshold for issuing warrants. Privacy should not be limited only for "operational efficiencies" / to "remove complexity".	No The "complexities" in warrants tests in many cases reflect a careful balancing of human rights against law enforcement / security interests. The proposal will likely remove important privacy safeguards.	Oppose in principle Standardisation may be justified if it reduces operational burdens with little or no impact on human rights. Further information on the specific changes being proposed is required.

Term of Reference	Proposal	Is the proposal directed at achieving a legitimate aim?	Is the proposal a reasonable and proportionate limitation on human rights?	Are there adequate safeguards in place?	Liberty Victoria's view / further information required
3. Streamlining and reducing complexity in the lawful access to communications regime	(a) Simplifying information sharing between agencies	Yes The stated aim is to remove complexity and support co-operative arrangements between agencies (DP, 25).	In part Detailed information-sharing rules may reflect a balance of privacy against security interests. Removal of unnecessary burdens that do not serve this purpose may be reasonable and proportionate.	Unclear The proposal should not affect barriers to information-sharing where these operate as substantial "safeguards" to protect privacy.	Support in part Simplifying information sharing is justifiable where it is directed at reducing operational burdens. We oppose the reform if it is a mechanism to expand agencies' access to information it cannot currently access.
	(b) Removing legislative duplication	Yes The stated aim is to remove complexity (DP, 26).	N/A Any simplification should only remove unnecessary complexity, and not look to achieve simplicity at the expense of human rights.	Unclear Care is needed to ensure any simplification does not weaken legitimate checks and balances.	Support in principle The DP does not provide a clear list of "unnecessary" duplication. This list would need to be reviewed and considered.
5. Amending ASIO Act to modernise and streamline ASIO's warrant provisions	(b) Enabling warrants to be varied by the AG, simplifying the renewal of the warrants process and extending duration of search warrants from 90 days to 6 months	No The DP suggests the proposal is intended to "modernise" intelligence gathering. It does not explain why technological change requires changes to the duration of warrants. Accordingly, the proposal does not appear directed at a legitimate aim.	No The proposal compromises privacy by reducing judicial oversight. It offers no rationale or supporting evidence except references to "operational benefits" and "instances" where ASIO had to seek a new warrant.	No The proposal offers no alternative safeguards to those which it would remove.	Oppose A substantive rationale for the changes has not been put forward. Nor have agencies put forward sufficient evidence of the benefits of the proposal or quantitative evidence that there is a problem to be solved.

Term of Reference	Proposal	Is the proposal directed at achieving a legitimate aim?	Is the proposal a reasonable and proportionate limitation on human rights?	Are there adequate safeguards in place?	Liberty Victoria's view / further information required
11. Amending the ASIO Act to modernise and streamline ASIO's warrant provisions	(c) Enable the disruption of a target computer for the purposes of a computer access warrant	Yes The stated aim is to "obtain[n] access to data relevant to security" on a computer which is otherwise prevented by "computer protection mechanisms" (DP, 48).	Unlikely The extent of the problem has not been quantified and no alternatives identified. For the interference with privacy to be proportionate, it must be targeted to the aim (eg limited to disabling computer protection mechanisms).	No The DP briefly suggests a "proportionality" test but does not refer to any other safeguards that would limit the use of the proposed powers to the problem identified.	Oppose The DP contains little evidence about the need for this new power. In its current form, it is unworkably vague and contains no safeguards.
14. Reforming the Lawful Access Regime	(a) Expanding the basis of interception activities	Yes The stated aim is to make obtaining warrants less time-consuming, costly and privacy invasive (DP, 25).	Likely It is unclear precisely what is being proposed and alternatives have not been considered. Expanding the basis of interception may enhance privacy if accompanied by a requirement that agencies use the least privacy-invasive interception option available.	Unclear The DP contains no specific details of the proposal. Substantial further information is required.	Support further consideration Expanding interception powers (eg from the network/service to the application layer) may be justified if it allows more targeted, less privacy-invasive interception.

Term of Reference	Proposal	Is the proposal directed at achieving a legitimate aim?	Is the proposal a reasonable and proportionate limitation on human rights?	Are there adequate safeguards in place?	Liberty Victoria's view / further information required
15. Modernising the industry assistance framework	(c) Tailored data retention periods for up to 2 years	Unclear The DP does not state the aim and does not even refer to the Proposal. It is unclear whether it is designed to require C/CSPs to retain information they already record such as billing data (DP, 21 and agencies' submissions ⁱ) or capture new data such as content or GPS location.	No The extent of the problem has not been quantified and no alternatives or limits to the proposal identified. It is inherently unlikely the privacy risks of pre-emptively retaining data can be justified. The proposal is more likely to be justified if data collected is only what is necessary for the legitimate aim (if any) e.g. retention of non-content data is more likely to be justifiable, especially if it is limited to information C/CSPs already collect (eg billing information) and not location or other sensitive data.	No The DP makes no reference to safeguards including about: <ul style="list-style-type: none"> • limiting the type of data to be collected; • how the data will be stored and protected; and • which agencies will be permitted to access the data. The proposal makes no distinction between content and non-content data, or between different types of non-content data.	Oppose A regime of data retention is necessarily more privacy-invasive than a targeted interception regime. A clear and evidence-based rationale has not been provided in the DP or in the agencies' submissions. There is no evidence that alternative options or any limitations and safeguards have been considered.
17. Amending the ASIO Act to modernise and streamline ASIO's warrant provisions	(a) Use of third party computers and communications (3PC) in transit to access a target computer	Yes The stated aim is to respond to technological advancements by assisting agencies to be able to execute a computer access warrant (DP, 50)	No The extent of the problem has not been quantified and no alternatives or limits to the proposal identified. Assuming the problem is real, the power must be used only where the 3PC is the <i>only</i> means of executing the warrant.	No The DP does not address any safeguards, eg: <ul style="list-style-type: none"> • the definition or duration of "use"; • how the 3PC and its data can be altered; and • how any damage will be minimised and rectified. 	Oppose The proposal contains insufficient safeguards. No clear rationale for this new power has been provided either in DP or in the agencies' submissions.

Term of Reference	Proposal	Is the proposal directed at achieving a legitimate aim?	Is the proposal a reasonable and proportionate limitation on human rights?	Are there adequate safeguards in place?	Liberty Victoria's view / further information required
	(b) Incidental power in search warrants to authorise access to third party premises (3PP) to execute warrant	Yes The stated aim is to assist in "executing the search or computer warrant" (DP, 50)	No The extent of the problem has not been quantified and no alternatives or limits to the proposal identified.	No The DP does not address limits on the power, eg that it will only be used where a 3PP is <i>only</i> way of executing the warrant.	Oppose Proposal contains no clear rationale and insufficient safeguards. Entry to a 3PP is not an "incidental" issue.
18. Amending the Intelligence Services Act	(a) New ministerial authorisation ground where person may be involved in intelligence or counter-intelligence	Unclear The DP does not explain the aim except (with circular reasoning) that existing grounds do not cover the situation (DP, 52)	No The extent of the problem has not been quantified and no alternatives or limits to the proposal identified. The breadth of the Proposal creates a risk it will encompass journalism.	No DP makes no reference to appropriate safeguards.	Oppose Proposal contains no clear rationale, consideration of alternatives or safeguards.

ⁱ See, for example:

- Victoria Police Submission, p 17: *'A mandatory and consistent data retention scheme does not provide law enforcement with additional powers. It merely ensures that an important existing investigative tool remains available.'*
- AFP Submission, p 16: *'Data retention would not give agencies new powers. Rather it would ensure that existing investigative capabilities remained available and were adapted to these changes in industry.'*