

The Senate

Legal and Constitutional Affairs
Legislation Committee

Intelligence Services Legislation Amendment
Bill 2011 [Provisions]

June 2011

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RECOMMENDATIONS

Recommendation 1

3.41 The committee recommends that the Attorney-General's Department revise and reissue the Explanatory Memorandum to the Bill as a matter of urgency to specifically include all additional information contained in the Department's submissions to this inquiry which relate to the proposed foreign intelligence amendments in Items 3, 7 and 13 of Schedule 1 of the Bill, including:

- detailed justification and explanation of why the amendments are considered necessary;
- specific examples of how the expansion of the definition of 'foreign intelligence' will assist ASIO and other foreign intelligence agencies to perform their functions; and
- an explanation of the safeguards in place to ensure appropriate use of the foreign intelligence collection function.

Recommendation 2

3.42 Subject to Recommendation 1, the committee recommends that the Senate pass the Bill.

CHAPTER 1

INTRODUCTION

Background

1.1 On 24 March 2011, the Senate referred the provisions of the Intelligence Services Legislation Amendment Bill 2011 (Bill) to the Senate Legal and Constitutional Affairs Legislation Committee, for inquiry and report by 21 September 2011.

1.2 The Intelligence Services Bill makes amendments to the *Australian Security Intelligence Organisation Act 1979*, the *Criminal Code Act 1995* and the *Intelligence Services Act 2001*, with the aim of improving the operation of key provisions of that legislation.

Conduct of the inquiry

1.3 The committee advertised the inquiry in *The Australian* newspaper on 30 March and 13 and 27 April 2011, and invited submissions by 6 May 2011. Details of the inquiry, the Bill and associated documents were placed on the committee's website.

1.4 The committee received 13 submissions, which are listed at Appendix 1. Submissions were placed on the committee's website for ease of access by the public.

1.5 A public hearing was held in Canberra on 16 June 2011. A list of witnesses who appeared at the hearing is at Appendix 2, and copies of the *Hansard* transcript are available through the internet at <http://aph.gov.au/hansard>.

Acknowledgement

1.6 The committee thanks organisations and individuals who made submissions to this inquiry and gave evidence at the public hearing.

Note on references

1.7 Submission references in this report are to individual submissions as received by the committee, not to a bound volume. References to the committee *Hansard* are to the proof *Hansard*. Page numbers may vary between the proof and the official *Hansard* transcripts.

CHAPTER 2

OVERVIEW OF THE BILL

Background

2.1 The Attorney-General, in his second reading speech, advised that the proposed amendments in the Bill are part of the government's ongoing review of national security legislation and 'have been identified through practical experience' as measures to improve the operation of the key provisions of the legislation to be amended.¹

2.2 In announcing these proposed amendments, the Attorney-General also noted that Australia's intelligence and security agencies continue to be subject to a range of oversight and accountability measures, including the Parliamentary Joint Committee on Intelligence and Security and the Inspector-General of Intelligence and Security.²

Summary of provisions

2.3 The Bill amends the *Australian Security Intelligence Organisation Act 1979*, (ASIO Act) the *Criminal Code Act 1995* (Criminal Code) and the *Intelligence Services Act 2001* (IS Act).

Amendments to the ASIO Act

Definitions

2.4 Items 1 and 2 of Schedule 1 insert a definition for 'Defence Minister' and 'Foreign Affairs Minister' into section 4 of the ASIO Act. The Explanatory Memorandum (EM) notes that the definitions to be inserted are consistent with the way the Defence and Foreign Affairs ministers are defined in other legislation.³

2.5 To ensure that the collection of foreign intelligence under the ASIO Act encompasses the same range of intelligence about state and non-state threats as provided for in the IS Act and the *Telecommunications (Interception and Access) Act 1979* (TIA Act), Item 3 of Schedule 1 repeals the current definition of 'foreign intelligence' and substitutes an amended definition consistent with those Acts.⁴ This amendment changes the definition of 'foreign intelligence' from 'intelligence relating to the capabilities, intentions or activities of a foreign power' where 'foreign power' means 'a foreign government; an entity that is directed or controlled by a foreign

1 The Hon Robert McClelland MP, Attorney-General, *House Hansard*, 23 March 2011, p. 2862.

2 The Hon Robert McClelland MP, Attorney-General, *House Hansard*, 23 March 2011, p. 2862.

3 EM, p. 4.

4 EM, p. 4.

government or governments; or a foreign political organisation' to 'intelligence about the capabilities, intentions or activities of people or organisations outside Australia.'

2.6 The Minister noted in his second reading speech that this amendment:

...ensures a consistent approach to the collection of foreign intelligence and reflect[s] that the modern national security context encompasses threats from both state and non-state actors.⁵

Computer access warrants

2.7 Item 4 of Schedule 1 amends paragraph 25A(4)(a) of the ASIO Act dealing with the 'things' that may be authorised in a computer access warrant. It clarifies the intent of the existing provision to ensure that such a warrant authorises access to data held in the target computer at any time while the warrant is in force, and is not limited to data held at a particular point in time. This proposed amendment will also ensure consistency with the language used throughout section 25.⁶

2.8 The EM notes that this amendment is not intended to change the operation of the provision.⁷

Issue of warrants for foreign intelligence collection

2.9 Items 5 and 6 make consequential amendments to paragraph 27A(1)(a); and Items 8 to 10 make consequential amendments to subsections 27A(1) and (3) regarding the issuing of warrants, to provide clarification that references to the 'Minister' mean the Minister responsible for issuing warrants under section 27A.

2.10 Item 7 repeals and replaces paragraph 27A(1)(b) to amend the conditions for the issue of foreign intelligence warrants, bringing the ASIO Act into alignment with the IS Act and TIA Act. The current conditions for the issue of such a warrant is that the issuing Minister must be satisfied that, on the basis of advice received, the collection of foreign intelligence relating to that matter is important in relation to the defence of the Commonwealth or to the conduct of the Commonwealth's international affairs. The proposed amendment broadens the conditions, so that the matter can be in the interests of Australia's national security, Australia's foreign relations or Australia's national economic well-being.

Authorising foreign intelligence collection

2.11 Item 13 repeals and replaces paragraph 27B(b) to amend and broaden the conditions for authorising foreign intelligence collection. Similar to Item 7, this

5 The Hon Robert McClelland MP, Attorney-General, *House Hansard*, 23 March 2011, p. 2861.

6 EM, p. 5.

7 EM, p. 5.

amendment will align the ASIO Act with the relevant provisions in the IS Act and TIA Act.⁸

2.12 Currently under section 27B of the ASIO Act, the Attorney-General must be satisfied, on the basis of advice received from the relevant Minister, that the collection of foreign intelligence relating to that matter is important in relation to the defence of the Commonwealth or to the conduct of the Commonwealth's international affairs.

2.13 Under the amended paragraph 27B(b), the authorising Minister will have the ability to authorise the collection of foreign intelligence if satisfied, on the basis of relevant advice, that the collection relating to that matter is in the interests of Australia's national security, Australia's foreign relations or Australia's national economic well-being.

2.14 Items 11 and 12, and Items 14 and 15 make consequential amendments to paragraph 27B(a) and section 27B respectively, to ensure that references to the Minister are references to the Minister responsible for granting authorisations.

Communication of information relating to employment decisions

2.15 Item 18 amends section 36 in Part IV of the ASIO Act, relating to security assessments, to exclude the communication by ASIO of information relating to the engagement, or proposed engagement, of a person by ASIO or another intelligence or security agency within the Australian intelligence community (AIC).⁹

2.16 The EM states that:

The amendment will ensure that ASIO can share information about employment decisions with other members of the AIC. This might include information in response to inquiries about a person's employment or proposed employment with ASIO or another AIC agency, information about security clearances and other related information. Other AIC agencies are already able to share this information and are not subject to the same administrative requirements that apply to ASIO (which includes notification and review rights). Therefore, this amendment will put ASIO on the same footing as other AIC agencies when it comes to sharing information relating to employment within the AIC. This is a very limited category of information, and the amendment will only impact on a small group of persons. Employment decisions within the AIC need to be made carefully, and necessarily the processes take quite some time compared to other Government employment processes in order to ensure suitability of applicants and minimise risk of compromising national security.¹⁰

8 EM, p. 6.

9 EM, p. 7.

10 EM, p. 7.

2.17 Item 16 inserts a definition of 'agency head' into subsection 35(1) of the ASIO Act for the purpose of the proposed amendment under Item 18 and includes the head of each of the six AIC agencies.

2.18 Similarly, Item 17 inserts a definition of 'staff member' into subsection 35(1) of the ASIO Act as a consequence of the proposed amendment under Item 18. The definition is broad and covers a range of employment arrangements for staff of the six AIC agencies. The EM explains:

These agencies operate under differing legislative provisions, and therefore have differing employment provisions, so this definition needs to cover all such employment arrangements.¹¹

Amendment to the Criminal Code

Immunity from civil and criminal liability relating to computer offences

2.19 Item 19 amends subsection 476.5(2A) of the Criminal Code. This subsection provides immunity from civil and criminal liability for staff members or agents of the Australian Secret Intelligence Service (ASIS), Defence Imagery and Geospatial Organisation (DIGO) or Defence Signals Directorate (DSD) for computer-related activities carried out by the agencies in the proper performance of their functions, which might otherwise be prohibited by the unintended consequence of certain Australian laws.

2.20 The proposed amendment inserts a clause into existing subsection 476.5(2A) to ensure that the immunity provision is not inadvertently overridden by subsequent Commonwealth, state or territory legislation, unless that law expressly states otherwise.¹²

2.21 The EM notes that this amendment is complementary to the amendment made by Item 26.¹³

Amendments to the IS Act

Amendments to make express the status of certain instruments

2.22 Proposed amendments under Items 20, 22, 27 and 28 of Schedule 1 'make express' the status of certain instruments made under the IS Act.¹⁴

2.23 The EM notes that these amendments are consistent with the recommendations from the *2008 Review into the Legislative Instruments Act 2003*

11 EM, p. 6.

12 EM, p. 7.

13 EM, p. 7.

14 EM, pp 7-8 and 9-10.

where it indicated a preference for exemptions to be included in the primary Act rather than the *Legislative Instruments Regulations 2004* (Legislative Instruments Regulations).¹⁵ In that context, the EM explains the purpose of the proposed amendments:

This makes laws clearer and means that it is only necessary to consult the primary Act to ascertain whether an instrument is a legislative instrument. Therefore th[ese] item[s] move the exemption from the Regulations into the *Intelligence Services Act 2001*.¹⁶

2.24 The EM clarifies that the proposed amendments under Items 20, 22, 27 and 28 do not change the law, as any instruments made under the relevant sections to be amended are already exempt from the *Legislative Instruments Act 2003* (Legislative Instruments Act), and this is stated in the Legislative Instruments Regulations.¹⁷

Ministerial directions

2.25 Items 20 and 22 will amend subsection 6(3) and section 8 of the IS Act relating to ministerial directions. The amendments provide that a direction given by the responsible Minister under paragraph 6(1)(e) and section 8 are not legislative instruments.¹⁸

Rules to protect privacy of Australians

2.26 Item 27 inserts new subsection 15(7) into the IS Act to clarify the status of instruments made under section 15 of that Act which deals with rules to protect the privacy of Australians. The amendment provides that rules made under this section are not legislative instruments.

Guidelines related to the use of weapons and self-defence techniques

2.27 Item 28 will insert a new subclause 8 at the end of clause 1 of Schedule 2 of the IS Act to clarify the status of instruments made under subclause 1(6) of Schedule 2 of that Act dealing with the guidelines issued by the Director-General on matters related to the use of weapons and self-defence. This amendment provides that guidelines issued under subclause (6) are not legislative instruments.

Functions of DIGO

2.28 Section 6B of the IS Act relating to the functions of DIGO is amended by Item 21 of Schedule 1. This amendment inserts proposed new paragraph 6B(g) to expressly allow DIGO to provide assistance to the Australian Defence Force in

15 EM, pp 8-10.

16 EM, pp 8-10.

17 EM, pp 8-10.

18 EM, p. 8.

support of military operations and to cooperate with the Defence Force on intelligence matters .

2.29 The EM notes:

This is not an extension of the functions of DIGO but a clarification of them. The function is consistent with a similar function of the Defence Signals Directorate.¹⁹

Ministerial authorisation for producing intelligence about Australian persons

2.30 Item 23 of Schedule 1 inserts new subparagraph 9(1A)(a)(iva) into the IS Act to provide an additional ground for obtaining a Ministerial Authorisation under that section.

2.31 The IS Act requires a Ministerial Authorisation for ASIS, DSD or DIGO to undertake activities for the purpose of producing intelligence on an Australian person and requires the Minister to be satisfied that the person is, or is likely to be, involved in one or more of the activities listed in paragraph 9(1A)(a).²⁰

2.32 This item will amend the grounds for such an authorisation under paragraph 9(1A)(a), to include as a ground that the Australian person is, or is likely to be, involved in activities related to a contravention, or an alleged contravention, of a 'UN sanction enforcement law'.²¹

2.33 Item 24 inserts a definition of 'UN sanction enforcement law' in subsection 9(1B) of the IS Act for the purpose of the amendment made by Item 23, and provides that the term has the same meaning as in the *Charter of the United Nations Act 1945*.

Immunity from civil and criminal liability for certain acts

2.34 Item 26 will amend section 14 of the IS Act in a similar way to the proposed amendment under Item 19 to the Criminal Code (discussed in paragraphs 2.19-2.21 above).

2.35 Section 14 provides immunity from civil and criminal liability for staff members and agents of an agency (ASIS, IGO or DSD) for activities carried out by the agencies in the proper performance of their functions, which might otherwise be prohibited by the unintended consequences of certain Australian laws.

19 EM, p. 8.

20 EM, p. 9. These activities include, for example, activities that present a significant risk to a person's safety; acting for, or on behalf of, a foreign power; or committing a serious crime by using or transferring intellectual property.

21 EM, p. 9.

2.36 The proposed amendments will insert two new subsections into section 14 to ensure the immunity provision is not vulnerable to being overridden by other Commonwealth, state or territory laws, unless that law expressly states otherwise.²²

22 EM, p. 9.

CHAPTER 3

KEY ISSUES

3.1 The committee received submissions from a range of organisations and individuals for this inquiry. Submissions from the Queensland Police Service and the Law Society of Western Australia expressed broad support for the Bill.¹ The New South Wales Minister for Police and Emergency Services also offered support for the Bill, advising that the proposed amendments do not raise any specific legal issues for the NSW Police Force and that the Bill appears uncontentious from a law enforcement point of view.²

3.2 However, a number of submissions received by the committee raised concerns with Items 3, 7 and 13 of Schedule 1 of the Bill, which relate to ASIO's power to collect foreign intelligence. Other aspects of the Bill which the committee received comment on were Item 4, which amends the ASIO Act to clarify that computer access warrants authorise ongoing access to the relevant computer during the life of the warrant; and Items 19 and 26, which amend certain immunity provisions in the IS Act and the Criminal Code to clarify that those provisions can only be overridden by express legislative intent.

Collection of foreign intelligence under the ASIO Act

3.3 As noted above, concerns were raised about the proposed amendments contained in Items 3, 7 and 13 of Schedule 1 of the Bill which will amend certain provisions of the ASIO Act dealing with ASIO's power to collect foreign intelligence. Those items expand the definition of 'foreign intelligence', along with the scope of provisions relating to foreign intelligence collection warrants and authorisations.

3.4 The Law Council of Australia (Law Council) expressed its opposition, not only to the breadth of the proposed new definition of 'foreign intelligence', but also to the amended test in sections 27A and 27B. It recommended that Items 3, 7 and 13 be removed from the Bill.³

3.5 At the public hearing, Ms Rosemary Budavari articulated the Law Council's position:

The Law Council opposes the proposed amendments relating to the definition of foreign intelligence essentially for two reasons. The first reason is that we consider that no real case has been made out to justify them, and certainly not one which takes proper account of the full scope of

1 See *Submission 5* and *Submission 10*.

2 *Submission 7*, p. 1.

3 *Submission 1*, p. 3.

ASIO's existing powers and which explains by reference to more than fairly broad statements why those powers are inadequate. In this context it is important to note ASIO's existing powers to gather information that are relevant to security and the fairly broad definition of security that is already within the Act. The materials that support this bill, the explanatory memorandum and submissions in our respectful submission from the Attorney-General's Department, do not clearly spell out the effect of the amendments nor provide sufficient justification for them. For example, what is not clearly stated is that the amendments are not simply about allowing ASIO to do the same work it has always done—for example, counterterrorism work, but in a different threat environment which is referred to in those materials—but, in fact, potentially allow ASIO to do different work altogether—for example, gathering information about economic activity and negotiations. In short, the amendments expand ASIO's sphere of activity.⁴

3.6 Ms Budavari continued:

The second reason that we oppose the new proposed definition and the threshold test for the authorisation of the gathering of this foreign intelligence is that these provisions are so broadly drafted they no longer fulfil their purpose. They do not simply substitute new parameters for old parameters, but they replace statutory parameters with broad ministerial discretion and that starts to undermine the purpose and effectiveness of the act. In this regard we contrast the test for the use of these powers with the threshold test for ASIO gathering information in relation to domestic matters which is far more tightly defined.⁵

3.7 While acknowledging the changing nature of threats to Australia's security,⁶ the Law Council described the proposed changes as affording 'the Minister and [ASIO] almost unfettered discretion to determine when and how ASIO's powers may be used to gather information about people's activities, communication and relationships abroad.'⁷ The Law Council outlined the impact of the proposed amendments in Items 3, 7 and 13:

[T]he proposed amendments to the definition of "foreign intelligence", coupled with the further proposed amendment to the test in sections 27A and 27B, will mean that search warrants, computer access warrants and surveillance and listening device warrants are available to ASIO in a very broad range of circumstances. The proposed changes will almost render meaningless the threshold test that must be met by ASIO in order to obtain a warrant or authorisation to collect intelligence under 27A and 27B. A warrant or authorisation will be able to be obtained to gather information about the activities of *any* person or group outside Australia whenever those

4 *Committee Hansard*, 16 June 2011, p. 1.

5 *Committee Hansard*, 16 June 2011, p. 2.

6 *Supplementary Submission*, p. 2.

7 *Submission 1*, p. 2.

activities are considered to be somehow relevant to Australia's national security, Australia's foreign, relations or Australia's economic well-being.⁸

3.8 The Castan Centre for Human Rights Law (Castan Centre) was also critical of the proposed broadening of the definition of 'foreign intelligence' and the amended conditions for the issue of foreign intelligence warrants under the Bill. It also recommended that Items 3 and 7 should not be enacted unless more detailed reasons can be given as to why ASIO's capabilities need to be expanded in the ways for which those items provide.⁹

3.9 The Castan Centre argued that the current definition of 'foreign intelligence', which includes 'a foreign political organisation', adequately covers most non-state organisations that may threaten national security:

[B]oth individuals and organisations that are linked to threats or acts of politically-motivated violence, even if the violence has nothing to do with Australia, would fall under the current definition of security, which includes all offences again Part 5.3 of the *Criminal Code* (Cth), meaning that ordinary special powers warrants would be available in respect of them.¹⁰

3.10 The Castan Centre agreed that the amendments would allow ASIO a wider scope to investigate the activities of Australians who are overseas, whose activities do not pose a threat to Australia's security but do have implications for Australia's foreign relations or economic interests.¹¹ Two examples were presented in that regard:

An example of such activities might include the release of secret government information by an Australian living abroad, such as has been the case in respect of Julian Assange and Wikileaks. Currently, information about Wikileaks probably would not constitute foreign intelligence – because Wikileaks is (arguably) not a foreign political organisation, and its activities do not threaten Australia's security (as defined in section 4 of the *Australian Security Intelligence Organisation Act 1979* (Cth)). But Wikileaks is an organisation, and Mr Assange is a person, outside Australia, and their activities evidently do have implications for Australia's foreign relations. This example shows how the notion of "person or organisation outside Australia", combined with the notion of "Australia's foreign relations", very considerably expands the scope of ASIO's potential activities.

Another example can be given by combining the notion of "intelligence pertaining to organisations outside Australia" with the notion of "Australia's national economic wellbeing". This suggests that the amendments would permit ASIO to engage in certain forms of economic or industrial

8 *Submission 1*, p. 2.

9 *Submission 2*, p. 4.

10 *Submission 2*, pp 2-3

11 *Submission 2*, p. 3.

espionage, including in relation to Australians working for overseas firms that are major rivals to key Australian industries.¹²

3.11 The Federation of Community Legal Centres Victoria also voiced concern about the expansionary implications of the proposed amendments under Item 3 and 7 of Schedule 1 of the Bill, and endorsed the Castan Centre's submission.¹³

Departmental response

3.12 The Attorney-General's Department (Department) explained that the rationale for the proposed changes relating to the definition and collection of foreign intelligence under the ASIO Act is to align it with the IS Act and the TIA Act. The Department further advised that the amendment will result in a consistent approach to foreign intelligence collection and authorisations, enhancing interoperability and intelligence sharing and allowing for more efficient processes for collecting and communicating foreign intelligence.¹⁴

3.13 In addressing concerns about the breadth of the proposed amendments, the Department emphasised the importance of aligning ASIO's foreign intelligence collection with that of other relevant intelligence agencies, to ensure a complementary role and to eliminate potential gaps in intelligence coverage.¹⁵ However, the Department assured the committee that '[t]his is not 'consistency for the sake of consistency' – rather it reflects that ASIO has long played a role that is intended to complement the foreign intelligence role of the other intelligence agencies' and that those roles 'have not been completely aligned because legislation was drafted at different times, reflecting different threat environments'.¹⁶

3.14 With respect to specific concerns about a possible lowering of the threshold test for the collection of foreign intelligence, the Department reiterated that 'this is already the construct within which Australia's foreign intelligence agencies collect foreign intelligence and which sets the three broad boundaries which have been enshrined in the [IS] Act since 2001. This definition has provided the parameter for the activities of Australia's foreign intelligence collection agencies (ASIS, DSD, DIGO) since their creation'.¹⁷ The Department advised that it did not expect 'that this amendment will result in significantly more foreign intelligence collection warrants or authorisations being issued under the ASIO Act';¹⁸ and that ASIO's core focus will

12 *Submission 2*, pp 3-4.

13 *Submission 3*, p. 2.

14 *Submission 4*, p. 1.

15 *Submission 4*, p. 2.

16 *Second Supplementary Submission*, p. 5.

17 *Second Supplementary Submission*, p. 6.

18 *Second Supplementary Submission*, p. 5.

continue to be its security intelligence function, as opposed to the collection of foreign intelligence.¹⁹

3.15 Further:

The proposed amendment does not create a broad new power or space for ASIO to engage in new activities or 'economic espionage'. It merely seeks to apply the existing parameters already applicable to foreign powers and political organisations to individual 'non-state' actors as part of the harmonisation of the legislative definitions. This is designed to facilitate more streamlined cooperation between ASIO and the foreign intelligence agencies and minimise the chance of risk of an intelligence failure.

...the changing security environment presents a need for updating the ASIO legislation. The current ASIO Act provisions do not cover the same range of national security threats, and do not reflect the modern concept of foreign intelligence as reflected in the [IS] Act. The ASIO Act provisions were drafted at a time when the main national security threats were state-sponsored threats, and therefore focused on defence and international affairs.²⁰

3.16 The Department listed terrorism, transnational crime, weapons proliferation (including proliferation of nuclear, biological, chemical and conventional weapons and related technologies) and people smuggling as some examples of the types of modern national security threats that are increasingly not state sponsored.²¹ An officer from the Department provided further examples of potential threats during questioning at a Budget Estimates 2011-12 hearing:

An example of that would be—and this is something that people do have in mind with these amendments—is major cyberattacks, for example. Nowadays much of our industry and much of our economic infrastructure, which is very, very connected to our national security, is owned by the private sector as well as the Australian government, the state government and the like and they can be targeted by individuals, not other countries, who could threaten our national economic wellbeing. A major organised crime syndicate which had been effective in attacking, say, our banks could cause a loss of confidence in the banking system and then do considerable damage to our economy. That would be an example of something major of that nature.

Another one, which is particularly important, is to do with the proliferation of nuclear biological, chemical and conventional weapons technology. In the old days, everyone would think: that would have to be controlled or initiated by a foreign power, which is the traditional side of it; however, there is a lot of money in it. There is a lot of money in these sorts of

19 *Second Supplementary Submission*, p. 5.

20 *Second Supplementary Submission*, p. 7.

21 *Submission 4*, p. 2; *Second Supplementary Submission*, p. 8.

activities, and so you could have individuals threatening our national economic wellbeing in that way.

Another final area, which is important, is the environment side such as illegal fishing operations or wiping out whole species of fish and the like. You could have a situation where you had individuals doing that and affecting our national wellbeing in that way.²²

3.17 With respect to safeguards on the exercise of the foreign intelligence collection function, the Department reiterated that existing safeguards and requirements will continue to apply under the proposed amendments:

The safeguards under the Intelligence Services Act, including the requirement for a Ministerial authorisation, would continue to apply. This is because ASIO obtains foreign intelligence at the request of the other agencies. Therefore, before making a request of ASIO, those agencies would need to comply with their own legislation. In relation to the collection of foreign intelligence by ASIO, there would be an additional safeguard as the Attorney-General will be required to be satisfied that collecting particular intelligence is in the interests of Australia's national security, Australia's foreign relations or Australia's national economic wellbeing. In making this decision, the Attorney-General receives advice from the Minister for Defence or the Minister for Foreign Affairs.²³

Role of the Inspector-General of Intelligence and Security

3.18 The Department advised that the Inspector-General of Intelligence and Security (IGIS) 'regularly reviews ASIO's warrant documentation and in doing so has full access to all the warrant information, including the supporting evidence that was put forward to the Attorney-General'. The IGIS also 'looks at propriety which is not just about whether ASIO met the legislative requirements but encompasses all those other aspects that sit in and around it, including whether ASIO adhered to internal guidelines'.²⁴

3.19 At the public hearing, the IGIS, Dr Vivienne Thom, informed the committee:

In general, I consider that it is not my role to comment on government policy, the operational requirements of the intelligence agencies or the legislative amendments which might be required to meet those policy requirements. But if I formed the view, based on my oversight activities, that any proposed amendments might compromise oversight arrangements or pose risks to propriety or human rights that may not be apparent from the face of the amendments, or if I believe that the organisation might not have

22 Committee Hansard, 25 May 2011, p. 87. See also *Second Supplementary Submission*, p. 8.

23 *Second Supplementary Submission*, p. 5; see also *Second Supplementary Submission*, pp 8-11.

24 *Second Supplementary Submission*, pp 10-11.

the adequate internal controls to implement new amendments then I would consider it appropriate that I should inform the committee of my views.²⁵

3.20 Dr Thom addressed the Law Council's concerns regarding the threshold test:

While the new conditions recognise the broader nature of the contemporary threat environment, in my view the threshold of being in the interests of national security, Australia's foreign relations or national economic wellbeing are not insignificant or trivial. I would not paraphrase 'in the interests of' as 'somehow relevant to', as has been done in some of the submissions. When inspecting foreign intelligence collection warrant documentation, under the proposed regime we would be paying close attention to the documentation that addresses these criteria.²⁶

3.21 At the hearing, some members of the committee raised concerns about the broad nature of the element of the new definition concerning 'Australia's economic well-being' and, in particular, the approach of the IGIS in her role or review of that element. An officer from the Department confirmed that this element is not defined, but the intention is that it would not concern any matters that are 'trivial' in nature. He emphasised that this phrase has been used in the IS Act for over 10 years.²⁷

3.22 Dr Thom described her approach to review in regards to 'Australia's economic well-being' criterion:

[T]hat is ultimately a decision for the minister which I do not inquire into. What I would look at is the sort of case that ASIO have put forward, the information they have provided and, of course, the other agency that is involved, be it a foreign affairs agency or a defence agency. Is the information they have put forward to support the case balanced and thorough? Is the case that is put forward firmly based on the information they have?²⁸

Immunity provisions in the IS Act and the Criminal Code

3.23 Items 19 and 26 of Schedule 1 amend certain immunity provisions in the Criminal Code and the IS Act, respectively, for clarification to ensure the immunity provisions are not vulnerable to being inadvertently overridden by subsequent Commonwealth, state or territory laws, unless that law expressly states otherwise.

3.24 The Department's submission noted:

This provision provides immunity from civil and criminal activities for a limited range of circumstances directly related to the proper performance by the agencies of their functions. This limited immunity is necessary as

25 *Committee Hansard*, 16 June 2011, p. 8.

26 *Committee Hansard*, 16 June 2011, p. 8.

27 *Committee Hansard*, 16 June 2011, p. 9.

28 *Committee Hansard*, 16 June 2011, p. 10.

certain Australian laws, including State and Territory laws, could impose liability on the agencies. The proposed amendment will not prevent other laws from limiting this immunity. However, the amendment will ensure that any such limitation cannot be done inadvertently, and will require express consideration to be given to whether section 14 should be overridden.²⁹

3.25 Subsection 476.5 of the Criminal Code provides immunity from civil and criminal liability for staff members and agents of ASIS, DSD and DIGO for computer-related activities carried out by the agencies in the proper performance of their functions, which might otherwise be prohibited by the unintended consequences of certain Australian laws. Item 19 of the Bill amends subsection 476.5 of the Criminal Code to ensure this immunity provision is not vulnerable to being inadvertently overridden by subsequent legislation, unless the law expressly states otherwise.³⁰

3.26 The Department noted in its submission that this amendment mirrors the immunity provision in section 14 of the IS Act, described above, so it is desirable to maintain consistency between the two provisions.³¹

3.27 The Castan Centre for Human Rights Law considered that Items 19 and 26 are constitutionally unproblematic in relation to state and territory laws. However, it raised concerns with the application to Commonwealth legislation:

While there is scholarly support for the notion that the Commonwealth Parliament enjoys the power to require its own legislation to be amended, if at all, only by express words, there are contrary opinions. Some commentators take the view that a consequence of the Commonwealth Parliament's plenary legislative power (as stated in section 51 of the *Constitution*, and of course subject to the *Constitution* itself) is that the Parliament cannot deprive itself of the power of implied repeal by provisions such as those that items 19 and 26 would introduced into the law.³²

3.28 However, the Department considered the Castan Centre's view of constitutional complications arising out of Items 19 and 26 to be 'overstated':

The normal rules of statutory construction provide that an earlier statutory provision is not repealed by a later provision unless an intention to that effect is implied (for example, the provisions are not capable of operating consistently). There is a general presumption that the legislature intends that both provisions should operate and that, to the extent they would otherwise overlap, one should be read as subject to the other.

29 *Submission 4*, p. 7.

30 EM, p. 7.

31 *Submission 4*, p. 7.

32 *Submission 2*, p. 5.

The proposed amendments would make it clear that the provisions are intended to prevail in the absence of an express contrary provision. This makes the legislature's intention clear as to the intended operation of the law. In the absence of clear indication by a later legislature that it intends to displace these express provisions and impliedly 'repeal' them, the proposed amendments to the immunity provisions may operate to affect the question of precedence between overlapping provisions in relevant cases.

The proposed amendments will not prevent other laws from limiting the immunity in these provisions as Parliament may choose to override these immunities in appropriate circumstances. The immunity provisions are not necessarily something that legislators would actively turn their mind to, and the risk of inadvertently overriding these provisions could therefore arise. However, the amendments will ensure that there would need to be a conscious decision to do so and it would need to be made express on the face of the legislation. This would ensure that any such limitation cannot be done inadvertently.³³

ASIO computer access warrants

3.29 Item 4 of the Bill amends the ASIO Act to clarify that computer access warrants authorise ongoing access to the computer during the life of the warrant. The EM notes that this amendment updates the language to ensure consistency throughout section 25A and to make clear the original legislative intent of the section.³⁴

3.30 The submission of the Attorney-General's Department highlighted the existing safeguards concerning computer access warrants:

These amendments will not impact on the strong existing safeguards that ensure computer access warrants are only authorised in appropriate circumstances. A computer access warrant can only be issued by the Attorney-General in the prescribed circumstances set out in the provision – that is, the Attorney-General must be satisfied that there are reasonable grounds for believing that access by ASIO to data held in a particular computer will substantially assist the collection of intelligence...in respect of a matter that is important in relation to security. Additionally, the Attorney-General's Guidelines, issued under section 8A of the ASIO Act, require that 'any means used for obtaining information must be proportionate to the gravity of the threat posed and the probabilities of its occurrence', and 'using as little intrusion into individual privacy as is possible'. When a warrant is issued, the Director-General is required to report to the Attorney-General on the extent to which the warrant assisted ASIO in carrying out its functions.³⁵

33 *Supplementary Submission*, p. 4.

34 EM, pp 4-5.

35 *Submission 4*, p. 3.

3.31 Dr Dan Svantesson raised concerns that the proposed amendment concerning computer access warrants may be inadequate as it limits access to the computer the warrant relates to, but not other possible data that may be associated with that computer through a 'cloud computing' arrangement.

A focus on such data risks becoming outdated in light of fast advancing cloud computing services. With cloud computing, person X's data will simply not be stored as such on person X's computer and a warrant to access data stored on that computer will be of limited value.

Imagine, for example, that a warrant is issued in relation to Mr X's computer (the "target computer"). Imagine further that, in accessing that computer it becomes clear that no substantial data is stored on the computer as Mr X uses a cloud computing structure for all his work. As the warrant is limited to Mr X's computer, it would seem that access would not be allowed to the cloud computing storage even if, for example, Mr X has stored his log-in details for that service on his computer.

Furthermore, under a cloud computing structure, it may not be possible to know in advance on what particular computer data is stored.³⁶

3.32 In a supplementary submission, the Department addressed Dr Svantesson's concerns:

The Bill will amend paragraph 25A(4)(a) of the ASIO Act to replace 'stored in the target computer' with 'held in the target computer at any time while the warrant is in force'. This amendment is not intended to change the law, but rather to clarify the intent of the provision and ensure consistent language is used throughout the provision.

The scope of this amendment is to clarify that the intention was to authorise access to data held in the target computer at any time while the warrant is in force. This makes clear that the provision is intended to authorise access to data that is held in the target computer during the life of the warrant, and is not limited to data held at a particular point in time (such as when the warrant is first executed).³⁷

3.33 The Department also expanded upon the definitions within the ASIO Act that deal with computer access warrant provisions:

Section 22 of the ASIO Act provides a number of definitions for the purpose of interpreting the computer access warrant provisions under section 25A of the ASIO Act. These definitions are technologically neutral and provide authoritative and useful definitions for ASIO in the exercise of its powers under section 25A. The definitions are wide enough to include various aspects of a computer and types of data. Under section 22 of the ASIO Act, computer means 'a computer, a computer system or part of a

36 *Submission 9*, p. 1.

37 *Supplementary Submission*, p. 4.

computer system' while the definition of data 'includes information, a computer program or part of a computer program'.³⁸

Committee view

3.34 The committee acknowledges that some submissions and witnesses raised important issues regarding certain proposed amendments in the Bill, particularly Items 3, 7 and 13 of Schedule 1 which will enable ASIO to collect a broader range of foreign intelligence than is currently possible. However, the committee believes that the proposed amendments are necessary to ensure that ASIO is able to respond to modern national security threats which encompass both state and non-state actors. Further, the committee agrees that the Bill's proposed measures will provide for a consistent approach across relevant intelligence agencies in Australia.

3.35 The proposed amendments to the ASIO Act relating to foreign intelligence will allow ASIO to fulfil its intended role of complementing the foreign intelligence function of other intelligence agencies. The committee has confidence in the integrity and conduct of ASIO in relation to any collection of foreign intelligence under the proposed amendments, and is of the view that the expansion of ASIO's powers in this regard are necessary to enable it to continue to act lawfully in dealing with the changing nature of potential security threats to Australia.

3.36 In that context, the committee notes assurances by the Department as follows:

In exercising their powers, agencies are necessarily focused on performing their statutory functions and they do not have the resources or legislative mandate to engage in unwarranted or lower level activity. Agencies would only look into matters of high importance to the national interest...[and] relevant safeguards...ensure the propriety and legality of ASIO's exercise of their functions and powers, including the monitoring, inspection and inquiry powers of the IGIS.³⁹

3.37 The committee agrees that the proposed amendments will improve the practical operation of some key provisions in relevant legislation, while maintaining sufficient safeguards where appropriate. In addition, the committee has confidence that the oversight by the IGIS to review the legality and propriety of activities of agencies within the Australian intelligence community, including monitoring, inspection and inquiry powers, is a sufficient and appropriate safeguard.

3.38 The measures in the Bill should be considered as key priorities in the current security environment, and the committee believes the Bill should be passed in a timely manner to ensure Australia's security and intelligence agencies have the ability to respond to the changing nature of threats to national security as soon as possible.

38 *Supplementary Submission*, p. 5.

39 *Second Supplementary Submission*, p. 8.

3.39 As a final point, however, the committee expresses its disappointment with the overall quality of the Explanatory Memorandum (EM) produced to accompany the Bill. The lack of detail in the EM, particularly in relation to the proposed foreign intelligence amendments, did not assist the committee in undertaking its consideration of the legislation. The EM does not provide a detailed explanation of the need for the provisions and how the expansion of ASIO's powers will assist it and other foreign intelligence agencies to perform their functions, nor does it mention the safeguards in place that will ensure appropriate use of the enhanced powers.

3.40 Given the opposition to the foreign intelligence provisions by a number of submitters and witnesses, this is a significant omission, and it would have been of great assistance if a more comprehensive explanation had been provided in the EM. The information subsequently provided by the Department to the committee (particularly in its second supplementary submission) was extremely helpful and, in the committee's view, should have been included in the EM in the first place. The committee recommends that this oversight be corrected immediately by way of revision and reissue of the EM to include all additional information provided to the committee during the course of the inquiry which relates to the proposed foreign intelligence amendments contained in the Bill.

Recommendation 1

3.41 The committee recommends that the Attorney-General's Department revise and reissue the Explanatory Memorandum to the Bill as a matter of urgency to specifically include all additional information contained in the Department's submissions to this inquiry which relate to the proposed foreign intelligence amendments in Items 3, 7 and 13 of Schedule 1 of the Bill, including:

- **detailed justification and explanation of why the amendments are considered necessary;**
- **specific examples of how the expansion of the definition of 'foreign intelligence' will assist ASIO and other foreign intelligence agencies to perform their functions; and**
- **an explanation of the safeguards in place to ensure appropriate use of the foreign intelligence collection function.**

Recommendation 2

3.42 Subject to Recommendation 1, the committee recommends that the Senate pass the Bill.

**Senator Trish Crossin
Chair**

DISSENTING REPORT BY THE AUSTRALIAN GREENS

1.1 The Australian Greens object to the content of this Bill and to the Committee reporting three months early so it can be rushed through the Senate. The poverty in both the content of the Bill and the Committee's process in reviewing it will be examined in turn.

1.2 The government is desperate to pass this Bill but is not clear as to why. At the hearing that only occurred because I insisted one was necessary, I asked about reasons for the hurry and was told by Attorney General's Department,

While I cannot reasonably talk about specific cases here, I can assure you that it is very important.¹

1.3 It is nothing short of Orwellian that this is considered an argument.

1.4 Evidence provided by senior legal experts regarding the unnecessary and dangerous implications of significantly broadening the definition of 'foreign intelligence' and 'foreign power' elicited longer but similarly meaningless responses from the Department.

1.5 The fact is that ASIO is already generally empowered to obtain, correlate and evaluate intelligence relevant to 'security' and may obtain warrants for this purpose. The current definition of 'foreign intelligence' includes intelligence relating to the capabilities, intentions or activities of foreign political organisations, even if they are not connected to or sponsored by any state.

1.6 In their evidence as to how the amendments would operate in practice, and their second and even third submissions, the Attorney General's Department has not been clear on exactly what additional targets they envisage being picked up by the amendments. In particular, they don't really explain what legitimate targets of spying would not get picked up by the current definition of 'foreign political organisation'.

1.7 The Law Council summarised the perplexity expressed in many submissions when stating,

We simply do not know what it is that ASIO wants to be able to do, needs to be able to do and cannot do because of the constraints of the current legislation, so we cannot possibly sensibly discuss how the proposed

1 *Committee Hansard*, 16 June 2011, p. 13.

amendment could be narrowed so that it only provides that additional flexibility that it needs to provide.²

1.8 While I have no doubt that the Inspector General of Intelligence and Security will,

...continue to monitor this closely, as not only will it affect my workload but also a significant increase in warrant applications could be a clear indicator of whether the relevant conditions are being applied too broadly.³

1.9 I share the concerns expressed by the Law Council that her role is seriously undermined by this legislation and the difficulties her office has in assessing the appropriateness of the gathering of foreign intelligence and the issuing of warrants because the tests contained within the Act do not set out clear parameters.

1.10 The Attorney General's Department also do not deal with the issue raised in the Castan submissions [submission 2] that, in addition to section 11 of the Intelligence Services Act, the Intelligence Services Act also imposes additional constraints on spying on Australians (in sections 8 and 9) which would not apply to ASIO under these amendments.

1.11 ASIS cannot spy on an Australian who is overseas and engaged in conduct affecting Australia's economic wellbeing without also satisfying the minister of the matters set out in sections 8 and 9 of the Intelligence Services Act. Why should ASIO have broader powers to spy on Australians simply because of their connections to overseas activity?

1.12 The discussion of supply chains of nuclear material is an incredibly weak justification for the 'economic wellbeing' issue. If, however, nuclear proliferation is really of such concern, why not expressly incorporate that into the definition rather than this catchall of 'people or organisations outside Australia' plus 'national economic wellbeing'?

1.13 As is well known, the proliferation issue is already covered by the definition of security. In their third submission, the Department merely rehashed this example and added another about illegal fishing, which seems strangely appropriate given how fishy this process has been.

1.14 Turning to the Committee's process, I object to the undue haste pressed upon the Committee by the government and the complicity of both major parties in abandoning the initial reporting date of 21 September for no good reason.

1.15 The Senate Committee system is pivotal to the thorough scrutiny of legislation. Committees have a vital role to play in carefully reviewing the

2 *Committee Hansard*, 16 June 2011, pp 4-5.

3 *Committee Hansard*, 16 June 2011, p. 9.

implications of laws and enhancing public understanding about their practical application.

1.16 The inquiry process that solicits expert opinion and takes evidence in public hearings is not simply a rubber stamping exercise but rather has an important role in helping legislators get important details right. The process should assist in weighing up whether laws afford the right balance between security and civil liberties and whether they are necessary or proportionate.

1.17 It should not take media attention being drawn to a Bill's existence for the Committee process to be reluctantly initiated. The public hearing for this Bill was conducted over a 90 minute period during a busy Parliamentary sitting day. It was only by accident that I was able to attend the hearing because debate on another bill was postponed.

1.18 Yet again, the Senate is being called upon to rubber stamp an extraordinary expansion of ASIO's powers with entirely inadequate justification provided. And yet again, there appears to be a bipartisan consensus to simply let this sail through.

1.19 ASIO is very well endowed. Given that its mandate and budget is ever-increasing, its staffing complement has tripled over the decade, and its facilities under construction resemble a fortress second only in size to the Parliament, each expansion of ASIO's powers should be carefully examined.

1.20 That has not been the case with this inquiry. The Australian Greens are not satisfied that this report adequately addresses the issues and concerns raised in the submissions received and do not believe the Bill should proceed.

Senator Scott Ludlam
Australian Greens

APPENDIX 1

SUBMISSIONS RECEIVED

Submission Number	Submitter
1	Law Council of Australia
2	Castan Centre for Human Rights Law
3	Federation of Community Legal Centres (Vic)
4	Attorney-General's Department
5	Queensland Police Service
6	Mr Lawrence Lyons
7	The Hon Michael Gallacher MLC, NSW Minister for Police and Emergency Services
8	Mr Terence Dwyer
9	Dr Dan Svantesson
10	Law Society of Western Australia
11	Ms Jean Sievers
12	Mr Robert Fox
13	Ms Nicola Giuliano

APPENDIX 2

WITNESSES WHO APPEARED BEFORE THE COMMITTEE

Canberra, Thursday 16 June 2011

BUDAVARI, Ms Rosemary, Co-Director, Criminal Law and Human Rights,
Law Council of Australia

DONOVAN, Ms Helen, Co-Director, Criminal Law and Human Rights,
Law Council of Australia

MCDONALD, Mr Geoffrey, First Assistant Secretary, National Security Law and
Policy Division, Attorney-General's Department

MUNSIE, Ms Laura, Principal Legal Officer, Security Law Branch,
Attorney-General's Department

THOM, Dr Vivienne, Inspector-General,
Office of the Inspector-General of Intelligence and Security

WILLING, Ms Annette, Assistant Secretary, Security Law Branch,
Attorney-General's Department

