

Parliamentary Joint Committee on Law Enforcement Bill 2010

This is a later edition of a Bills Digest previously prepared for the 42nd Parliament

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Parliamentary Joint Committee on Law Enforcement Bill 2010

Date introduced: 30 September 2010

House: House of Representatives

Portfolio: Attorney-General

Commencement: The day after Royal Assent

Links: The links to the [Bill, its Explanatory Memorandum and second reading speech](#) can be found on the Bills home page, or through <http://www.aph.gov.au/bills/>. When bills have been passed they can be found at the ComLaw website, which is at <http://www.comlaw.gov.au/>.

This Bill lapsed on the proroguing of Parliament in July 2010. It has been re-introduced without any significant changes.

Purpose

The purpose of the Parliamentary Joint Committee on Law Enforcement Bill 2010 (the Bill) is to improve oversight of the Australian Federal Police (AFP) by establishing the Parliamentary Joint Committee on Law Enforcement (PJCLE). This Committee will replace and extend the functions of the current Parliamentary Joint Committee on the Australian Crime Commission (PJACC) and will be responsible for providing parliamentary oversight of the AFP in addition to the Australian Crime Commission (ACC).

Background

This Bill was introduced in the 42nd Parliament but lapsed on the proroguing of the Parliament on 19 July 2010. This Bill is identical to that introduced in the last Parliament.

This Bill is part of a package of reforms and was introduced in cognate with the National Security Legislation Amendment Bill 2010. The Library has published a separate Bills Digest on that Bill and that can be found via the Bills Homepage [here](#).

The existence of parliamentary committees to oversee law enforcement agencies is generally seen as beneficial, adding to the transparency and accountability of such agencies.

The current Parliamentary Joint Committee on the Australian Crime Commission (PJACC) was established under Part III of the *Australian Crime Commission Act 2002* (the ACC Act) and is charged with monitoring, reviewing and reporting on the activities of the Australian Crime Commission (ACC).

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The Committee had existed prior to 2003 as the Parliamentary Joint Committee on the National Crime Authority but was renamed in 2003 to reflect the establishment of the ACC.¹

The PJACC and its predecessor have inquired into and reported on a range of matters including:

- The legislative arrangements to outlaw serious and organised crime groups (2009)
- Future impact of serious and organised crime on Australian society (2007)
- Amphetamines and Other Synthetic Drugs (AOSD) (2007)
- Review of the *Australian Crime Commission Act 2002* (2005)
- Inquiry into the trafficking of women for sexual servitude (2005)
- Cybercrime (2004)
- Australian Crime Commission Establishment Bill 2002 (2002)

There are also two other joint parliamentary committees with functions of overseeing law enforcement agencies, namely:

- the Parliamentary Joint Committee on Intelligence and Security (PJCS), with functions of reviewing matters in relation to various security agencies (ASIO, ASIS, DIGO, DIO, DSD and ONA), and
- the Parliamentary Joint Committee on the Australian Commission for Law Enforcement Integrity (PJACLEI) established in 2007 with duties including the monitoring and reporting on the Integrity Commissioner's performance of his or her functions and examining trends and changes in law enforcement as far as they relate to corruption and integrity.

It has been noted² that there is an anomaly in this grouping of parliamentary committees in that the largest and most significant law enforcement body, the Australian Federal Police (AFP), is not subject to such parliamentary scrutiny. There have also been suggestions that not only would there be advantages in extending parliamentary oversight to the AFP but also in having all law enforcement bodies then subject to the one parliamentary committee— thus providing a consistent and informed approach to oversight and identifying common trends or areas of overlap.³

The Government's rationale for establishment of the new PJCLEC is that it forms part of the package of reforms being progressed to Australia's national security legislation—these reforms being aimed

1. The Parliamentary Joint Committee on the National Crime Authority was first established in 1984 under the *National Crime Authority Act 1984*.

2. For example: Australian Federal Police Association, Submission to the Senate Legal and Constitutional Affairs Committee: *Inquiry into the Parliamentary Joint Committee on Law Enforcement Bill 2010*, April 2010, p. 2.

3. For example: Commonwealth Ombudsman, Submission to the Parliamentary Joint Committee on the Australian Commission for Law Enforcement Integrity, *Inquiry into law enforcement integrity models*, viewed 15 June 2010, http://www.aph.gov.au/Senate/committee/aclei_ctte/lawenfmod/submissions/sub003.pdf

at 'promoting transparency and ensuring that our laws are appropriately accountable in their operation'.⁴ The most significant difference between the proposed Committee and the existing

Committee's functions is that it will have the capacity to monitor and to review the performance by the AFP of its functions.⁵ However, it must be noted that the AFP is presently not free from scrutiny and accountability. Through the Commonwealth Ombudsman and parliamentary processes such as Senate Estimates, the AFP is required to regularly report on its operations relating to telecommunications interceptions, controlled operations (under the *Crimes Act 1914*) and surveillance. Under section 15 of the ACLEI Act, the Integrity Commissioner has the function to investigate corruption and integrity matters in the AFP. Further, the AFP could be compelled to assist or give evidence to any inquiry that may be established with powers under the *Royal Commissions Act 1902*.

An exposure draft of the Bill was released on 12 August 2009 in the Government's Discussion Paper on National Security Legislation. The Attorney-General's Department has noted that there were very minimal comments on the exposure draft and that those submissions were generally supportive of the proposals to enhance oversight of law enforcement agencies.⁶ The Bill as introduced into Parliament differs only slightly to this exposure draft.⁷

Committee consideration

During the previous Parliament the Bill, together with the National Security Legislation Amendment Bill 2010, was referred to the Senate Legal and Constitutional Affairs Committee for inquiry (The Senate inquiry).

The Senate reported on the Bill on 17 June 2010. In its report, the Committee called on the Attorney-General to provide a ministerial direction or additional materials to explain the circumstances in which the Chief Executive Officer of the Australian Crime Commission and the Commissioner of the Australian Federal Police ought to proactively report matters to the Parliamentary Joint Committee on Law Enforcement.⁸

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4. R McClelland (Attorney-General), 'Second reading speech: Parliamentary Joint Committee on Law Enforcement Bill 2010', House of Representatives, *Debates*, 18 March 2010, pp. 2715–2717, viewed 15 June 2010, http://parlinfo.aph.gov.au/parlInfo/genpdf/chamber/hansardr/2010-03-18/0043/hansard_frag.pdf;fileType=application%2Fpdf
 5. The functions of the AFP are prescribed in section 8 of the *Australian Federal Police Act 1979*.
 6. Attorney-General's Department, Submission to the Senate Legal and Constitutional Affairs Committee, *Inquiry into the Parliamentary Joint Committee on Law Enforcement Bill 2010*, April 2010, p. 4.
 7. Ibid.
 8. Recommendation 5.

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In making this recommendation, the Committee was influenced by the Law Council of Australia's view that the disclosure provisions in the Bill suffer from many of the same shortcomings as those identified with section 59 of the ACC Act by the PJACC.⁹

Subject to this, the Committee recommended that the Senate pass the Bill.¹⁰

Submissions to the Committee's inquiry and report are at:

http://www.aph.gov.au/senate/committee/legcon_ctte/National_Security_Legislation/index.htm

Position of major interest groups

Those submissions to the Senate inquiry that commented on this Bill were generally supportive of the concept of extending parliamentary scrutiny to the AFP. However there were some criticisms of the information disclosure provisions in the Bill and suggestions that these provisions would place limitations on the PJCLE information gathering powers to the extent that the new Committee would not have any special ability to meaningfully oversee the ACC and AFP.

The **Australian Federal Police Association** (AFPA) strongly supports the Bill and is pleased with the proposal that the new Committee have combined oversight of the AFP and ACC which it hopes 'will further entrench principles of public accountability' and will also 'provide protections to AFP employees from unfair criticism by the media and the public'. Their submission notes that the Association has on a number of occasions advocated for this reform, but notes that this support has been the subject of criticism from the AFP.¹¹

The **Police Federation of Australia** also supports the Bill and considers it achieves an appropriate balance between the scrutiny warranted and the necessary safeguards for sensitive information held by law enforcement bodies.¹²

The **Law Council of Australia** welcomes the Bill, noting that in contrast to Australian intelligence agencies and the ACC, it is anomalous that the AFP is not currently subject to oversight by a dedicated parliamentary committee. To the extent that the Bill seeks to address this gap, the Law Council supports this enactment.¹³

However, the Law Council is concerned that the effectiveness of the new Committee may be undermined by certain provisions in the Bill. In particular the Law Council is concerned that the information gathering powers in the provisions in the Bill may not sufficiently compel the AFP and the ACC to furnish the Committee with the information it requires to fulfil its functions, such that the

9. The sorts of concerns identified by the PJACC and referred to by the Law Council are set out in the Key Provisions section of this Digest. See also Law Council of Australia, Submission to the Senate Legal and Constitutional Affairs Committee, *Inquiry into the Parliamentary Joint Committee on Law Enforcement Bill 2010*, April 2010, p. 30.

10. Recommendation 6.

11. Australian Federal Police Association, op. cit., p. 2.

12. Police Federation of Australia, op. cit.

13. Law Council of Australia, op. cit., p. 30.

new Committee, like the PJACC which preceded it, will not have any special ability to meaningfully oversee the ACC and AFP.¹⁴

The Law Council's submission is referred to in more detail under the Main Provisions section of this Digest.

The **Australian Human Rights Commission** (AHRC) also supports the establishment of the new PJCLE and believes that the Committee's oversight function is an important safeguard on the proper and lawful exercise of the broad police powers. The AHRC does however have some concerns with the Bill, namely that:

- the functions of the new Committee as set out in clause 7 do not include a reference to human rights and particular to the International Covenant on Civil and Political Rights¹⁵, and
- the mechanisms for protection of sensitive information in clauses 8 and 9 could prevent the Committee from obtaining the information necessary for it to adequately fulfil its oversight functions.¹⁶

The **Australian Crime Commission** is supportive of the Bill.¹⁷

The Key Provisions section of this Digest contains further comment from submissions to the Senate inquiry.

Financial implications

The Explanatory Memorandum states that the amendments in this Bill have no financial impact on Government revenue.¹⁸

14. Ibid., pp. 30 and 33.

15. Note that the Human Rights (Parliamentary Scrutiny) Bill 2010, currently before the Parliament, provides for the establishment of a Parliamentary Joint Committee on Human Rights. Its functions include examination of Bills and laws for compatibility with human rights and to inquire into any matters related to human rights referred to it by the Attorney-General.

16. Australian Human Rights Commission, Submission to the Senate Legal and Constitutional Affairs Committee, *Inquiry into the Parliamentary Joint Committee on Law Enforcement Bill 2010*, May 2010, pp. 50–51.

17. Australian Crime Commission, Submission to the Senate Legal and Constitutional Affairs Committee, *Inquiry into the Parliamentary Joint Committee on Law Enforcement Bill 2010*, April 2010.

18. Explanatory Memorandum, Parliamentary Joint Committee on Law Enforcement Bill 2010, p. 1.

Key provisions

Establishment of the Parliamentary Joint Committee on Law Enforcement (PJCLE)

Clause 5 sets out the administrative arrangements for establishing the PJCLE and its membership for each Parliament. The PJCLE will consist of 10 members of Parliament, with five members of the House of Representatives and five members of the Senate. Ministers, the President of the Senate and Speaker of the House of Representatives are not eligible to be committee members. The provision follows the existing practices of appointing members to serve on parliamentary joint select committees.

Clause 6 requires that all matters relating to the powers and proceedings of the Committee are to be determined by resolution of both Houses of Parliament. Again this is a standard provision—see for example section 54 of the ACC Act or section 214 of the *Law Enforcement Integrity Commissioner Act 2006*.

Functions of the PJCLE

The functions of the PJCLE are set out in **clause 7** and will include:

- monitoring, reviewing and reporting on the ACC's performance of its functions
- monitoring, reviewing and reporting on the AFP's performance of its functions
- examining both the AFP's and the ACC's annual reports and reporting on matters arising out of such reports
- examining and reporting on trends and changes in criminal activities, practices and methods, and reporting on any desirable changes to the ACC's and the AFP's functions, powers or procedures, and
- inquiring into any question in connection with its functions which is referred to it by either House of Parliament.

Subclause 7(2) places limits on the PJCLE's functions and confirms that the PJCLE's functions *do not* extend to:

- undertaking an intelligence operation or investigating a matter relating to a relevant criminal activity
- reconsidering the findings of the ACC in relation to an operation/investigation (including completed operations and investigations)
- reviewing of certain sensitive operational information or operational methods
- reviewing particular AFP or ACC investigations or operations
- reviewing information provided by a foreign government or its agency where that government does not give consent to disclosure of that information

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- conducting inquiries into complaints about the AFP or ACC.

The PJCLE may however examine and report on information disclosed to it by the CEO of the ACC or by the Commissioner of the AFP under sections 8 and 9 of the Act (**subclause 7(3)**).

Comment

The Attorney-General's Department submission to the Senate inquiry justifies the drafting of this provision on the grounds that it is based on the similar provisions that currently apply to the PJCACC. It states that the purpose of the limitations is to clarify that the role of the PJCLE is to focus broadly on the performance by the AFP and ACC of their functions. It is not intended that the PJCLE be concerned with reviewing individual operations and investigations.¹⁹

The AFPA notes, by way of comparison, a difference between the functions of the new PJCLE committee and the functions of the PJCIS. A primary function of PJCIS is to review the administration and expenditure of the various intelligence agencies (paragraph 29(1)(a) of the *Intelligence Services Act 2001*). AFPA argues that the Bill would benefit from similar coverage to specifically allow for the review of administration and expenditure of the AFP and ACC.²⁰ However, the AFP and ACC are subject to administration and expenditure review through the Senate Estimates processes as well as reporting obligations to the Ombudsman.

Disclosure of information to the PJCLE

Clauses 8 and 9 deals with disclosure of information to the PJCLE by the CEO of the ACC and the Commissioner of the AFP respectively. In general, under **paragraphs 8(1)(a) and 9(1)(a)**, the CEO and the Commissioner must comply with a Committee request for information in relation to an ongoing operations and investigations of their agency. The CEO and Commissioner must also when requested by the Committee, and may at such other times as the CEO or Commissioner think appropriate, inform the Committee about the general performance of the ACC or AFP of its functions (**paragraphs 8(1)(b) and 9(1)(b)**).

However, the CEO and Commissioner may decide not to comply with a Committee request if:

- the information is 'sensitive information' (as defined in **clause 3**), and
- the public interest served in giving the information is outweighed by the prejudicial consequences that might result (**subclauses 8(2) and 9(2)**)

In such a situation, the Committee may refer the request to the relevant Minister (**subclauses 8(3) and 9(3)**). The Minister must then determine in writing whether the information is 'sensitive information' and whether the public interest in disclosing it is outweighed by the prejudicial consequences that might result from disclosure (**subclauses 8(4) and 9(4)**). The Minister may, but is

19. Attorney-General's Department, op. cit., p. 4.

20. Australian Federal Police Association, op. cit.

not required to disclose his or her reasons for such determination (**subclause 8(5)** and **subclause 9(5)**) and such a determination is not a legislative instrument (**subclause 8(4)** and **subclause 9(4)**).

‘Sensitive information’ is defined broadly in **clause 3**. It includes amongst other things, information that if disclosed:

- could prejudice:
 - the security, defence or international relations of Australia
 - relations between the various governments of Australia
- would disclose deliberations or decisions of cabinet
- could reveal a confidential source of information in relation to law enforcement, or to investigations and operations of the AFP and ACC
- could endanger life and safety
- would disclose information, the disclosure of which is prohibited by another Commonwealth law
- could prejudice proper enforcement of the law or the operations of law enforcement agencies
- could prejudice a person’s reputation
- would unreasonably disclose personal information, or confidential commercial information.

Comment

The Explanatory Memorandum states that it is intended that clauses 8 and 9 that allow non-disclosure should be relied upon only in exceptional circumstances. Other options such as providing the information in a private hearing or on condition that sensitive information not be included in the PJCLE’s public reports would be open to the PJCLE in accordance with the powers and proceedings of the PJCLE as determined in accordance with clause 6.²¹

Clauses 8 and 9 closely replicate those provisions of the *Law Enforcement Integrity Commissioner Act 2006* which govern the powers of the PJACLEI to request and receive information from the Integrity Commissioner. The Law Council of Australia in their Senate inquiry submission acknowledge that these clauses are an improvement on the disclosure provisions in the ACC Act because they recognise that, even where the disclosure of certain information may have prejudicial consequences, this may be outweighed by the public interest in the information being disclosed to the Committee.²²

21. Explanatory Memorandum, p. 4.

22. The current provisions in the ACC Act provide simply that the Chair of the ACC board *must not* disclose information to the PJACC if the disclosure of the information to the public could prejudice the safety or reputation of persons or the operations of law enforcement agencies. There is no requirement that this be weighed against the public interest in the Committee having access to the information.

Nonetheless, it is the Law Council's view that the disclosure provisions in the Bill still suffer from many of the same shortcomings as those identified with section 59 of the ACC Act by the PJACC.²³ For example:

- they offer very little guidance about what information agency heads should be required to proactively volunteer to the Committee and when, and instead assume that Committee members will be in a position to identify and request any pertinent information
- they do not provide any timeframe within which agency heads must respond to a request for information
- they allow agency heads wide latitude to refuse a request for information, in relation to which the only remedy is appeal to the Minister, and
- the Minister is not required to provide any reasons for his or her determination.²⁴

While the Explanatory Memorandum states that the provisions allowing an agency to refuse a Committee request for information '*should be relied upon only in exceptional circumstances*', the Law Council argues that this sentiment is not reflected in the text of the Bill itself, and in particular is not captured in the test to be applied by agency heads or the Minister in determining whether information should be disclosed:

In the circumstances, the Law Council is concerned that the provisions of the Bill may not sufficiently compel the AFP and the ACC to furnish the Committee with the information it requires to fulfil its functions, such that the new Committee, like the PJACC which preceded it, will not have "*any special ability to meaningfully oversee*" the ACC and AFP.²⁵

Comment—definition of 'sensitive information'

The definition of 'sensitive information' contained in the Bill closely mirrors the definition of 'sensitive information' in the *Law Enforcement Integrity Commissioner Act 2006*. However, the definition in the Bill is slightly more expansive in that it also includes information that '*could prejudice a person's reputation*' (**proposed subclause 3(h)**). This addition to the definition is perhaps a consequence of the current provisions of the *ACC Act* which provide that the Chair of the Board must refuse a request for information from the PJACC if he or she considers that disclosure of information to the public could, amongst other things, prejudice the reputation of persons.

23. The Law Council's submission refers the situation in 2007 relating to urgent retrospective changes to the *Australian Crime Commission Act*. The PJACC was apparently not adequately informed about the problems in the ACC that triggered these amendments. In a related report, the PJACC made a number of observations about its oversight role and the limitations of its statutory powers to access information. A fuller account can be found in: Law Council, Submission, op. cit., and in: Parliamentary Joint Committee on the Australian Crime Commission, *Inquiry into the Australian Crime Commission Amendment Act 2007*, 2008, Chapter 4, viewed 15 June 2009, http://www.aph.gov.au/Senate/committee/acc_ctte/acc_amend_act07/report/report.pdf

24. Law Council of Australia, op. cit., p. 33.

25. Ibid.

The Law Council is of the view that it is unnecessarily restrictive to include information that ‘*could prejudice a person’s reputation*’ in the category of information that might be withheld from the Committee, noting that parliamentary committees of all types frequently receive evidence of this nature and have procedures for handling such information, including receiving such information in private session, expunging such material from the transcript of evidence and forbidding publication of that evidence.²⁶ The submission continues:

The Committee’s inquiries and reports may from time to time legitimately reveal information which reflects poorly on a person’s actions, judgments or associations. That is the nature of a body tasked with oversight and accountability of another agency. It should be a matter for the Committee and its judgment to ensure that its processes are not misused as a vehicle for an *unwarranted* attack on a person’s reputation. The Law Council recommends that section 3(h) be deleted from the Bill.²⁷

The **Australian Human Rights Commission** is also critical of clauses 8 and 9 in the Bill. It strongly urges the Senate inquiry to recommend amendments to these provisions to ensure that the mechanisms for protection of sensitive information do not prevent the Committee from obtaining the information necessary for it to adequately fulfil its oversight functions. To this end it recommends the provisions be replaced with a provision that would penalise members and staff of the PJCLE for disclosing any sensitive information and the definition of sensitive information be amended to remove the references to sensitive information being information that could prejudice a person’s reputation or would unreasonably disclose confidential commercial information.²⁸

Commonwealth Ombudsman to brief the PJCLE

Clause 10 requires the Commonwealth Ombudsman to brief the PJCLE at least once a year about the involvement of the ACC and AFP in controlled operations.²⁹ This equates to existing section 55AA of the ACC Act, which requires the Ombudsman to brief the PJACC on the ACC’s use of controlled operations under Part 1AB of the *Crimes Act 1914*.³⁰

Comment

The Commonwealth Ombudsman in his submission to the Senate inquiry recommended amendment of this provision:

26. Ibid., p. 36.

27. Ibid.

28. Australian Human Rights Commission, *op. cit.*, p. 52.

29. ‘Controlled operations’ are law enforcement operations that are carried out for the purpose of obtaining evidence that may lead to prosecution of a person for a serious offence, and may involve a law enforcement officer or other person engaging in conduct that would constitute an offence if not authorised in accordance with Part IAB of the *Crimes Act 1914*. Explanatory Memorandum, p. 5.

30. The Ombudsman has a similar obligation in relation to the Law Enforcement Integrity Commissioner (section 218 of the *Law Enforcement Integrity Commissioner Act*).

In my view, it would benefit the PJC-LE if the Ombudsman's obligation to brief it extended to providing information about his oversight activities relating to telecommunications interceptions, stored communications access and use of surveillance devices by the AFP and the ACC.

The decision to restrict the matters about which it is proposed that the Ombudsman brief the PJC-LE may stem from the differing reporting regimes that apply to the various oversight functions. As noted above, the Ombudsman's controlled operations and surveillance devices reports are tabled directly in Parliament; the telecommunications interception and stored communications reports are provided to the Attorney-General who must include in his annual report to Parliament those matters of concern raised by the Ombudsman.

However, in each case a report is ultimately made to Parliament on issues identified by the Ombudsman's inspection of AFP and ACC records and it would seem appropriate to afford the PJC-LE the opportunity to hear directly from the Ombudsman about the findings and recommendations from his inspection reports.

In past years, the Ombudsman has provided information to the PJC when asked, on the ACC's use of these other covert policing powers. However, at present the Ombudsman is only required to brief on the conduct of controlled operations of the ACC and is not in a position to volunteer information that may be of concern or interest to the PJC in other areas of covert policing and which would inform the PJC's Parliamentary oversight role.

In my view, the Bill should be amended to provide that the Ombudsman should brief the PJC-LE on all matters concerning the AFP and ACC that are subject to Ombudsman scrutiny to better inform the PJC-LE in its role and strengthen the external accountability frameworks in which the ACC and AFP operate.

Regulations

Clause 11 enables the Governor-General to make regulations as required or permitted by the Act, or as necessary or convenient in order to give effect to the Act.

Consequential amendments

As noted above, the PJCLE is to replace the PJCACC, the Committee that currently oversees the Australian Crime Commission. The provisions relating to the PJCACC are in Part III of the ACC Act and are to be repealed by **items 5** and **6** in Schedule 10 of the accompanying National Security Legislation Amendment Bill 2010.

Concluding comments

The Bill has bipartisan support in the Parliament. This is both an acknowledgement of the importance of parliamentary scrutiny of law enforcement bodies and a recognition of the anomaly

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that the AFP, unlike other similar agencies, is not currently subject to oversight by a dedicated parliamentary committee.

Despite this bipartisan support, the Law Council of Australia and others have concerns regarding the information disclosure provisions in the Bill, arguing that the provisions may not sufficiently compel the AFP and the ACC to furnish the new Committee with the information it requires to fulfil its oversight functions.

It is of interest that discussion on this Bill, unlike previous similar reforms, has not included the suggestion that there would be benefit in having all law enforcement bodies subject to one parliamentary committee— in terms of providing a consistent and informed approach to oversight and identifying common trends or areas of overlap.

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