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Parliamentary Joint Committee on Intelligence and Security
PO Box 6021
Parliament House
Canberra ACT 2600

By email only: pjcis@aph.gov.au

Dear Chair,

INTELLIGENCE SERVICES AMENDMENT BILL 2018

I refer to your Committee's call for submissions in relation to the above Bill.

As a dual-qualified Irish and Australian legal practitioner with a particular interest in national security and counter-terrorism law, I provide this submission for the Committee's consideration.

The Bill proposes to amend the *Intelligence Services Act 2001* (Cth) ('*the IS Act*') to clarify the law concerning the use of force by the Australian Secret Intelligence Service ('*ASIS'*) to address key operational issues. The Bill proposes to:

a) enable the Minister to specify additional persons outside Australia who may be protected by an ASIS staff member or agent; and

b) provide that an ASIS staff member or agent performing specified activities outside Australia will be able to use reasonable and necessary force in the performance of an ASIS function.

The evident intent of the Bill is welcomed and proposes timely amendments which will clarify certain matters for ASIS officers operating overseas. However, the mechanism chosen by the Bill is overly complex and could have unintended consequences.

<u>Requirement for Ministerial Approval</u>

The Bill proposes to provide a power to the Minister for Foreign Affairs to specify additional persons outside Australia who may be protected by an ASIS staff member or agent under schedule 2 of the act. The power would be at ministerial discretion and could potentially include

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[redacted]

a range of individuals or categories of persons. The act would require the Minister to consult with a wide range of other government members.

The explanatory memorandum notes the reality that the current law with respect to the use of self-defence by ASIS officers imposes a greater burden on ASIS officers than would apply to members of the general public in Australia. In providing less protection to ASIS officers than is provided to the general public domestically, the current framework ignores the hazardous environment in which ASIS operates and the uniquely difficult circumstances its officers have to face in performing their role. It is preposterous that ASIS officers operating in war-zones or in hostile areas have *less* legal protection than that which is afforded to members of the general public in Australia. In relation to self-defence, the law ought to recognise the challenges faced by ASIS officers and impose no greater burden on them than is available to members of the general public.

The proposal to permit the Minister for Foreign Affairs to specify additional persons outside Australia who may be protected by an ASIS staff member is overly burdensome and unnecessarily complex. ASIS should operate under a broad legal framework which stipulates the principles and policies for which the agency may be directed and leave operational matters to the Director-General of ASIS. This approach would also reflect the fact that Australia has a world-class and unmatched integrity framework through the operation of the Inspector-General of Intelligence and Security and the work of this Parliamentary Committee. The Ministerial Approval process proposed by this Bill continues the nonsense of ASIS officers being at a legal disadvantage compared to members of the general public and imposes an unwieldy and complex legal framework as an answer.

In my submission, ASIS officers ought to be afforded the same minimum legal protection in relation to self-defence as members of the general public, and operational matters should be left to the Director-General. There is simply no need for a complex Ministerial Approval process, and such a process will not of itself lead to better outcomes. The current oversight and integrity framework is more than sufficient to provide the level of scrutiny to which the community has become accustomed.

The Executive Power of the Commonwealth

In a recent paper, I concluded that there was some uncertainty about the scope of the executive power in the Australian Constitution where legislation purported to cover the field of activity for a particular matter. What is certain, however, is the more prescriptive legislation is, the less scope is available to the Executive Government to conduct activities by reference only to the executive power of the Commonwealth.

In my submission, legislation dealing with intelligence matters should be broadly-framed and general in nature. Such legislation should do no more than establish agencies, set purpose, and provide general principles and policies to guide the conduct of intelligence activities. Operational aspects of intelligence activities should never be prescribed in legislation, and operational decisions should be left to those best placed to direct activities. Overly complex,

technical or prescriptive, legislation can limit the agility and operational effectiveness of intelligence agencies, and may result in unintended consequences. Such legislation might also inadvertently have the effect of ousting the capacity of the executive government to conduct intelligence activities which are not strictly in accordance with legislation.

By nature of the difficult job they perform, intelligence agencies may be required to respond to very dangerous situations in rapidly evolving circumstances. It is not possible for legislators to anticipate every potential scenario that an intelligence officers may find themselves in. For that reason, legislators should set the broad principles and policies in which intelligence activities are undertaken, but leave the operational minutiae to agencies. Scrutiny and integrity can be assured by reference to Australia's renowned oversight regime.

This submission is provided in my personal capacity and the views expressed are my own.

Yours faithfully,

David Greene.