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Senator Peter Khalil, MP
Chair
Parliamentary Joint Committee of Intelligence and Security (PJCIS)

6 April 2023

Subject: Review of the National Security Legislation Amendment (Comprehensive Review and Other Measures No. 2) Bill 2023

Thankyou for the opportunity to make a submission to the Committee's review of the subject Bill.

I have prepared this submission in a private capacity as a law student and member of the ACT Law Society, it has not been endorsed by and does not express the views of the University of Canberra, the Canberra Law School or the ACT Law Society.

The explanatory memorandum to the Bill notes the intent to implement recommendations 18, 19, 66, 136, 145, 167, 186, 188, 191 and 192 of the *Comprehensive Review of the Legal Framework of the National Intelligence Community* conducted by Mr Dennis Richardson AC ('Richardson Review') by amending ten separate pieces of legislation as well as amending membership of the Committee.

The proposal in part 2 schedule 1 to amend the *Criminal Code Act 1995* (Cth) ('Criminal Code'), based on Recommendation 66 of the Richardson Review, would introduce a defence to several offences at ss 474.6, 477.2 and 477.3 for ASIO officers reasonably performing their duty.

The Richardson Review, at 24.51, notes that ASIO can currently geolocate targets, and then at 24.53 adds 'ASIO has identified another, more efficient method of geolocating the target which involves disconnecting the transmitter from the telecommunications network' but this method is not used '[D]ue to concerns regarding criminal liability for telecommunications and computer offences.'

In ASIO's own submission to this Committee's review of the Bill, it states at (6) that ASIO 'needs to understand who else might be in the vicinity before conducting activities - to make sure we don't

unnecessarily impact unrelated third parties in the area and to prevent our covert activity from being detected' and at (14) paraphrases the Richardson Review recommendation 'the targeted defences to [Criminal Code ss 477.2 and 477.3] offences would allow ASIO officers to undertake necessary activity both under and without a warrant' (emphasis added).

ASIO submits that 'when ASIO is acting without a warrant, ASIO must carefully consider whether the use of these techniques in the circumstances is necessary, proportionate, reasonable and justified.'

It is reasonable to expect that ASIO would be granted access to methods which allow it's officers to legally carry out it's business in the most efficient way available. Making defences available for ASIO officer's to properly perform their duties is also reasonable.

The proposed amendments would grant ASIO officers the freedom from immunity for offences when undertaking covert actions without a warrant, where the community must rely on ASIO's own assessment of the necessity, proportionality, reasonableness and justification for the actions.

When such covert action is taken under a warrant, an officer with judicial independence may consider those guardrails of what the community may consider proper, but without such a review ASIO need only satisfy itself. Any documentation produced as part of this self evaluation process would be hidden from any external scrutiny (save any process undertaken by the IGIS, but which has not been addressed in this review).

The offences in question involve 'modification of data to cause impairment' (emphasis added) of computer or telecommunication systems, offences listed under the head 'Serious Computer Offences' in the Criminal Code.

The Committee has only allowed five working days for community consultation on the proposed amendments. The ASIO submission yesterday gives only a single day for community responses.

I urge the Committee to consider the seriousness of ASIO being granted impunity to undertake covert actions, without a warrant, that would otherwise be considered serious computer offences, guided only ASIO's own internal review mechanisms, for the sake of efficiency.

Thankyou for the opportunity to make this submission.

Damon O'Hara