



28 October 2010

Mr Hamish Hansford
Committee Secretary
Standing Committee on Legal and Constitutional Affairs
Department of the Senate
Parliament House
CANBERRA ACT 2600

By Email: LegCon.Sen@aph.gov.au

Dear Mr Hansford.

INQUIRY INTO THE TELECOMMUNICATIONS INTERCEPTION AND INTELLIGENCE SERVICES LEGISLATION AMENDMENT BILL 2010

Thankyou for inviting the Law Council to make a submission to the Senate Legal and Constitutional Affairs Committee Inquiry into the *Telecommunications Interception and Intelligence Services Legislation Amendment Bill 2010*.

As an outside observer, it is difficult for an organisation like the Law Council to fully comprehend the likely impact of this Bill on the practices and procedures of Australia's intelligence agencies. Further, it is difficult to accurately assess the privacy ramifications of the proposed amendments or whether they will undermine the traditional division between intelligence gathering and law enforcement functions.

For that reason, rather than comment on any particular aspect of the Bill, the Law Council would like to take the opportunity to raise some questions about its intended operation.

It is hoped that the current Inquiry may assist in eliciting answers to those questions and, depending on the information provided, make appropriate recommendations to tighten the relevant provisions.

1. Relaxation of the restrictions on when ASIO can share information with other agencies

Subsection 18(3) of the *Australian Security Intelligence Agency Act 1979* ("the ASIO Act") sets out the circumstances in which, and to whom, ASIO may share information which has been obtained in the performance of its functions.

Currently, where ASIO has in its possession information which relates to the commission or planned commission of an indictable offence, ASIO may share the information with specified law enforcement agencies.

ASIO may also share information with a range of specified persons and bodies where:

- the Director-General or his or her delegate is satisfied that the national interest requires it; and
- the information has come into ASIO's possession outside Australia or concerns matters outside Australia.

Schedule 6, Item 12 of the Bill seeks to repeal this subsection and replace it with a new provision which will allow ASIO to share information with any Commonwealth or State Authority if:

- the information relates, or appears to relate, to the performance of the functions, responsibilities or duties of the agency; and
- either
 - the information relates, or appears to relate, to the commission, or intended commission, of a serious crime (which is defined as an offence against a law of the Commonwealth or a State which carries a term of imprisonment of at least 12 months); or
 - the Director-General, or his or her delegate, is satisfied that the national interest requires the information to be shared.

The most significant changes introduced by the proposed amendment would be as follows:

- ASIO would be allowed to share information with a much wider range of government agencies, and not just traditional law enforcement agencies; and
- Where the national interest is deemed to require it, ASIO would be allowed to share information which does not relate to the commission or planned commission of an offence, *even in circumstances where the relevant information was obtained in Australia and only concerns matters within Australia.*

Obviously, it is important that the safety and security of the nation are not jeopardised because government agencies are unable to share information in a way which allows credible national security threats to be promptly and effectively identified and neutralised.

However, it is also important that safeguards are in place to ensure that ASIO's extraordinary powers, which are exercised in a highly secretive environment largely beyond the scrutiny of the courts and the public, are not improperly employed for collateral purposes unrelated to ASIO's functions.

In that context, the Law Council has a number of questions about the intended effect of this proposed amendment and the type of information sharing it will authorise.

The amendment would appear to allow ASIO to share information with agencies such as the Australian Tax Office, Centrelink and the Australian Securities and Investment Commission about possible breaches of the laws those agencies administer.

Is it envisaged that ASIO will share information with these and like agencies?

Once the broad statutory criteria are met (i.e. the relevant information relates to a possible breach of the law the agency administers and that breach attracts a term of imprisonment of at least one year), what further criteria will be employed to determine when information should be shared?

Will ASIO be required to periodically report to the Minister and the public about what agencies it has shared information with and how often?

This amendment would also allow ASIO to share information with government agencies even where the information does not relate to the commission or planned commission of an offence either within Australia or abroad, provided that the Director-General or his or her delegate is satisfied that it is in the national interest to share the information.

How is the term “national interest” defined?

What type of information, obtained within Australia and relating to matters exclusively within Australia, is this intended to capture? Can some generic examples be provided?

Is it envisaged that this will include information about individual’s movements, associations, business activities, financial status or communications even where this information has no immediate nexus with the possible commission of an offence?

How will the use of this broader discretion to share information be monitored?

Depending on the answers to these questions, the Law Council is of the view that the proposed amendments to subsection 18(3) may go further than is necessary to facilitate an effective inter-agency approach to national security and may in fact represent an undue risk to individual privacy rights.

2. Allowance for ASIO to provide assistance to other agencies, including by making personnel and resources available, for purposes which do not relate to the performance of ASIO’s own functions

ASIO’s functions are currently set out in section 17(1) of the ASIO Act. Those functions are as follows:

- a) to obtain, correlate and evaluate intelligence relevant to security;
- b) for purposes relevant to security and not otherwise, to communicate any such intelligence to such persons, and in such manner, as are appropriate to those purposes;
- c) to advise Ministers and authorities of the Commonwealth in respect of matters relating to security, in so far as those matters are relevant to their functions and responsibilities;
- d) to furnish security assessments to a State or an authority of a State in accordance with paragraph 40(1)(b) of the ASIO Act;
- e) to advise Ministers, authorities of the Commonwealth and such other persons as the Minister, by notice in writing given to the Director-General, determines on matters relating to protective security; and
- f) to obtain within Australia foreign intelligence pursuant to section 27A or 27B of this Act or section 11A, 11B or 11C of the Telecommunications (Interception and

Access) Act 1979 , and to communicate any such intelligence in accordance with this Act or the Telecommunications (Interception and Access) Act 1979 .

Under Section 19 of the ASIO Act, ASIO is currently authorised to cooperate with other Commonwealth, State and foreign government agencies provided that such cooperation is necessary for, or conducive to, the performance of ASIO's functions as set out in section 17 above.

Schedule 6, Item 17 of the Bill seeks to insert a new section into the ASIO Act, section 19A, which would allow ASIO, on request and subject to any contrary direction from the Minister, to cooperate with and assist other intelligence agencies, law enforcement agencies and prescribed government agencies even where the provision of such cooperation or assistance is otherwise unrelated to ASIO's primary functions.

Proposed sub-section 19A(3) explains that cooperation may include making available the services of ASIO officers and employees, and other ASIO resources.

To accommodate the insertion of this new section, Schedule 6, item 11 of the Bill seeks to amend section 17(1) of the ASIO Act by adding an additional function to the list of ASIO functions. The additional function is "to co-operate with and assist bodies referred to in section 19A in accordance with that section".

The Law Council acknowledges and supports the proposition that ASIO must be able to work cooperatively with other agencies in pursuit of the common goal of maintaining security. However, the distinctions which exist between agencies, and in particular their distinct mandates, should not be rendered meaningless in the process.

For that reason, legislation should facilitate cooperation between agencies where their functions converge, but not otherwise.

ASIO personnel, with their particular training, resources, practices and procedures should not be regarded as a mercenary force available on request, provided the Director-General consents and the Minister does not object.

The safeguards which are in place to ensure that ASIO personnel operate within a lawful framework are dependent on a clear articulation of ASIO's functions. Those safeguards would be undermined by a provision which allowed ASIO personnel to pursue unrelated functions for other agencies.

In that context, the Law Council has a number of questions about the intended operation of proposed section 19A.

Is the result of this proposed amendment that there is no statutory constraint on the purposes for which ASIO personnel and resources may be deployed?

Is it intended that ASIO personnel and resources might be utilised by other agencies or in the context of a multi-agency team or taskforce for purposes that are unrelated to obtaining, correlating and evaluating intelligence relevant to security, i.e. ASIO's primary function?

Could ASIO personnel be used to request and conduct interviews with people for purposes unrelated to the fulfilment of ASIO functions. If so, would ASIO personnel be required to disclose that, although they were from ASIO, they were conducting the interview on behalf of another specified agency.

In the Explanatory Memorandum that accompanies the Bill it is claimed that *“the Bill does not affect the distinction between law enforcement and intelligence functions – arrests and prosecutions will remain a matter for police and prosecutorial authorities. ASIO’s primary function will remain gathering and analysing intelligence.”*

How can the distinction between law enforcement and intelligence functions be guaranteed if proposed section 19A does not require any nexus between the type of work that ASIO staff may do for other agencies and ASIO’s existing functions?

If, as is hoped, the Inquiry explores questions of this kind and relevant information is furnished by the Department or affected agencies, the Law Council would welcome the opportunity to make a further supplementary submission.

Yours sincerely

Bill Grant
Secretary-General