Inquiry Secretary
Parliamentary Joint Committee on Intelligence and Security
Parliament House
Canberra ACT 2600

Inquiry into the *Counter-Terrorism Legislation Amendment Bill (No. 1) 2014* (Cth)

This submission responds to the Committee's invitation to comment on the *Counter-Terrorism Legislation Amendment Bill (No. 1) 2014* (Cth).

In summary, the Bill represents a disquieting, inappropriate and inadequately justified weakening of official and ministerial responsibility.

It fosters a piece-meal 'slow drip' expansion of the powers of law enforcement and national security agencies on the basis of bureaucratic convenience rather than fundamental need.

It is not substantiated through the increasingly formulaic reference to 'serious threat' and 'reasonable, necessary and appropriate' that has featured in the cascade of associated legislation.

The very short period allowed for public comment on the Bill reflects no credit on the Government or Parliament.

My recommendation is accordingly that the Committee should disregard the temptation to endorse the Bill on the basis that it is advantageous to be seen to be responding to potential terrorist activity. Rather than rubber-stamping a flawed proposal, the Committee should be encouraging the community engagement that is a foundation of informed policy-making and political legitimacy.

Basis

The submission is made by Assistant Professor Bruce Baer Arnold. I teach law (in particular privacy, confidentiality and secrecy law) at the University of Canberra. I have published widely in those areas, have made invited submissions to a range of national and state/territory law reform and policy governance bodies, and have been recurrently cited in reports and discussion papers by those bodies.

The following paragraphs do not represent what would reasonably be construed as a conflict of interest. They do not reflect a political affiliation and are independent of the University of Canberra and civil society organisations. They have informed but are independent of the submission by the Australian Privacy Foundation, a civil society organisation that has no political affiliation and whose board includes leading law academics, legal practitioners and information technology specialists.

The Bill

The Bill must be considered in the context of other legislation rather than in isolation, with the Committee recognising that –

- both officials and ministers are inclined to confuse what is

bureaucratically convenient with what is necessary and proportionate

- there is substantial law enforcement and national security legislation that has never been used (and that, because it is redundant, is not necessary)
- the Australian community expects that Governments both should and can substantiate rhetoric about existential threats and responses
- the cascade of national security represents a slow drip erosion of civil liberties, with acceptance of provisions in one Act (for example re oral authorisations) being used to justify similar provisions in the next Bill which in turn is passed and is used to justify the erosion inherent in provisions in the next Bill.
- Australian Governments are reluctant to wind back bad national security legislation, ie we have a 'ratchet effect' because political parties are fearful of being misrepresented as soft on 'terror'.

In making sense of those points four matters are salient.

1 The legal profession, academics and civil society advocates are cognisant of the practicalities of law enforcement and of the potential for terrorist incidents. That potential is evident since at least 1868, which was marked by the attempted assassination in Sydney of the then Duke of Edinburgh. That awareness is fully consistent with human rights.

Respect for privacy – and more broadly for law that is proportionate to actual/substantive harms – is not antithetical to national security.

2 Australia as a liberal democratic state is differentiated from totalitarian and terrorists regimes because its legal system, public administration and society are founded on a respect for human rights and on the accountability of government. We should be very wary of an erosion of that respect and accountability through a cascade of statutory amendments that in isolation appear innocuous but in aggregate are contrary to expectations regarding rights and responsibilities.

In essence, we should be neither ashamed nor fearful of what it means to be Australian. We should be sufficiently self-confident about our values as to not casually abandon them on the basis of hyperbole about a 'hundred year war on terror' that necessitates abandonment of government accountability and civil freedoms. We should not abandon them on the basis of political opportunism and institutional aggrandisement.

We should encourage community engagement in policy-making through appropriate periods of consultation by the Government and by Parliament, rather than the current style of summary consultation that is politically opportune but antithetical to informed discussion on matters of public importance.

3 Provisions in the *Counter-Terrorism Legislation Amendment Bill (No. 1) 2014* (Cth) – and more broadly the suite of national security legislation – are dependent on performance by the Australian Federal Police (AFP), the Australian Security Intelligence Organisation, ministers and their offices. Incidents such as the bungled AFP 'raid' on Seven West Media earlier this year demonstrate that we should be wary about expectations that officials will 'always get it right'. They also demonstrate that we should be wary of expectations that there is no need for deliberation and no need for the discipline that is provided by preparation of documentation rather than

simply picking up a phone to obtain an authorisation.

4 The suite of national security legislation, including the 'Foreign Fighters' amendments and mandatory retention of metadata proposal, has been accompanied by reassurance from the Government that there will be no substantive privacy concerns because the *Privacy Act 1988* (Cth) remains in place and abuses will be prevented through supervision by bodies such as the Commonwealth Ombudsman and Australian Privacy Commissioner. In that respect it is worth noting concerns about systemic underfunding of both the Ombudsman and the Privacy Commissioner. An underfed and complaisant watchdog does not provide meaningful protection against abuses, particularly abuses that in practice are likely to foster terrorism within Australia. It is highly desirable that the Committee consider individual national security Bills in relation to other statutes rather than on an item by item basis that elides the significance of particular proposals.

Continuity of government

Provisions in the Bill, discussed in more detail below, refer to circumstances in which neither the Prime Minister, the Defence Minister, the Foreign Minister or the Attorney-General are available to make an emergency authorisation.

The basis of that unavailability is unclear. If the expectation is that the ministers will be dead or incapacitated there is an underlying issue about continuity of government that is inadequately addressed in any of the national security enactments and that would be properly explored by the Committee. The literature on continuity in other jurisdictions indicates that overseas governments have established formal mechanisms to address uncertainties regarding attacks on the Executive. A clearer framework in Australia would foster the resilience espoused by the current and previous national Governments.

If the expectation is simply that ministers will be unable to sight and manually sign an authorisation we should be reviewing both the communications infrastructure available to the four ministers and the practices of those ministers and their staff.

Oral Authorisation

The Bill is characterised in the Explanatory Memorandum as addressing circumstances in which none of the Ministers are available to issue an emergency authorisation or in which the Attorney-General "may not be readily available or contactable to provide his or her agreement". Greater clarity regarding "not readily available" is desirable and is not obviated through reference to an environment of "a serious and ongoing terrorist threat" and "an increased operational tempo from Australia's law enforcement agencies".

The current requirement is for emergency authorisations to be issued in writing. The Bill envisages that authorisations should be made on a 'dial a pizza' basis, ie simply through a phone call that is subsequently documented.

The stated rationale for the change is that –

> the arrangements for the issuing of emergency authorisations are not as streamlined as they need to be, and are incompatible with the circumstances of extreme urgency in which emergency authorisations are intended to operate. These limitations may mean that time critical opportunities to collect vital intelligence are lost or compromised if

> requirements in relation to matters of form cannot be met, or particular individuals are not available, and legislative provision is not made for contingency arrangements in such cases."

There has however been **no** demonstration that the change is needed.

There are no indications that delays have occurred and resulted in harm.

There is no substantiation of the need for 'streamlining' or examination of alternative mechanisms.

We should not privilege bureaucratic convenience at the expense of action that is lawful, transparent and proportionate. Given the very large expenditure across the national government in relation to national security it is presumably feasible for the Government to allocate resources within the agencies, departments and ministerial offices that are sufficient to provide for briefing and written authorisation. In other words, rather than reducing accountability through 'streamlining', the Government should ensure that there are enough bodies to properly brief the authorising ministers. A tacit feature of that briefing will be the provision of cautions.

The value of such cautions – and the value of calm deliberation rather than reaching for the phone, button or trigger – is evident in official and scholarly studies of national security crisis decision-masking over the past 50 years.

The Government notes that –

> other emergency authorisation or warrant based provisions … permit oral authorisations, including those applicable to law enforcement warrants authorising the searching of premises, the interception of telecommunications and the use of surveillance devices; and the authorisation by the Attorney-General of special intelligence operations conducted by the Australian Security Intelligence Organisation.

That statement is, with respect, disingenuous. It is characteristic of an approach to legislation in which a practice is enshrined in one statute and then referred to as the benchmark of reasonableness or common sense or practicality in support of a similar provision in a new Bill. That Bill, once enacted, in turn provides the benchmark for a similar provision in additional legislation, embodying an ongoing creep of practice that is contrary to the community expectations noted above and that is not wound back by Governments because of their fear of being damned as soft on terror and other harms.

It is useful to recall the caution by then Prime Minister Robert Menzies in 1939 about the cumulative disappearance of restrictions on government through a succession of well-intended but pernicious minor amendments. Such a disappearance is not legitimised through invocation of terms such as 'streamlining'.

On that basis I offer three comments –

The first is that the Committee should be cautious in endorsing *any* expansion of oral authorisations, irrespective of whether they are retrospectively documented. Any law enforcement agency should have the capacity to prepare documentation 'on the spot' for signature by the relevant Minister. That preparation is an appropriate discipline that should be welcomed by agencies rather than seen as an impediment to legitimate activity.

The second is that the Committee should be wary of endorsing what appears to be a pattern in delegation of authorisations. It is disquieting that the Government is proposing to delegate authorisations to officials on an uncertain basis of ministerial availability. Given uncertainties about contestability and transparency the amendment is open to abuse.

The third issue is that the amendment is being justified through reference to past changes. We are accordingly seeing a process of 'creep': a small change there provides a benchmark for a change here which will in turn provide a benchmark for a further change somewhere else, ultimately with a substantial erosion of privacy and other rights. The repetition in the Explanatory Memorandum for this Bill (and in associated legislation) of reference to "numerous legislative safeguards that preserve the fundamental human rights" and to action that is "reasonable, necessary and proportionate" is formulaic. Repetition does not address the concerns expressed by a range of bodies about what is 'proportionate' in recent national security legislation; reiteration does not make a statement doubly true.

Overall we should question an emphasis on bureaucratic convenience; "streamlining" doesn't necessarily make counter-terrorism more effective or more legitimate.

Control Orders

The Bill provides for amendments to the Criminal Code to "enhance" the control order regime by replacing the current requirement for the AFP to provide all documents that will subsequently be provided to the issuing court. The AFP in seeking the Attorney-General's consent to apply for a control order will instead be required to provide the Attorney-General with a draft of the interim control order, information about the person's age and the grounds for the request (which may include national security information within the meaning of the *National Security Information (Criminal & Civil Proceedings) Act 2004* (Cth)), when seeking the Attorney-General's consent to apply for a control order.

That proposal is presumably bureaucratically convenient. That convenience does not mean it should be endorsed. The rationale for removing the requirement for documentation removes a check that was accepted by previous Parliaments. The rationale for removal is unclear; the Government has not provided compelling information about harms attributable to the current arrangements. If there is a substantive need that should be addressed through allocation of resources and improved management within government, rather than weakening of the existing mechanism. In essence, there's no evidence that it's broken, so don't fix it.

Caution is desirable given the pattern of creep noted above.

The Bill also provides for replacement of the existing requirement for the AFP officer to provide an explanation as to why 'each' obligation, prohibition and restriction should be imposed. Instead the AFP will be required to provide an explanation as to why 'the control order' should be made or varied. Such 'streamlining' is, again, bureaucratically convenient but would most appropriately addressed through the better allocation of resources within the agency rather than a tacit permission to weakly justify the request for an order that does affect rights under Australian and international law. In essence, the AFP should be required to fully document its requests and be accountable to oversight under the national security monitoring arrangements.

Under the current regime there is a requirement for the issuing court to be satisfied on the balance of probabilities that 'each' obligation, prohibition and restriction "is reasonably necessary, and reasonably appropriate and adapted" to achieving one of the objects in section 104.1. That requirement will be weakened through adoption of the Bill. The court will need to be satisfied on the balance of probabilities that the overall control order (rather than every element) is 'reasonably necessary, and reasonably appropriate and adapted' to achieving one of those objects. The amendment is accordingly more permissive and open to abuse; it encourages poor drafting and inadequate justification. That is of particular concern given the contestability arrangements criticised in submissions from a range of authors regarding the national security suite.

The AFP Commissioner can apply for a variation of a control order where he 'suspects' on reasonable grounds that the varied order would substantially assist in preventing a terrorist act or the provision of support for or the facilitation of a terrorist act.

As a society that is confident in the legitimacy of our legal system and founded on a respect for human rights we should be wary about weakening protections in the absence of information by the Government as to why such weakening is imperative.