Submission to the PJCIS

Counter-Terrorism Legislation Amendment Bill

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By

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Many of the proposed amendments are sensible and proportionate and in general are supported in this submission. The apparent adoption of my previous recommendation vis-à-vis extending the PJCIS's oversight to aspects of the operation of the amended Acts (either through reference to my submission or alternatively something that was independently arrived upon as a common sense measure) is acknowledged.

Schedule 1 Criminal Code Act 1995 (CC) Control Orders regime.

The change from individually considering each separate obligation, prohibition and restriction to a more holistic approach appears sensible and more practical. Considering the Control Order application taken as a whole appears appropriate. However for example the wording in Section 23, amending s 104.14(7)(b) of the CC, it suggested that the words 'confirm and vary the order by removing **or amending** one or more […]

(ie adding the words 'or amending') would afford the decision maker greater discretion in ensuring that the outcome in question is better and more appropriate and adapted.

Schedule 1 Section 1

Section 1: Referring to SS 102.1A(1)(2) CCA: (it is suggested) should read 'The PJCIS *MUST* […] (a) review […] (b) report […]

Comment: As appears in the Bill the provision arguably clarifies but does not add in any way to the substance of the Bill. Clearly each member or Senator may act in accordance with s 46B of the *Acts Interpretation Act* and therefore, as a rights enhancing measure, this provision should also add in substance to work on disallowable instruments that augments the work of the *Regulations and Ordinances Committee*.

Schedule 1 EM para. 34

Where an Australian person has been convicted in a foreign country it should be open to a person to challenge the validity of that conviction in an Australian court, particularly when the Australian State seeks to use this foreign conviction as a basis for further sanction against the individual. For practical purposes, the Control Order should be operational on the day of approval but the individual should be entitled to challenge the basis of this CO as per normal but in addition be allowed to have a

court examine the content of the foreign conviction for example for compliance with Australian domestic standards (such as the admissibility issues surrounding evidence etc). Australian citizens subject to these CO measures base on a foreign conviction should be eligible to avail themselves of legal aid as a matter of right.

Schedule 2 *Intelligence Services Act* 2001

Schedule 2, s 9(B): The absence of some objective definitional aspects such as what constitutes an 'emergency' or the meaning of 'urgent' (see para 12, explanatory memorandum), or the meaning of 'readily available or contactable' appear to be an omission in the Amending Bill. Further, therefore, for the absence in the instances mentioned, of objective criteria sanctions that are applied to individuals could in cases possibly be viewed as perhaps though not exactly being 'not arbitrary' in the ordinary meaning of the term (as in: arbitrary as being 'not reasonably predictable' or repeatable but) at least quite subjective. It is also a concern that the Bill envisages that it is probable that four senior members of the Government may not be contactable by the most senior bureaucrats/authorities in the land for a period of 48 hours.

I have no reservations with the head of the relevant public sector (security) organisations making the judgment call or decision in the circumstances or that decisions in 9A being conveyed orally (and later documented in a written record) in instances. If practical however, the authority attempting to make contact with the ministers, should record the message with the consent of the decision maker/s so that in case of doubt the recorded message can provide clarification of and subsequently documented reasoning.

On the issue of the head of the Security Agency making the decision in the absence of a Minister of the Crown: in fact one might even say that these decisions *should* be considered operational and therefore made by impartial and trusted authorities (ie the head of the agency) in the circumstances. The security agencies enjoy the trust of the vast majority of citizens. However, in the absence of a definition for the meaning of 'readily available or contactable' it should be mandated that all steps taken to contact the relevant person is documented in a manner that would enable a reasonable person to concur that the steps taken were apt. These documents should also be subject to the oversight of the Independent National Security Legislation Monitor (INSLM).

Schedule 2 *Intelligence Services Act* 2001

4. After paragraph 8(1)(a)(i)

(ia) and (ib) refer to a 'class of Australian' persons.

While it might be convenient to leave this definition of what constitutes a 'class' open, it can in the mind of some communities raise the spectre of 'racial or religious profiling'. The legislation is by omission clearly subject to the *Racial Discrimination Act*. However as religiously based discrimination is not unlawful in all Australian jurisdictions, this has raised some concerns in sections of the Muslim community. This is not a claim that the community as a whole, or even that a substantially section of the community, has concerns over this phraseology. The consultation / opinions sought was fairly unsystematic and not conducted in accordance with statistical principles and therefore indicative only.

Further, persons who fall into such a class are probably outside an Australian court's territorial jurisdiction, as implied by reference to ASIS. It might be useful for the legislation to make some reference to how agencies with jurisdiction primarily within Australia and those with extra territorial functions might operate with respect to areas of overlap in their respective jurisdictions and what recourse Australian citizens may have as a remedy in cases of extraterritorial application.

Schedule 2 *Intelligence Services Act* 2001 (EM Para. 25)

Once again it would be useful to have a text (EM para. 25 dot point 3) for determining 'whether the A-G is or not readily available or contactable'.

Schedule 2 *Intelligence Services Act* 2001 **(EM Para. 61)**

It would be better if the Act provided that the IGIS *must* conduct oversight and report any concern to the PJCIS, and further, *must* provide relevant declassified information in the IGIS's annual report. There should also be a mandated role for the INSLM.

Schedule 2 *Intelligence Services Act* 2001 **(EM Para. 62)**

Information on Australian citizens should not in the ordinary course be divulged to foreigners. In any event there should be some form of reciprocity. We should under the strictest conditions etc only divulge information on our citizens if the receiving nation/s do the same with respect to their citizen vis-à-vis Australia.

Thank you

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