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NSWCCL SUBMISSION

PARLIAMENTARY JOINT COMMITTEE ON INTELLIGENCE AND SECURITY

REVIEW OF THE NATIONAL SECURITY LEGISLATION AMENDMENT (COMPREHENSIVE REVIEW AND OTHER MEASURES No 1) BILL 2021

February 2022

About NSW Council for Civil Liberties

NSWCCL is one of Australia's leading human rights and civil liberties organisations, founded in 1963. We are a non-political, non-religious and non-sectarian organisation that champions the rights of all to express their views and beliefs without suppression. We also listen to individual complaints and, through volunteer efforts, attempt to help members of the public with civil liberties problems. We prepare submissions to government, conduct court cases defending infringements of civil liberties, engage regularly in public debates, produce publications, and conduct many other activities.

CCL is a Non-Government Organisation in Special Consultative Status with the Economic and Social Council of the United Nations, by resolution 2006/221 (21 July 2006).

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Introduction

1. The New South Wales Council for Civil Liberties (CCL) thanks you for the opportunity to make a submission regarding the National Security Legislation Amendment (Comprehensive Review and Other Measures No. 1) Bill 2021 (the Bill). This letter raises our concerns generally, given that the timeframe including the Christmas period was limited and did not enable us as a volunteer-led organisation to prepare a more detailed submission on this occasion. We would be pleased to expand upon these general observations at a future time.

2. The intention of the Government with respect to the Bill is to seek to improve the legislative framework governing the National Intelligence Community (NIC) and address operational challenges facing Australia's national security agencies. The Bill would amend several acts and would increase the powers of Australian intelligence agencies. It would implement the Government response to several recommendations of the Comprehensive Review of the Legal Framework of the National Intelligence Community by Dennis Richardson AC (the Richardson Review).

3. The Bill raises a number of questions about how these amendments will affect Australian national security and what this entails for Australians and, in particular, the work of journalists and media organisations.

4. While understanding and supporting the Government's stated aim and the need for law enforcement and intelligence agencies to investigate serious offending and obtain intelligence on security threats, CCL is concerned that the proposed amendments will carry undesirable consequences.

5. Schedules 1, 2, 4 and 5 raise particular concerns and Schedules 3, 8, and 9 also require further consideration.

6. CCL's concerns relate to the role (rather, increasing role) and surveillance and intelligence collection powers of the NIC in Australia and the potential for amendments such as are proposed to add to an incremental erosion of the civil rights and freedoms of Australians.

Schedule 1 – Emergency Authorisations under the *Intelligence Services Act* 2001

7. Schedule 1 would amend the *Intelligence Services Act 2001* (IS Act) to allow the heads of intelligence service agencies, rather than the Minister, to authorise activities including the production of intelligence on an Australian person who is overseas without first obtaining that person's consent, in situations where the agency head is satisfied that there is, or 'is likely to be', an imminent risk to their safety.

8. CCL notes that there is no requirement for an agency head to be satisfied that there is a serious or significant risk to safety of an Australian person, as a precondition to issuing the authorisation (in addition to that risk being 'imminent').

9. CCL is of the view that an agency head authorisation should be given only if the agency head is first satisfied that there is a serious or significant risk to the person, just as applies for such authorisations under s9B(2)(c)(ii) in the case of an emergency which requires 'serious risk'. This would also be consistent with proposed s 9D(12) which provides that an authorisation must be cancelled if there is not or there is not likely to be a 'significant risk' to the safety of the Australian person.

10. Section 9D(1) proposes that the agency head could give the authorisation if they were satisfied that:

    (a) there is, or is likely to be, an imminent risk to the safety of an Australian person who is outside Australia; and

    (b) it is necessary or desirable to undertake an activity, or a series of activities, for the specific purpose, or for purposes which include the specific purpose, of producing intelligence on the person; and

    (c) it is not reasonably practicable to obtain the person's consent to the agency producing that intelligence; and

    (d) having regard to the nature and gravity of the risk, it is reasonable to believe that the person would consent to the agency producing that intelligence if the person were able to do so.

11. Proposed s9D(2) provides that:

    (2) The agency head may, orally or in writing, give an authorisation under this section for the activity, or series of activities, if the agency head is satisfied that, apart from paragraph 9(1A)(b):

    (a) the facts of the case would justify the responsible Minister giving an authorisation under section 9 because the agency head is satisfied that the conditions in subsections 9(1) and (1A) are met; and

    (b) the responsible Minister would have given the authorisation.

12. CCL considers that if such amendments are to be made, an authorisation should only be given and the powers should only be exercised if the primary purpose for the production of intelligence on the person is to protect the person from serious or significant risk or ameliorate such risk to their life or safety.

13. Of further concern is that under s9(14) the agency head would be able to delegate all or any of their powers, functions or duties under this new provision to a staff member. There is no requirement for any degree of seniority or qualifications for the staff member to exercise these powers or duties or carry out these functions. The only restriction is that the staff member cannot be a consultant or a contractor. In other words, these very significant powers could potentially be delegated to a junior staff member.

14. The discretion is too broad and the ability to delegate such an intrusive power to a staff member, including a junior staff member, is inappropriate when all that is required is that:

    - The staff member of the agency is satisfied that there is likely to be an imminent risk to the safety of an Australian overseas;
    - The staff member is satisfied that it is desirable to undertake a series of activities for any number of purposes, as long as one of them is for the specific purpose of producing intelligence on the person;
    - The staff member is satisfied that it is not reasonably practical to obtain the person's consent and it is reasonable to believe that the person would consent to the agency producing that intelligence if the person were able to do so; and
    - The staff member is satisfied that the facts would justify giving the authorisation, it satisfies the legislative requirements in ss 9(1) and (1A) and it is an authorisation the Minister 'would have given'.

15. The breadth of discretion means there is potential for misuse of agency-authorised collection and production of intelligence on Australians by individuals within intelligence agencies.

16. If the power of delegation to a staff member is to be retained, it should be constrained. At the very least, the staff member should be required to hold a senior position within the intelligence agency, potentially in line with a 'senior position holder' as defined in s4 of the *Australian Security Intelligence Organisation Act* 1979 (Cth) (ASIO Act).

17. The authorisation given by an agency head should be limited in time and should last only for so long as is reasonably required for the relevant minister to consider the authorisation and make his or her own decision. The primacy of ministerial authority over such an intrusive power ought be preserved.

18. CCL suggests that before an emergency authorisation is granted, all reasonable efforts should be made to contact the relatives of the affected Australian person to seek their consent on behalf of the Australian person if it is not possible to obtain the consent of the person themself.

Schedule 2 – Class authorisations relating to counter-terrorism

19. These amendments would give the Minister the power to authorise activities to enable intelligence to be produced on one or more members of a class of Australian persons who are or are likely to be involved with a listed terrorist organisation.

20. The definition in proposed s9(1AAB) of involvement with a listed terrorist organisation is too broad. A person would be taken to be involved with a listed terrorist organisation if the person *inter alia* provides 'financial or other support to' or 'advocates for, or on behalf of, the organisation'.

21. Non-financial support and advocacy are not defined in this context, and the conduct captured would cover a broad spectrum of activity, some of which would not constitute terrorist-related activity as it is generally understood (and ought to be understood).

22. Would baking for a lamington drive or turning chippolatas at a sausage sizzle held by a local community group constitute 'support' for a listed organisation? Given that there is no requirement for a person to knowingly provide support for a listed organisation, nor that they know the group they are supporting is a listed terrorist organisation, it is quite possible that an individual may innocently be providing such support, yet their conduct might be captured.

23. Without further definition, 'advocating for' an organisation might include merely reporting on or expressing a view sympathetic to one or more of the organisation's causes or ideals that would not be understood as terrorism-related. Without further definition, this has the potential to impede the work of journalists, including providing legitimate information to the public, creating an unreasonable fetter upon journalistic freedom and the freedom of political expression.

24. In order to avoid unintended consequences, the conduct sought to be captured ought to be defined more precisely so that it covers only support or advocacy that materially assists or is intended to materially assist the terrorist-related activities of the listed organisation.

25. The proposed amendments have the potential to limit the freedom of journalists and media organisations and inhibit the provision of information to the public and may be misused and weaponised against media organisations to hinder journalists' abilities to freely report on legitimate news.

Schedule 3 – Authorisations for activities in support of the Australian Defence Force

26. Schedule 3 would amend section 8 of the *Intelligence Services Act (2001)* to expand the class authorisation mechanism to include the Australian Signals Directorate (ASD) and Australian Geospatial-Intelligence Organisation (AGO) in their functions to support the Australian Defence Force (ADF).

27. This would apply where the Defence Minister has made a written request of the ISA agency for assistance in support of military operations outside Australia and the agency then seeks to produce intelligence on Australian persons, for the purpose of providing that assistance.

28. At present, only ASIS has the ability to seek ministerial class authorisations in support of the ADF. This amendment would extend this ability to all three *Intelligence Services Act* Agencies. Given the differences in types of intelligence each agency collects (human, signals, and geospatial intelligence respectively) the desire to expand the class authorisation mechanism is justifiable and CCL notes that it was supported by the Richardson Review.

29. CCL suggests that the written request of the Defence Minister should have a 'sunset' so that it cannot be used in perpetuity by the IS Agencies despite changes over time in government, in minister, or the circumstances of the overseas conflict for which the authorisation was originally sought.

Schedule 4 – Authorisations for producing intelligence on Australians

30. The effect of new subsection 8(1B) of the ISA as proposed by Schedule 4 would revise the circumstances under which ministerial authorisation is required by an agency for the production of intelligence on Australians.

31. This is in response to the Richardson Review's observation that agencies had been seeking ministerial authority for benign activities to 'produce intelligence' on an Australian person in circumstances where there was no material interference with the person's privacy or other civil rights and freedoms, including reviewing existing holdings of information or publicly-accessible materials, or receiving intelligence reporting from foreign partners.

32. The proposed Schedule 4 amendments provide that the requirement for a ministerial authorisation to produce intelligence on an Australian person would apply to intelligence activities that are both covert and intrusive, which is appropriate. Other forms of intelligence collection on Australian persons as proposed by Schedule 4, however, would require only agency level authorisation.

33. CCL agrees that ministerial authorisation may not be required in all circumstances (eg the collection of information already in the public domain or where the impact on a person's rights or liberties would be negligible), but we are of the view that to ensure accountable oversight and control as a means to ensure the ethical surveillance of citizens, surveillance and intelligence productions relating to Australians should require ministerial authorisation where there is the potential for interference with a person's civil rights or liberties.

34. CCL has concerns that the proposed amendments in Schedule 4 have the potential to absolve agencies of the requirement for ministerial authorisation in broader circumstances than intended.

35. More detailed statutory guidance on relevant factors in determining whether an activity is 'covert and intrusive' ought to be provided and circumstances where ministerial authorisation is required should be expanded at the very least to include covert human surveillance and intelligence collection, accessing metadata from telecommunications sources (as opposed to

the use of telecommunications interceptions, which would clearly be within the definition covert and intrusive) and the collection and use of satellite imagery with respect to an individual.

36. The interrogation and combination of numerous, large datasets (eg data available to intelligence agencies recording ATM withdrawals, credit card and other financial transactions, road toll payments, passenger movements and the like) has the potential to reveal highly personal and private information with respect to an individual. For that reason, such activity should also require ministerial approval.

Schedule 5 – ASIS cooperating with ASIO

37. Schedule 5 would amend section 13B of the *Intelligence Services Act 2001* to expand the powers of Australian Secret Intelligence Service (ASIS), allowing it to undertake certain intelligence production activities within Australia, where the Australian Security Intelligence Organisation (ASIO) requests its assistance to perform its security intelligence functions.

38. At present, paragraph 13B(1)(b) only enables ASIS and ASIO to undertake such activities outside Australia (although mechanisms are already in place to enable cooperation between ASIS and ASIO, including through the secondment of ASIS staff to ASIO under ASIO's command).

39. CCL is of the view that insufficient justification has been provided to establish the necessity of the proposed Schedule 5 amendment. Robust justification for its necessity is particularly apposite given that the Richardson Review recommended against it.

40. No adequate explanation is given as to how or why the existing mechanisms for cooperation are inadequate to justify the proposal in the face of the Richardson Review recommendation against it.

41. The need for ASIS to conduct surveillance and intelligence activities appears on its face unnecessary given the existing powers of ASIO to conduct such activities. This amendment would potentially result in an unjustified increase in surveillance and intelligence collection being conducted on Australians and the possible duplication of activities between ASIO and ASIS with respect to the same individuals within Australia.

42. CCL notes with concern that ASIS would not be required to obtain ministerial authorisation to undertake domestic collection activities in support of ASIO. Not only should the necessity for increasing the powers of ASIS to include onshore activities be justified, so should the authorisation process. CCL is particularly concerned that Schedule 5 proposes that internal, agency level approval is all that is required and no sufficient justification for excluding ministerial approval from the process is provided.

Schedule 8 – Timeframe for suspension of travel documents

43. Schedule 8 amends the *Passports Act and Foreign Passports Act* and would extend the period of time for which the Minister for Foreign Affairs may order the suspension or surrender of an Australian or foreign travel document, from 14 to 28 days, on the basis that it is required to afford ASIO sufficient time to resolve its investigative activities.

44. This doubling of the maximum period of interim suspension of Australian or foreign travel documents has not been adequately justified. Given that the amendment would significantly hinder the rights of affected individuals to freedom of movement, adequate justification is required.

45. The interests of efficiency and the convenience of ASIO are insufficient reason for creating the potential for such a significant impact on people's freedom of movement.

Schedule 9 – Expanded immunities for computer-related acts

46. Schedule 9 would amend section 476.6 of the *Criminal Code* to expand immunities to the staff members and agents of ASIS and AGO as well as ASD (whose staff and agents were given immunity recently by virtue of Schedule 2 of the *Security Legislation Amendment (Critical Infrastructure) Act* 2021 (Cth)).

47. The stated purpose is to ensure that they can perform their functions effectively in an increasingly complex online environment. In particular, the extension of immunity to these agencies is intended to protect their staff members and agents from liability if their activities inadvertently affect a computer or device located inside Australia.

48. This amendment would extend the immunity to apply where a staff member or agent of the agency engages in conduct whether inside or outside Australia and reasonably believes that conduct is likely to cause a computer-related act outside of Australia.

49. The provisions as they currently apply to the ASD and would apply by virtue of this amendment to ASIS and AGO, will extinguish the rights of affected Australians to obtain a legal remedy in respect of any loss or damage they may suffer if their computer or device is affected.

50. Consideration should be given to whether a defence of a mistake of fact or ignorance of fact is a more suitable mechanism to address potential accidental acts affecting devices or computers within Australia rather than providing a blanket immunity that would deny a civil remedy to affected Australians.

51. Despite the intention to limit the immunity from liability so that it would not apply in circumstances where the staff member or agent knew or believed that a target computer or device was located in Australia, effective safeguards are required to protect Australian people from potential impact on the civil remedies available to them.

Summary of Recommendations

Schedule 1 – Emergency Authorisations under the *Intelligence Services Act* 2001

1. That proposed amendments to section 9D(1) *Intelligence Services Act 2001* (IS Act) include a requirement for an agency head to be satisfied that there is a serious or significant risk to safety of an Australian person, as a precondition to issuing an emergency authorisation (in addition to that risk being 'imminent').

2. That an authorisation should only be given and the powers should only be exercised if the primary purpose for the production of intelligence on the person is to protect the person from serious or significant risk or ameliorate such risk to their life or safety.

3. If the power of delegation to a staff member is to be retained, it should be constrained. At the very least, the staff member should be required to hold a senior position within the intelligence agency, potentially in line with a 'senior position holder' as defined in s4 of the *Australian Security Intelligence Organisation Act* 1979 (Cth) (ASIO Act).

4. The authorisation given by an agency head should be limited in time and should last only for so long as is reasonably required for the relevant minister to consider the authorisation and make his or her own decision. The primacy of ministerial authority over such an intrusive power ought be preserved.

5. Before an emergency authorisation is granted, all reasonable efforts should be made to contact the relatives of the affected Australian person to seek their consent on behalf of the Australian person if it is not possible to obtain the consent of the person themself.

Schedule 2 – Class authorisations relating to counter-terrorism

6. The conduct sought to be captured ought to be defined more precisely so that it covers only support or advocacy that materially assists or is intended to materially assist the terrorist-related activities of the listed organisation.

Schedule 3 – Authorisations for activities in support of the Australian Defence Force

7. The written request of the Defence Minister should have a 'sunset' so that it cannot be used in perpetuity by the IS Agencies despite changes over time in government, in minister, or the circumstances of the overseas conflict for which the authorisation was originally sought.

Schedule 4 – Authorisations for producing intelligence on Australians

8. To ensure accountable oversight and control as a means to ensure the ethical surveillance of citizens, surveillance and intelligence productions relating to Australians should require ministerial authorisation where there is the potential for interference with a person's civil rights or liberties.

9. More detailed statutory guidance on relevant factors in determining whether an activity is 'covert and intrusive' ought to be provided and circumstances where ministerial authorisation is required should be expanded at the very least to include covert human surveillance and intelligence collection, accessing metadata from telecommunications sources and the collection and use of satellite imagery with respect to an individual.

10. The interrogation and combination of numerous, large datasets has the potential to reveal highly personal and private information with respect to an individual. For that reason, such activity should also require ministerial approval.

Schedule 5 – ASIS cooperating with ASIO

11. Insufficient justification has been provided to establish the necessity of the proposed Schedule 5 amendment to allow ASIS to undertake intelligence activities within Australia where ASIO

requests assistance. Robust justification for its necessity is required given that the Richardson Review recommended against such an amendment.

12. If this amendment is to proceed, ASIS should be required to obtain ministerial authorisation to undertake domestic collection activities in support of ASIO. Internal, agency level approval alone is not sufficient.

Schedule 8 – Timeframe for suspension of travel documents

13. Justification is required for doubling of the maximum period of interim suspension of Australian or foreign travel documents given the impact on hindering freedom of movement.

Schedule 9 – Expanded immunities for computer-related acts

14. Consideration should be given to whether a defence of a mistake of fact or ignorance of fact is a more suitable mechanism to address potential accidental acts affecting devices or computers within Australia rather than providing a blanket immunity that would deny a civil remedy to affected Australians.

This submission was prepared by [redacted] with the assistance of [redacted] on behalf of the New South Wales Council for Civil Liberties.

Yours sincerely,

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