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**Submission to the Senate Legal and Constitutional
Affairs Committee**

***Inquiry into the Telecommunications Interception
and
Intelligence Services Legislation Amendment Bill 2010***

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This Submission concerns the Telecommunications Interception and Intelligence Services Legislation Amendment Bill 2010 (Cth) (hereafter, the Bill). It is particularly concerned with Schedule 6 of the Bill.

The provisions of Schedule 6 would significantly broaden the scope for Australian intelligence organisations – including organisations with hitherto have had a statutory obligation to confine their operations primarily to people and organisations outside Australia – to become participants in domestic governmental functions, including but not limited to domestic law enforcement. This has implications for privacy, for the political independence of law enforcement bodies, and for the relationship between Parliament, the Executive and the people that is at the heart of the Australian system of government.

1. Changes to the functions of the Australian Security Intelligence Organisation

Items 8, 10 to 12 and 17 of Schedule 6 of the Bill would alter ASIO's powers and functions in a number of ways.

1.1 Communication of information by ASIO

Item 12 would amend the *Australian Security Intelligence Organisation Act 1979* (Cth) (hereafter, the *ASIO Act*) so as to significantly broaden the grounds on which ASIO may lawfully communicate information that it has acquired in the course of carrying out its functions.

At present, Part III Division 1 of the *ASIO Act* provides that such information may be communicated only:

- (i) for purposes relevant to security, and only to such persons, and in such manner, as are appropriate to those purposes;¹
- (ii) to an officer of an agency from another country, in circumstances where (a) ASIO is cooperating with that agency, and (b) the information in question is relevant to the security of that country;²

¹ *ASIO Act* s 17(1)(b).

² *ASIO Act* s 19(2).

- (iii) in accordance with Part VIA of the *Privacy Act 1988* (Cth), in the event that an emergency declaration is in force pursuant to that Act;³
- (iv) to an Australian police force, the Australian Crime Commission or the Australian Commission for Law Enforcement Integrity, in circumstances where information that has been acquired by ASIO in carrying out its functions relates, or appears to relate, to the commission, or intended commission, of an indictable offence against an Australian law;⁴
- (v) to a Minister, a Department, another intelligence agency, an Australian police force, the Australian Crime Commission or the Australian Commission for Law Enforcement Integrity, in circumstances where (a) information that has been acquired by ASIO in carrying out its functions has come into ASIO's possession outside Australia or concerns matters outside Australia, and (b) ASIO is satisfied that the national interest requires communication of that information.⁵

The Bill would not affect the first, second or third of these grounds on which ASIO may communicate information, but would significantly expand the fourth and fifth of these grounds, permitting ASIO to communicate information:

- (iv*) to a Minister or a staff member of a Commonwealth or State authority, in circumstances where information that has been acquired by ASIO in carrying out its functions relates, or appears to relate, (a) to the performance of the functions, responsibilities or duties of that person, and (b) to the commission, or intended commission, of conduct that, if engaged in within, or in connection with, Australia, would constitute an offence against an Australian law punishable by imprisonment for a period exceeding 12 months;⁶
- (v*) to a Minister or a staff member of a Commonwealth or State authority, in circumstances where (a) information that has been acquired by ASIO in carrying out its functions relates, or appears to relate, to the performance of

³ *ASIO Act* s 18(3)(c).

⁴ *ASIO Act* s 18(3)(a).

⁵ *ASIO Act* s 18(3)(b).

⁶ Items 8 and 12 of Schedule 6 of the Bill.

the functions, responsibilities or duties of that person, and (b) ASIO is satisfied that the national interest requires communication of that information.⁷

As the previous paragraph makes clear, the Bill would expand the fourth ground in two respects, both as to who may be the recipient of a communication from ASIO, and as to the grounds on which such a communication may be made. Thus, the conduct to which the information relates need no longer be an offence against an Australian law, but only conduct which, *were it committed within Australia*, would be a criminal offence. This creates the possibility of ASIO becoming involved in criminal investigations of Australians or foreigners overseas (perhaps as an element of cooperation with the agencies of another country) and then communicating that information to Australian authorities to whom ASIO deems it relevant (such as the Department of Foreign Affairs, if the behaviour of an Australian abroad risks creating a diplomatic incident). It also raises the possibility of ASIO communicating information about Australians or others abroad who are not committing offences overseas but are engaged in conduct which would be an offence in Australia (for example, ASIO might communicate to customs or immigration officials information about an individual's trading in substances that are prohibited in Australia but legal in the overseas country where the trading took place). The examples suggested here also illustrate that the potential recipients of communication would be broadened well beyond those Australian agencies concerned with the enforcement of Australian law, to encompass a wide range of agencies concerned with the full spectrum of Australian government policy.

The fifth ground would be expanded in two respects also. The first expansion would be to include State authorities as the potential recipients of information. The second, and more significant, expansion would be to remove the requirement that the information in question have been obtained overseas or concern matters outside Australia. Because the effect of this expansion would depend upon ASIO's understanding of *the national interest*, it is hard to estimate the consequences that it would have. The present requirement that the information in question have been obtained overseas or concern matters outside Australia has the tendency to confine

⁷ Item 12 of Schedule 6 of the Bill.

the notion of *national interest* to traditional foreign policy concerns. The amendment that the Bill would bring about, however, would invite ASIO to apply the notion of *national interest* in a far broader way. The significance of the inclusion of State authorities also depends upon what ASIO takes this much broader notion of *the national interest* to require. It seems, for example, that the amendment would permit ASIO to communicate information that it obtains about non-violent political activities, where ASIO forms the view that such demonstrations or protests could lead to economic disruption, or to disruption of high-level government activities (such as diplomatic gatherings), and that such disruption would be contrary to the national interest. This could extend beyond protest or demonstrations to (for example) political advertising campaigns that appeared to threaten the national interest. Furthermore, such information could be communicated not only to police forces, but (for example) to State departments or instrumentalities concerned with the activity that ASIO fears will be disrupted.

It is true that the Bill would leave intact section 17A of the *ASIO Act*, which provides that the Act, and ASIO's functions under it, shall not limit the right of persons to engage in lawful advocacy, protest or dissent. Nevertheless, the Bill's expansion of the grounds on which communications may be made in the national interest opens the door to information being communicated in ways that, while not actively limiting political freedom, nevertheless has the potential to chill political activity by creating the possibility – or even the mere apprehension – that information about political activity deemed contrary to the national interest will be communicated by ASIO to other agencies and authorities.

Concerns about the expansion of the grounds on which ASIO may communicate information are reinforced by the necessarily clandestine character of ASIO's operations. It is, in practice, difficult if not impossible for individuals to be aware of the information that ASIO may be collecting and communicating in respect of them. To the extent that these amendments would have the tendency to increase the secrecy of government information, and to increase the reliance by Australian government agencies upon clandestine means of gathering information about Australians, they undermine the relationship between citizen and government that is

at the heart of the Australian system of government, namely, that the government is ultimately the servant and not the master of the citizen, and is therefore answerable and accountable, through open administration, the operation of Parliament, and (ultimately) the votes of an informed electorate. The increase use of intelligence services to serve the ordinary purposes of government is at odds with this.

In addition to the expansion of the fourth and fifth grounds on which ASIO may communicate information that it has acquired in carrying out its functions, the Bill would add a new, sixth, ground – it would permit communication:

(vi*)to ASIS, DSD or DIGO, if the information relates, or appears to relate, to the functions of the relevant agency.⁸

The activities of intelligence agencies are, of necessity, secret. It is therefore very difficult for this submission to express a view on the need for, and benefits of, increased cooperation between intelligence agencies. On its face, however, this appears to be an unobjectionable provision. The next subsection of this submission will nevertheless raise some concerns that flow from the interaction of this amendment (and the other amendments that item 12 of Schedule 6 of the Bill would bring about) with the other amendments that the Bill would make to ASIO's functions.

1.2 Interagency cooperation by ASIO

Items 10, 11 and 17 of Schedule 6 of the Bill would alter ASIO's functions, to include cooperation with a range of other agencies: other intelligence agencies (ASIS, DSD and DIGO), Australian law enforcement agencies, and other Australian governmental authorities prescribed by regulation.

This would be a significant change to ASIO's functions, and there is good reason to be concerned about it. Although the Explanatory Memorandum to the Bill asserts that the Bill "does not affect the distinction between law enforcement and intelligence functions",⁹ item 17 of Schedule 6 has the potential to do just this. The concerns of ASIO are necessarily very different from those of a police force or a public prosecution service. Australian police forces and prosecutors are obliged to act in an

⁸ Item 12 of Schedule 6 of the Bill.

⁹ At page 1.

apolitical fashion. They are independent of the political Executive. They ought not to be motivated by foreign policy or similar political concerns. ASIO, on the other hand, is tightly integrated into the political Executive, being subject to ministerial direction in several respects.¹⁰ ASIO is also statutorily obliged to have regard to foreign policy considerations, as its functions include carrying out Australia's responsibilities to foreign countries in respect of their security, and obtaining, within Australia, intelligence concerning the capabilities, intentions and activities of foreign governments.¹¹ An increased involvement of ASIO in law enforcement activities therefore risks the politicisation of agencies whose depoliticisation has been a major achievement of the Australian system of government.

Similar concerns would arise in respect of ASIO's involvement in the activities of other government authorities that ought to operate free of political interference, such as Centrelink, the Australian Taxation Office and so on.

Furthermore, this expanded statutory definition of ASIO's functions would then feed back into the expansion of ASIO's power to communicate information discussed in the previous subsection of this submission. Because ASIO's functions would now include cooperation with other government agencies, ASIO would be empowered not only to communicate information that it collected (incidentally, as it were) in the course of undertaking its own primary role of collecting intelligence relevant to security (whether the security of Australia or of other countries) but also to collect information precisely in order to assist other agencies in carrying out their functions. It would open the door to ASIO – a necessarily clandestine intelligence service – actively undertaking activities and collecting information in order to serve functions quite divorced from its hitherto primary role, thereby undermining those central characteristics of Australian democratic government discussed earlier in this submission.

This consequence would mark a significant departure from the current provision pertaining to interagency cooperation, which restrict such cooperation to that which

¹⁰ *ASIO Act* ss 8(2), 8A, 19(1). The Minister also plays a key role in approving the issue of warrants under Divisions 2 and 3 of Part III of the Act.

¹¹ *ASIO Act* s 17(1)(a),(e) read together with the definitions of "security" and "foreign intelligence" in s 4.

is conducive to ASIO's performance of its existing functions.¹² This only heightens the concerns expressed in the previous subsection of this submission about the increased involvement of ASIO in the everyday activities of government.

To the extent that it is felt necessary to make ASIO's technical expertise available to other government agencies, including law enforcement agencies, to better enable them to fulfil their functions – which seems to be a principal concern of the Bill, according to the Explanatory Memorandum¹³ – a superior model is provided by the amendments that Schedule 1 of the Bill would make to the *Telecommunications (Interception and Access) Act 1979* (Cth). These amendments would permit other agencies to take advantage of ASIO's technical expertise in relation to telecommunications interception, while ensuring that any information collected is used only in accordance with the purposes for which a particular interception warrant has been issued.¹⁴

The Explanatory Memorandum, in discussing the approach actually adopted by Schedule 6 of the Bill, states that it

is intended to provide flexibility to ensure that ASIO is able to provide information to the most appropriate person or body, having regard to their functions. This will also ensure that where new agencies or bodies are created or existing agencies are conferred with new functions, ASIO's ability to communicate with them is not restricted by having a narrow list of agencies and bodies with whom it may communicate.¹⁵

It is the very open-ended character of the provisions of Schedule 6, however, that give rise to the concerns raised in this submission. A need for greater detail and precision in the legislative conferral and regulation of clandestine functions is a small price to pay in order to uphold the values and character of Australia's democratic system of government.

¹² *ASIO Act* s 19(1).

¹³ At page 23.

¹⁴ Items 18 to 22 of Schedule 1 of the Bill.

¹⁵ At page 26.

The provision in item 17 for increased cooperation between ASIO and other Australian intelligence agencies does not raise the concerns expressed so far in this subsection. Even here, however, there is reason to consider whether the amendments that the Bill would introduce might not blur the line between agencies which have hitherto been established on a distinct basis with good reason. For example, it would tend to undermine the present distinction between domestic and overseas intelligence operations that results from the distinctive statutory basis and responsibilities of ASIO and the other agencies.

1.3 Conclusions in relation to items 8, 10, 11, 12 and 17 of Schedule 6 of the Bill

For the reasons set out above, this submission opposes enactment of items 8, 10, 11, 12 and 17 of Schedule 6 of the Bill in their present form.

This submission would support the substitution of “serious crime” for “indictable offence” in section 18(3)(a), but rather than the definition given in item 8 of Schedule 6, “serious crime” should be defined as *an offence against the law of the Commonwealth or of a State or Territory punishable by imprisonment exceeding a period of 12 months*. This would address the concerns about item 8’s definition of “serious crime” set out above in subsection 1.1 of this submission.

In respect of those aspects of those items that deal solely with communication and cooperation between intelligence agencies, however, the submission is not entirely opposed. It does urge caution, however, for the reasons stated above, namely, that increased integration of the activities of these agencies has the potential to blur distinctions – particularly between domestic and overseas intelligence gathering operations – that were put in place for good reasons.

The submission therefore favours the enactment of section 18(4A) set out in item 12 of the Bill, without any further expansion of ASIO’s functions or powers. Enacting this provision would, in effect, expand existing section 18(3)(b)(iii) of the *ASIO Act*, to permit ASIO to communicate information to other intelligence agencies not only when the national interest requires it and when it has been collected overseas or concerns overseas matters, but in any circumstances when the information is

relevant to, or appears relevant to, the functions of one of those agencies. It would therefore confer upon ASIO the additional power to communicate labelled as (vi*) in subsection 1.1 above. Such an approach would permit intelligence sharing between agencies without undermining their distinct roles and spheres of operation, and without any need for broadening ASIO's functions beyond its existing primary role.

1.4 Other items in Schedule 6 pertaining to ASIO's powers and functions

This submission supports the clarificatory amendments set out in items 14 and 16 of Schedule 6. This submission also does not object to the definitions that would be introduced or amended by items 1 to 6. The amendments set out in items 7, 9, 13, 15, 28 and 29 would be unnecessary but for items 10, 12 and 17, and therefore do not stand in need of independent comment.

2. Changes to the functions of ASIS, DIGO and DSD

The amendments that would be brought about by items 18 to 27 of Schedule 6 raise the same concerns as discussed in subsection 1.2 above in relation to ASIO. In particular, by making it a function of each of these other intelligence agencies to assist other agencies in undertaking those other agencies' functions, there is a very real risk of increasing the role, in Australian government, of clandestine intelligence agencies. Item 27, in particular, would permit these intelligence agencies, which hitherto have had as their function collection of intelligence about the capabilities, intentions or activities of people or organisations outside Australia,¹⁶ to take on a significant domestic operation. One potential upshot would be the Department of Defence – via DSD and/or DIGO – in effect spying on Australians in Australia in order to facilitate some other government authority's activities. For the reasons already given in this submission, such a development would be inimical to the values and the operation of Australian democracy.

As suggested above in subsection 1.3, a preferable approach would be one in which these intelligence agencies retain their distinct statutory functions – or at least their existing statutory demarcation from ASIO – while also enjoying a permission to share information with one another, and with ASIO, where such information is relevant to

¹⁶ *Intelligence Services Act 2001* (Cth) ss 6(1)(a), 6B(a), 7(a).

the functions of that other agency. Existing sections 11(2AA) and/or 13 of the *Intelligence Services Act 2001* (Cth) could be amended to confer a permission of this sort. At a minimum, new section 13A(1)(c), as set out in item 27 of Schedule 6 of the Bill – which would permit these agencies to operate completely outside the intelligence sphere – ought not to be enacted.