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ATTORNEY-GENERAL
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MEDIA RELEASE

**GOVERNMENT RESPONSE TO COMMITTEE REPORT ON
NATIONAL SECURITY LEGISLATION AMENDMENT BILL (NO 1) 2014**

The Government has responded to the inquiry of the Parliamentary Joint Committee on Intelligence and Security (PJCIS), into the National Security Legislation Amendment Bill (No 1) 2014 (the Bill). We thank the Committee for its thorough, constructive and bipartisan review which recommends that the Bill be passed subject to a handful of targeted amendments.

The Government has decided to support all of the Committee's 17 recommendations, which were contained in its report tabled on 17 September, and will move amendments to implement them when the Bill is debated in the Senate next week.

The Committee's recommendations focus on oversight and reporting requirements applying to ASIO's warrant-based intelligence collection activities, and the proposed new scheme of special intelligence operations. The Committee made useful recommendations to ensure that the proposed new offences in the Bill will not discourage people from disclosing information to the Inspector-General of Intelligence and Security, for the purpose of the Inspector-General's independent statutory oversight of intelligence agencies.

The Committee has further recommended that the Government initiate a review of the Attorney-General's Guidelines to ASIO, which set out requirements that ASIO must follow in carrying out its functions, including in relation to individuals' privacy.

The Government agrees with the Committee's assessment that its recommendations will further enhance the integrity of the Bill. The recommended measures will also help strengthen public confidence that the proposed reforms are accompanied by significant safeguards, and cannot be exercised in a way that exceeds their legitimate policy intent.

The Bill is an important contribution to the future capability of Australia's intelligence agencies. The Government recognises the valuable work of the Committee, and particularly its Chair, Mr Dan Tehan MP, and Deputy Chair, The Hon Anthony Byrne MP. We thank all those who participated in its inquiry. The Government also acknowledges the ongoing bipartisan support from the Opposition on this Bill and national security matters more broadly.

A copy of the Government response to the Committee's recommendations is attached.

19 September 2014

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Government response:

Parliamentary Joint Committee on Intelligence and Security Advisory Report on the National Security Legislation Amendment Bill (No 1) (Report tabled 17 September 2014)

Recommendation	Response
<p>1. ‘ASIO affiliate’ (s 4)</p> <p>The Committee recommends that the Explanatory Memorandum to the National Security Legislation Amendment Bill (No 1) 2014 be amended to clarify that the term ‘ASIO affiliate’ is intended to be restricted to natural persons.</p>	<p>Supported</p> <p>The Government will amend the Explanatory Memorandum to include an express statement of the policy intent that the term ‘ASIO affiliate’ is limited to natural persons.</p>
<p>2. Secondment of persons to and from ASIO</p> <p>The Committee recommends that the intent of proposed sections 86 and 87 be clarified to make explicit that a person on secondment shall be required to work wholly or on behalf of the host organisation, and under the host organisation’s legal framework.</p>	<p>Supported</p> <p>The Government agrees that, for the avoidance of doubt, there would be benefit in amending the Explanatory Memorandum to the Bill to include an express statement of the policy intent that a person on secondment under ss 86 and 87 must cease performing the functions of his or her home organisation.</p>
<p>3. Computer access warrants</p> <p>The Committee recommends that consideration be given to amending the Explanatory Memorandum or the Attorney-General’s Guidelines issued under section 8A of the <i>Australian Security Intelligence Organisation Act 1979</i> to clarify that a computer access warrant may only authorise access to a computer (which would include a network) to the extent that is necessary for the collection of intelligence in respect of a specified security matter.</p>	<p>Supported</p> <p>The Government will amend the Explanatory Memorandum to the Bill to make clear that the thresholds for the issuing of computer access warrants, and the authorisation of activities under those warrants, are limited to those activities which are carried out for the purpose of collecting intelligence in respect of a specific security matter as set out in the warrant request. (For example, a security matter may include a specific person or persons whose identity is known or unknown, entity or entities whether known or unknown, or an activity that is important in relation to ‘security’ as that term is defined in s 4 of the ASIO Act.)</p>

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<p>4. Attorney-General's Guidelines to ASIO</p> <p>The Committee recommends that the Government initiate a review of the Attorney-General's Guidelines issued under section 8A of the <i>Australian Security Intelligence Organisation Act 1979</i>, including examining requirements to govern ASIO's management and destruction of information obtained on persons who are not relevant, or no longer relevant to security matters.</p>	<p>Supported</p> <p>The Government will request ASIO and the Attorney-General's Department to undertake a review of the Attorney-General's Guidelines issued under s 8A of the ASIO Act, including examining requirements to govern ASIO's management and destruction of information obtained on persons who are not relevant, or are no longer relevant, to security matters.</p>
<p>5. Reporting on warrants</p> <p>The Committee recommends that the Director-General of Security be required to include details of any instances of material disruption of a computer, or non-routine access to third party computers or premises, in the reports on the execution of each warrant provided to the Attorney-General under section 34 of the <i>Australian Security Intelligence Organisation Act 1979</i>.</p>	<p>Supported</p> <p>The Government agrees that there is benefit in focusing reporting and oversight on those activities authorised under a warrant that the Committee has identified as having a high degree of intrusion on third parties' privacy or other property rights (namely in relation to computers and third party premises).</p> <p>The Government will move amendments to s 34 of the ASIO Act requiring reports to the Attorney-General on the execution of warrants to include details of material disruptions to, or interferences with, computers, caused by activities authorised under a warrant.</p> <p>In recognition of the complexity and potential ambiguity associated with a legislative requirement for Ministerial reporting on instances of 'non-routine' access to third party computers or premises, the Government will also consider issuing Ministerial directions to ASIO, in accordance with s 8 of the ASIO Act, requiring it to report to the Attorney-General on such activities. Copies of Ministerial directions must be given to the Inspector-General of Intelligence and Security (IGIS) under s 8(6).</p>
<p>6. Use of reasonable force in relation to persons</p> <p>The Committee recommends that the Australian Security Intelligence Organisation be required to</p>	<p>Supported</p> <p>The Government acknowledges that a specific reporting requirement in relation to the use of</p>

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<p>notify the Attorney-General and the Inspector-General of Intelligence and Security within 24 hours of any incident in which force is used against a person by an ASIO officer, and for a written report on the incident to be provided within 7 days.</p> <p>The Committee further recommends that the Director-General of Security be required to include details of any use of force against a person by ASIO officers in the reports on the execution of each warrant provided to the Attorney-General under s 34 of the <i>Australian Security Intelligence Organisation Act 1979</i>.</p>	<p>reasonable force against persons in the execution of warrants could provide additional reassurance in relation to the use of this power where it is exercised in accordance with a warrant issued under the ASIO Act.</p> <p>Recognising the importance of ensuring appropriate operational flexibility in addition to oversight and reporting arrangements, the Government favours a requirement that ASIO reports to the Attorney-General and the IGIS as soon as practicable after the relevant incident. The Government will move amendments accordingly.</p>
<p>7. Oversight of training – use of force</p> <p>The Committee recommends that the IGIS provide close oversight of the design and execution of training for ASIO officers who may be required to use force during the execution of warrants issued under the <i>Australian Security Intelligence Organisation Act 1979</i>.</p>	<p>Supported</p> <p>While recognising that this recommendation is a matter for the discretion of the IGIS in the performance of her statutory oversight functions in relation to ASIO, the Government agrees that any use of reasonable force, including training provided by or for ASIO, should continue to be subject to independent oversight by the IGIS under the <i>Inspector-General of Intelligence and Security Act 1986</i>.</p>
<p>8. Oversight of use of force against persons</p> <p>The Committee recommends that the IGIS provide close oversight of any application of the proposed powers to authorise the use of force against persons by ASIO officers to ensure those powers are used only in exceptional circumstances, and to the extent reasonable and necessary to carry out a warrant.</p>	<p>Supported</p> <p>While recognising that this recommendation is a matter for the discretion of the IGIS in performing statutory oversight functions in relation to ASIO, the Government agrees that the use of reasonable force in relation to persons, for the purpose of executing a warrant issued under the ASIO Act, should be subject to independent oversight by the IGIS under the <i>Inspector-General of Intelligence and Security Act 1986</i>.</p>
<p>9. Special intelligence operations: authorisation</p> <p>The Committee recommends that Schedule 3 to the National Security Legislation Amendment Bill (No 1) be amended to require that approval must be obtained from the Attorney-General before a special intelligence operation is commenced, varied or extended beyond six months by the</p>	<p>Supported</p> <p>The Government acknowledges that Ministerial involvement in the issuing process for special intelligence operations would provide an additional degree of assurance to the Parliament in relation to the operation of the proposed scheme. The Government will move amendments requiring</p>

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Australian Security Intelligence Organisation.	Ministerial authorisation for these operations.
<p data-bbox="113 302 769 336">10. Special intelligence operations: oversight</p> <p data-bbox="113 358 769 604">The Committee recommends that additional requirements be introduced into the National Security Legislation Amendment Bill (No 1) 2014 to enhance the Inspector-General of Intelligence and Security (IGIS's) oversight of the proposed special intelligence operations scheme, including:</p> <ul data-bbox="113 627 769 1355" style="list-style-type: none"> <li data-bbox="113 627 769 795">• a requirement for the Australian Security Intelligence Organisation (ASIO) to notify the IGIS when a special intelligence operation is approved <li data-bbox="113 817 769 929">• a requirement for ASIO to advise the IGIS of any special intelligence operation that is intended to continue beyond six months <li data-bbox="113 952 769 1198">• a requirement for ASIO to notify the Attorney-General and the IGIS as part of the six-monthly reports proposed in clause 35Q of the Bill, of any injury, loss or damage caused to a person or property in the course of a special intelligence operation, and <li data-bbox="113 1220 769 1355">• a requirement for the IGIS to periodically, and at least annually, inspect ASIO's records relating to current special intelligence operations. 	<p data-bbox="801 302 1487 336">Supported</p> <p data-bbox="801 358 1487 604">The Government agrees that these additional notification, reporting and inspection requirements will help enhance the ability of the IGIS to perform statutory oversight of special intelligence operations, under the powers conferred by the <i>Inspector-General of Intelligence and Security Act 1986</i>.</p> <p data-bbox="801 627 1487 828">The Government will move amendments to include additional notification requirements. This will provide further assurance to the Parliament and the public about the legality and propriety of ASIO's activities under the proposed new scheme.</p> <p data-bbox="801 851 1487 1142">On the issue of periodic inspection by the IGIS, the Government notes the preference of the IGIS that such inspections are undertaken on a discretionary basis. The Government is of the view that adequate provision is made in the IGIS Act for the conduct of inspections (s 9A) and reporting on such inspections (ss 25A and 35(2A)).</p>
<p data-bbox="113 1630 769 1664">11. Special intelligence operations: offences</p> <p data-bbox="113 1686 769 1933">The Committee recommends that additional exemptions be included in the offence provision relating to the disclosure of information on special intelligence operations in proposed section 35P of the National Security Legislation Amendment Bill (No 1) 2014 to explicitly enable:</p> <ul data-bbox="113 1955 769 2110" style="list-style-type: none"> <li data-bbox="113 1955 769 2033">• disclosure of information for the purpose of obtaining legal advice <li data-bbox="113 2045 769 2110">• disclosure of information by any person in the course of inspections by the Inspector-General 	<p data-bbox="801 1630 1487 1664">Supported</p> <p data-bbox="801 1686 1487 2101">The Government agrees that it would be beneficial to include these matters as additional exceptions to those presently in proposed s 35P. These additional exceptions will ensure that persons are able to obtain legal advice separately to their participation in legal proceedings, and to ensure that the proposed offences do not operate as a perceived barrier or disincentive to the disclosure of information to the IGIS in connection with the performance by the IGIS of her statutory oversight functions.</p>

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<p>of Intelligence and Security (IGIS), or as part of a complaint to the IGIS or other pro-active disclosure made to the IGIS</p> <ul style="list-style-type: none"> • communication of information by IGIS staff to the IGIS or other staff within Office of the IGIS in the course of their duties. 	<p>The Government will move amendments to include these matters in proposed s 35P.</p>
<p>12. Special intelligence operations: offences</p> <p>The Committee recommends that the National Security Legislation Amendment Bill (No 1) 2014 be amended, or if not possible, the Explanatory Memorandum of the Bill be clarified, to confirm that the Commonwealth Director of Public Prosecutions must take into account the public interest in publication, before initiating a prosecution for the disclosure of a special intelligence operation.</p>	<p>Supported</p> <p>Decisions about the commencement and continuation of prosecutions must be made independently of the Government, by the Commonwealth Director of Public Prosecutions (CDPP), in accordance with the Prosecution Policy of the Commonwealth. Under this policy, the CDPP is required to consider the public interest in the prosecution of a matter. It would be open to the CDPP, in the course of making decisions about the commencement or continuation of a prosecution under proposed s 35P, to take into account the public interest in publishing the relevant information. Accordingly, the Government will amend the Explanatory Memorandum to include an explanation of these matters.</p>
<p>13. Special intelligence operations: offences</p> <p>The Committee further recommends that, to make clear the limits on potential prosecution for disclosing information about special intelligence operations, section 35P of the National Security Legislation Amendment Bill (No 1) 2014 be amended to confirm that the mental element (or intent) of the offence is ‘recklessness’, as defined in the Criminal Code, by describing the application of that mental element to the specific offence created by section 35P.</p>	<p>Supported</p> <p>The general principles of criminal responsibility in Chapter 2 of the Criminal Code, including those in relation to fault elements, are of general application to all Commonwealth offences and are well understood by law enforcement agencies, courts and most legal practitioners.</p> <p>However, the Government acknowledges the Committee’s concern to ensure that the significant threshold imposed by the fault element of recklessness in relation to the circumstance in proposed ss 35P(1)(b) and 35P(2)(b) is communicated expressly on the face of these provisions, in recognition of stakeholder concerns</p>

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	<p>raised in the course of its inquiry.</p> <p>The Government intends to move an amendment to insert a note to the provision, which refers to s 5.6(2) of the Criminal Code as the source of the fault element of recklessness. Although such a provision would be exceptional and would not be necessary as a matter of law, the Government acknowledges the Committee's interest in providing further assurance.</p>
<p>14. Protection of information</p> <p>The Committee recommends that the National Security Legislation Amendment Bill (No 1) 2014 be amended to make it explicit that the offence provisions in Schedule 6 to the Bill do not apply to:</p> <ul style="list-style-type: none"> • information disclosed to the Inspector-General of Intelligence and Security (IGIS) in the course of inspections, or in support of a complaint or a pro-active disclosure, or • communication of information by IGIS staff to the IGIS or other staff within the Office of the IGIS in the course of their duties. 	<p>Supported</p> <p>The Government agrees that an express exclusion of these matters in the offences in Schedule 6 to the Bill would help avoid any perceived barriers or disincentives to the disclosure of information to the IGIS in the performance of her statutory oversight functions. The Government will move amendments to Schedule 6 accordingly.</p>
<p>15. IGIS resourcing</p> <p>The Committee recommends that the Office of the Inspector-General of Intelligence and Security's annual budget be supplemented to the extent required to provide for the new oversight requirements associated with the National Security Legislation Amendment Bill (No 1) 2014, including periodic reviews of special intelligence operations and oversight of the use of force in the execution of warrants. Supplementation of the Office of the Inspector General of Intelligence and Security's budget should also take other proposed measures to expand the powers of intelligence agencies into account.</p>	<p>Supported</p> <p>The Government has announced that it will increase the annual budget of the IGIS to provide for the new oversight requirements in relation to the measures in the National Security Legislation Amendment Bill (No 1) 2014.</p> <p>The Government will, in consultation with the IGIS, continue to monitor the resourcing needs of that Office to ensure it is resourced to perform effective oversight of the measures contained in this Bill, and in subsequent Bills to be introduced to the Parliament in the Spring sittings.</p>
<p>16. Oversight</p> <p>The Committee recommends that the Government appoint an Independent National Security Legislation Monitor as soon as practicable.</p>	<p>Supported</p> <p>The Government is considering the appointment of an Independent National Security Legislation Monitor (INSLM), noting that the measures in the</p>

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	Government's national security and counter-terrorism legislative reforms will, if enacted, fall within the statutory mandate of the INSLM.
<p>17. Passage of the Bill</p> <p>The Committee recommends that, following considerations of the recommendations in this report, the National Security Legislation Amendment Bill (No 1) 2014 be passed by the Parliament.</p>	<p>Supported</p> <p>The Government thanks the Committee for its thorough and constructive scrutiny of the Bill, and acknowledges the valuable contributions of all stakeholders participating in the Committee's inquiry. With the benefit of the Committee's bipartisan recommendations, the targeted measures in the Bill will modernise and improve the legislative framework governing the Australian Intelligence Community. This will go a considerable way towards ensuring that agencies will continue functioning effectively in the contemporary, evolving security environment, and to continue protecting Australia and Australians from current, emerging and future security threats.</p>