

NSW COUNCIL OF CIVIL LIBERTIES SUBMISSION TO THE SENATE LEGAL AND CONSTITUTIONAL AFFAIRS COMMITTEE INQUIRY INTO THE INSPECTOR GENERAL OF INTELLIGENCE AND SECURITY AMENDMENT BILL 2011

The New South Wales Council for Civil Liberties (CCL) is committed to protecting and promoting civil liberties and human rights in Australia.

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

CCL was established in 1963 and is one of Australia's leading human rights and civil liberties organisations. Our aim is to secure the equal rights of everyone in Australia and oppose any abuse or excessive power by the State against its people.

The NSW Council of Civil Liberties welcomes the opportunity to comment on the Inspector General of Intelligence and Security Amendment Bill 2011.

PRELIMINARY COMMENTS

NSWCCL offers comments on the proposed amendments to the IGIS legislation from a position of opposition to the extensive expansion in the powers of ASIO and the other intelligence agencies over the last decade. Cumulatively these have been a disproportionate response to the post 9/11 environment.

The challenge these powers pose for civil liberties and human rights and to the democratic state are exacerbated by the failure of Governments to balance them with effective accountability mechanisms. The activities of ASIO and other intelligence agencies have become increasingly opaque not only to the public, but to Parliament and the courts because of the proliferation of secrecy provisions.

We have recently been presented with amendments to several of the intelligence community acts which, while described in formal documentation and commentary as relatively minor (updating of existing provisions to match changes in the environment and to achieve consistency in definitions across the intelligence legislation), have, in fact, constituted significant further expansion of intelligence agency powers¹. Not surprisingly, given the low key presentation of the amendments, there has been very limited public discussion of the significance or the rationale for these changes.

To take one example.

NSWCCL opposes amendments in the Intelligence Services Legislation Amendment Bill 2011 which will significantly widen the powers of ASIO to gather foreign intelligence.

It is proposed to remove the current definition of 'foreign intelligence in the ASIO Act: 'intelligence relating to the capabilities, intentions or activities of (a) a foreign government; (b) an entity that is directed or controlled by a foreign government or governments; or (c) a foreign political

¹Telecommunications Interception and Intelligence Services Legislation Amendment Bill 2010 ; Intelligence Services Amendment Bill 2011. This Bill makes amendments to the *Australian Security Intelligence Organisation Act 1979* (ASIO Act), the *Intelligence Services Act 2001* (IS Act) and the *Criminal Code Act 1995* (Criminal Code).

organisation'. It will be replaced with the open-ended: 'intelligence about the capabilities, intentions or activities of people or organisations outside Australia.'²

It is also proposed to amend the grounds on which the Attorney General can issue a special powers warrant for ASIO to collect foreign intelligence. Currently the grounds are: 'that collecting the foreign intelligence in question be important in relation to the defence of the Commonwealth or to the conduct of the Commonwealth's international affairs.' The proposed new grounds are: 'that collecting the foreign intelligence in question be in the interests of Australia's national security, Australia's foreign relations or Australia's national economic well-being'³

This is not the context in which to argue the case against these amendments. NSWCCCL notes its agreement with the comments of the Law Council of Australia in its submission to the Senate Committee on this Bill. The Law Council pointed out that these changes:

..will mean that search warrants, computer access warrants and surveillance and listening device warrants are available to ASIO in a very broad range of circumstances.

The proposed changes will almost render meaningless the threshold test that must be met by ASIO in order to obtain a warrant or authorisation to collect intelligence under 27A and 27B. A warrant or authorisation will be able to be obtained to gather information about the activities of any person or group outside Australia whenever those activities are considered to be somehow relevant to Australia's national security, Australia's foreign relations or Australia's national economic well-being.

The new definition and test will afford the Minister and the agency almost unfettered discretion to determine when and how ASIO's powers may be used to gather information about people's activities, communications and relationships abroad.⁴

The decision to bring forward these amendments to the ASIO legislation at this time is understandably seen by many as part of the Government's preparation to respond to Julian Assange and WikiLeaks and their ilk.

Thus, for example, the amendments would permit ASIO a much wider scope to investigate the activities of Australians who are overseas, and whose activities do not pose any threat to Australia's security, but perhaps do have implications for Australia's foreign relations or economic interests. This could include Australians involved in non-violent political activities abroad, which while posing no threat to Australia's security, and not involving any foreign political organisations, might nevertheless be seen as having implications for Australia's foreign relations (for example, because they would be perceived adversely by the government of the country in which such activities were taking place). An example of such activities might include the release of secret government information by an Australian living abroad, such as has been the case in respect of Julian Assange and Wikileaks. Currently, information about Wikileaks probably would not constitute foreign intelligence – because Wikileaks is (arguably) not a foreign political organisation, and its activities do not threaten Australia's security (as defined in section 4 of the Australian Security Intelligence Organisation Act 1979 (Cth)). But Wikileaks is an organisation, and Mr Assange is a person, outside Australia, and their activities evidently do have implications for Australia's foreign relations. This example

² Item 3, Intelligence Services Amendment Bill 2011, relating to the current section 4 of the ASIO Act. .

³ Item 7 and 13, Intelligence Services Amendment Bill 2011, relating to current sections 27(a) and 27(b) of the ASIO Act 1979. .

⁴ Submission of the Law Council of Australia to the Senate Legal and Constitutional Affairs Committee Inquiry into the Intelligence Services Legislation Amendment Bill 2011.

shows how the notion of “person or organisation outside Australia”, combined with the notion of “Australia’s foreign relations”, very considerably expands the scope of ASIO’s potential activities.⁵

COMMENTS ON PROPOSED AMENDMENTS

It seems that the Government has no intention of rolling back any of the extraordinary powers and secrecy provisions that were extended to intelligence agencies in the aftermath to 9/11. Instead we are seeing further expansion of powers. There is ample historical record to establish that weak accountability tends to produce abuse of powers and unjust outcomes. Weak accountability and lack of reasonable transparency also work against public trust in intelligence agencies

In this context, the effectiveness of the mechanisms to oversight and monitor the activities of intelligence agencies and the proportionality of the consequences of these activities is of great importance.

The Inspector-General of Intelligence and Security is a key part of the existing accountability framework. It is therefore concerning that there is apparently little public interest in this amendment Bill.⁶

Within NSWCCCL there is some scepticism as to the effectiveness of such review and oversight roles. Notwithstanding their statutory independence, arguably they tend to be too constrained by statutory limits as to their real powers of review, by strong secrecy constraints in communicating their findings and by their context and limited resources to have much real impact. It would arguably be preferable for the courts and Parliament to be given much stronger oversight and review roles over ASIO the other intelligence agencies.. These might be more robust options for achieving a better balance between national security and the protection of civil liberties, human rights and a democratic society.

However, accepting the IGIS is established to have a key role in the existing accountability framework, NSWCCCL offers the following comments on the proposals in the Amendment Bill. NSWCCCL supports most of the proposed amendments, but its major proposal is for an additional amendment which will address a serious weakness in the review and oversight function of the IGIS.

Item 1 (Schedule 1)

NSWCCCL welcomes the positive statements as to the core intention of the Bill to provide assurance to Parliament and public about the effectiveness of the Government’s oversight of and the accountability of the agencies.

With a view to renewing assurance to the Parliament and the public that the intelligence agencies’ use of special powers and capabilities is subject to scrutiny, the Bill will recognise expressly the IGIS’s special role in assisting the Government in relation to oversight of the agencies.⁷

⁵Castan Centre for Human Rights Law, Monash University. Submission to the Senate Legal and Constitutional Affairs Committee Inquiry into the Intelligence Services Legislation Amendment Bill 2011

⁶At the time of writing there is no submission from any non-government agency or individual posted on the Senate Committee website.

⁷Department of the Prime Minister and Cabinet Submission to the Senate Legal and Constitutional Affairs Committee Inquiry into the Inspector General of Intelligence and Security Amendment Bill 2011

The Bill will also strengthen the accountability and oversight framework governing the activities of the agencies that make up the Australian Intelligence Community (AIC), providing greater assurance regarding the legality and propriety of their activities, as well as their respect for human rights.⁸

NSWCCL supports the amendment to Section 4 which adds a new Object to the Act:

and (d) to assist the Government in assuring the Parliament and the public that intelligence and security matters relating to Commonwealth agencies are open to scrutiny, in particular the activities and procedures of intelligence agencies

It is not clear however, that the Act will enable the IGIS to achieve its specified Objects. NSWCCL cannot see that the Act confers capability on IGIS to assess ‘the propriety of particular activities of, Australian intelligence agencies’ 4(a)(i) or to ensure ‘that the activities of those agencies are consistent with human rights’ 4(b).

The Act does not enable the IGIS to assure the public that intelligence agencies are under appropriate and effective scrutiny. Such assurance requires a deal more openness and transparency in the operation of the IGIS and more information about the content and outcome of reviews than is currently available. There is no indication that the IGIS can move beyond agencies’ activities and procedures to assess the evidentiary basis for their findings and assessments.

Item 2 and 5

NSWCCL supports the amendment to section 8 which allows the IGIS to undertake own motion full inquiries into the effectiveness and appropriateness of the procedures of ASIS, DIGO or DSD relating to the legality or the propriety of the agency/s activities .

NSWCCL supports the amendment to section 14 which allows the IGIS to undertake own motion preliminary inquiries of the head of agencies to determine whether IGIS is authorised to proceed with a full inquiry and if so ,whether IGIS should proceed.

Both these amendments enhance the independence of the IGIS and are welcome.

Item 6

NSWCCL supports the amendment to section 22 which requires a copy of an IGIS report which is provided to the responsible minister to also be provided to the Prime Minister.

NSWCCL would also propose that a further amendment be included to require a copy of such reports be provided to the Leader of the Opposition.

Item 10

NSWCCL does not support these amendments to section 34 which insert explicit prohibitions on the IGIS of unauthorised disclosure of sensitive or classified material to a court or tribunal .

NSWCCL considers the secrecy provisions in the intelligence legislation to be excessive and disproportionate and a danger to civil liberties and the democratic process. Inserting an explicit prohibition provides a further blanket barrier to legal challenges exploring access to relevant information from the IGIS.

⁸Inspector General of Intelligence and Security Amendment Bill 2011, Explanatory Memorandum.

Item 15

NSWCCL supports the amendment to section 34 which enables the IGIS to release material to any Royal Commission where it is expressly prescribed in regulations as authorised to seek evidence from or cooperate with the IGIS.

This amendment has the desirable effect of increasing access to the IGIS material- in an important but limited context.

Amendments dealing with the simplification and clarification of employment matters and the IGIS's scope of authority and review powers therein (Item 3) and additions allowing the employment of a person to assist the IGIS and providing for the delegation of some IGIS functions (Items 8 and 9) are sensible operational proposals and NSWCCL supports them.

PROPOSED ADDITIONAL AMENDMENT FOR INCLUSION IN IGIS BILL

Current provisions in relation to ASIO's security assessments of asylum seekers have created an abuse of human rights and fair process that is so gross that one would hope it was unintentional.

NSWCCL is currently assisting asylum seekers who have been granted refugee status but have been given adverse security assessments by ASIO. The reasons for these adverse assessments are not open to the person assessed nor are they subject to any testing or review process. The current consequence for refugees given an adverse assessment status is ongoing and indefinite mandatory detention until a third country willing to accept them as refugees is found. Current experience is that this can lead to very lengthy mandatory detention.

NSWCCL considers indefinite detention on the basis of a secret adverse assessment that cannot be merit tested is a gross abuse of human rights and fair process. Our concern is heightened by the strong possibility that numbers of current ASIO adverse assessments on asylum seekers who have been granted refugee status might be based on unsound information from a government hostile to the asylum seekers for reasons which would pose no threat to Australian security. In this case the refugees are Sri Lankan.

Given the Objects of the IGIS Act and the specified functions of IGIS in relation to ASIO set out in Section 8 of the Act, NSWCCL explored the possibility of an IGIS merit review of specific adverse assessments of Sri Lankan asylum seekers. It was an unsuccessful exploration. IGIS was unable to conduct a merit review of ASIO's grounds for its decision or of its methodology.

NSWCCL regards the incapacity of IGIS to be of assistance in this context to expose a major weakness in the role.

This is a situation where potentially large numbers of asylum seekers may be granted refugee status only to find themselves with an unchallengeable and untestable adverse assessment by ASIO based on secret information. The consequences of this will not only be denial of an Australian visa and the right to settle here as a legitimate refugee, but indefinite mandatory detention. There are also wider ramifications for the overall management of asylum seekers if a considerable number of persons granted refugee status find themselves in indefinite mandatory detention for unknown reasons. .

It is in everyone's interest to find a way of resolving this situation. NSWCCL is exploring other options, but the powers of the IGIS could be amended to allow it to deal with complaints from persons who have been determined to be eligible for refugee status but have an adverse or qualified security assessment from ASIO.

A process review is not an adequate response to this issue. Even processes which are legal and consistent with propriety can result in unjustified decisions if the information on which decisions are based is inaccurate or unreliable.

NSWCCL considers that IGI's should be given the power to conduct a merit review in situations with this significance for human rights.

NSWCCL recommends that Section 8(1) be amended to allow IGIS to inquire into the action (if any) that should be taken to protect the rights of a person who has been granted refugee status but has been given an adverse security assessment by ASIO which may result in adverse consequences for the person.

The amendment should specifically allow merit review of the information supporting the adverse assessment and the consequences of the decision.

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June 2011

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