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Victorian Council for Civil Liberties Inc  
Reg No : A0026497L

GPO Box 3161  
Melbourne, VIC 3001  
t 03 9670 6422  
info@libertyvictoria.org.au

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The Hon. Michael Kirby AC CMG

19 August 2012

Committee Secretary  
Parliamentary Joint Committee on Intelligence and Security  
Parliament House  
Canberra, ACT 2600  
**By email**

Dear Committee Members

### **Submission of Liberty Victoria to the Parliamentary Joint Committee on Intelligence and Security: Inquiry into potential reforms of National Security Legislation**

Liberty Victoria is one of Australia's foremost civil liberties and human rights advocacy organizations. It is also the longest standing, having been established initially as the Australian Council for Civil Liberties in 1936.<sup>1</sup>

Liberty Victoria is grateful for the opportunity to comment on the Discussion Paper released by the Commonwealth Attorney-General's Department in July 2012 entitled 'Equipping Australia Against Emerging and Evolving Threats' (the **Discussion Paper**). The Discussion Paper contains Terms of Reference for an inquiry by the Parliamentary Joint Committee on Intelligence and Security (the **Committee**) into a package of national security reform proposals (**National Security Reforms**).

The Committee's Terms of Reference include proposals with respect to:

- *Telecommunications (Interception and Access) Act 1979* (Cth) (the **TIA Act**);
- *Telecommunications Act 1997* (Cth);
- *Australian Security and Intelligence Organization Act 1979* (Cth) (the **ASIO Act**); and
- *Intelligence Services Act 2001* (Cth).

Liberty Victoria's submission will focus on the following proposals:

- strengthening privacy protections;
- the introduction of data retention obligations on telecommunications operators;
- telecommunications interception reform; and

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<sup>1</sup> Liberty Victoria would like to acknowledge the assistance of the King & Wood Mallesons Human Rights Law Group, Eliza Hovey and Roberta Blake in preparing this submission.

- Australian intelligence community legislation reform, particularly the powers of the Australian Security Intelligence Organisation (**ASIO**).

This is an inquiry of fundamental importance. The potential impact of the measures proposed on the human rights and civil liberties of all Australians is immense. Liberty Victoria is concerned that a number of the proposed reforms engage Australia's international law obligations to respect, protect and fulfil human rights, in particular the right to privacy, protected in article 17 of the *International Covenant on Civil and Political Rights (ICCPR)* to which Australia is a party.

Each of these proposals has the potential to limit the human right to privacy and needs to be advanced on the basis of rigorous evidence and after balancing the benefits of the proposal against the human rights impacts. Liberty Victoria acknowledges that some of these proposals may be justified once this balancing exercise has been undertaken.

However, there is a heavy onus on governments to justify any interference with human rights. Given this, Liberty Victoria is particularly concerned at the lack of evidence adduced to support the proposals, the lack of detail in many of the proposals, and the lack of reference to proportionality and accountability measures.

The lack of detail about the proposals in the Discussion Paper and the lack of supporting evidence, means that Liberty Victoria cannot provide unqualified support for any of the proposals. Liberty Victoria urges the Committee to consider this when evaluating whether the proposed reforms 'contain appropriate safeguards for protecting the human rights and privacy of individuals and are proportionate to any threat to national security and the security of the Australian private sector'.<sup>2</sup>

Liberty Victoria's position on the key reform proposals can be summarised as follows:

- **Data retention obligations threaten privacy and security of data** – Liberty Victoria is strongly opposed to this proposal. It constitutes a significant intrusion into the privacy of each end user of telecommunications services and creates a situation in which a single security breach would have dramatic consequences. It represents a significant move away from the 'targeted' approach of the *Telecommunications (Interception and Access) Act 1979* which requires specific identification of communications and their relevance to an agency's activities before information can be collected. Data retention is inherently more privacy-invasive than a targeted interception regime and has not been justified.
- **Standardisation of interception warrant tests must not compromise human rights** – Liberty Victoria recognises that there may be operational benefits in standardising various warrant tests. However, we are concerned to ensure that any standardisation process does not compromise human rights in the name of operational efficiencies. In particular, we oppose any reduction of the general threshold for interception so that it applies to offences with maximum penalties of less than 7 years' imprisonment.

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<sup>2</sup> See Term of Reference 3(a).

- **Caution and scrutiny needed prior to expanding the basis of interception activities** – Liberty Victoria is not at this stage opposed to further consideration being given to expanding interception obligations from the network/service layer to the application layer. Interception at the network/service layer often involves casting the net of information to be intercepted too broadly, with a greater risk of capturing irrelevant and innocent communications. However, any expansion must be accompanied by the adoption of appropriate safeguards and accountability mechanisms.
- **Simplifying information sharing provisions must not compromise privacy** – Liberty Victoria submits that any additional information-sharing between agencies should be taken seriously and with the upmost concern for privacy. The lack of detail regarding the proposed changes is concerning.
- **Lack of judicial oversight in proposed ASIO warrant regime** – Liberty Victoria is concerned that the proposals to extend the duration and allow the renewal of warrants potentially undermine judicial scrutiny of warrants. The lack of evidence to support the need for reforms and the lack of reference to accountability measures is problematic given the highly invasive nature of search warrants.
- **Disproportionate interference with privacy in ASIO powers related to third parties** – Liberty Victoria is concerned that the proposals relating to ASIO’s power to use third party premises, computers and communications make little acknowledgment of the serious invasions of privacy proposed. There is no reference to proportionality tests applicable or the need to balance any national security benefit against the cost to individual privacy.
- **Lack of evidence to justify the need for reform to ASIO powers** – Liberty Victoria wishes to highlight that in many of the proposed reforms to ASIO powers, such as extending search warrant duration, renewal of warrants and the disruption of target computers – the Government makes no attempt to describe or quantify the current practical deficiencies in the regime or to adduce evidence as to why such proposals are necessary.

Finally, Liberty Victoria would like to note the limited timeframe in which public submissions have been permitted. This impacts the ability of organisations and individuals to prepare detailed and rigorous submissions and impairs the quality of public debate.

It is Liberty Victoria’s submission that many proposals in the Discussion Paper limit the right to privacy protected under article 17 of the *International Covenant on Civil and Political Rights (ICCPR)* to which Australia is a party. This means the Government must demonstrate that the limitation of rights is reasonable and demonstrably justified in a free and democratic society.<sup>3</sup> Liberty Victoria’s submission is informed by this standard (explained further in the Annexure).

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<sup>3</sup> See for example section 7 of the *Victorian Charter of Human Rights and Responsibilities Act*, section 1 of the *Canadian Charter of Rights and Freedoms*, section 5 of the *New Zealand Bill of Rights Act*, section 36 of the *South African Constitution*. For a detailed explanation of the proportionality test see Human Rights Law Centre, ‘Review of Australia’s Counter-Terrorism and National Security Legislation: Submission to the Independent National Security Legislation Monitor’, 26 October 2011.

## **1. PROPOSAL TO STRENGTHEN PRIVACY PROTECTIONS**

The Discussion Paper proposes to strengthen the privacy regime under the TIA Act and to introduce a privacy focused objects clause which would 'guid[e] interpretation of obligations under the Act' (See Term of Reference A1).

Liberty Victoria agrees that privacy protections under the TIA Act need to be strengthened. We commend the Government for proposing to do so. We support a privacy focused objects clause.

We are concerned, however, at the language used to describe the need for reform. The Discussion Paper states that, 'the need to amend the Act to adapt to changes in the telecommunications environment has seen the range of exceptions to the general prohibition grow'. From a privacy perspective, the model of a general prohibition on interception subject to a number of strict exceptions is non-negotiable. Liberty Victoria would be concerned if any 'review' of the relevance or appropriateness of the privacy protections sought to diminish their importance.

Furthermore, we are concerned at the lack of detail regarding the proposed review. The Discussion Paper states that: 'Reviewing the current checks, balances and limitations on the operation of interception powers will ensure that the privacy needs of contemporary users are appropriately reflected in the interception regime.' The Discussion Paper does not provide any details as to the specific matters to be considered by any such review nor how such review might be conducted. Consequently, it is difficult for Liberty Victoria to do anything but provide the Committee with a general expression of support.

## **2. TELECOMMUNICATIONS INTERCEPTION REFORM**

Our submission will focus on the following proposals:

- Modernising the industry assistance framework
  - Establishing an offence for failure to assist in the description of communications
  - Instituting industry response timelines
  - Providing for tailored data retention periods for up to two years for parts of a data set
- Reforming the lawful access to communications regime
  - Reducing the number of eligible agencies
  - Standardising warrant tests and thresholds
  - Expanding the basis of interception activities
- Streamlining and reducing complexity in the lawful access to communications regime
  - Simplifying information sharing provisions
  - Removing legislative duplication

## **2.1 Modernising the industry assistance framework**

The Discussion Paper proposes to (a) establish an offence for failure to assist in the decryption of communications, (b) institute industry response timelines and (c) provide for data retention obligations on carriers/carriage service providers (**CSPs**) (See Term of Reference C15). On these matters generally, Liberty Victoria notes that apart from their inclusion in the Committee's Terms of Reference, there is little (if any) discussion of the matters in the Discussion Paper. This makes it difficult for stakeholders to be in a position to provide informed comments.

### ***Establish an offence for failure to assist in the description of communications Institute industry response timelines***

Liberty Victoria has no comment on these proposals, other than to repeat the points made elsewhere in this submission that the proposals contain so little detail that it is impossible to provide informed comment on their merits.

### ***Provide for tailored data retention periods for up to two years for parts of a data set***

Liberty Victoria believes this proposal is unsupportable for a number of reasons.

First, the lack of detail in the Discussion Paper is particularly problematic for such a significant proposal. The proposal would create a significant intrusion into the privacy of each end user of telecommunications services, create a situation where a single security breach would have dramatic consequences, and would impose significant costs on the telecommunications industry. It is simply impossible to determine from the Discussion Paper what the proposal might mean. For example, which data would be included and would it include the content of the communications itself or information about communications such as URLs? To which agencies and agency priorities does the proposal refer? Which cost impacts are being referred to? Without clarity and specificity on these questions, Liberty Victoria believes it is unfair to expect stakeholders to provide comment about the merits of the proposal.

All Liberty Victoria is able to do is provide its position on data retention obligations generally. In this regard, Liberty Victoria is strongly opposed to the proposal, noting that:

- the proposal represents a significant move away from the 'targeted' approach of the TIA Act, which requires specific identification of communications and their relevance to an agency's activities before information can be collected. A data retention regime is inherently more privacy-invasive than a targeted interception regime and has not been justified – it interferes with the privacy rights of all end users when it is only the information from a small minority which are relevant;
- there are significant privacy risks associated with the proposal. In Liberty Victoria's view, the very collection of the data would in and of itself raise significant privacy concerns. However, it also creates significant flow-on risks since there will be unfathomable privacy impacts should any information be leaked or accessed and disseminated in unauthorised ways;

- this is of particular concern because (as seems to be suggested from the Discussion Paper) carriers/CSPs will likely be required to store the information themselves, instead of handing it over to government agencies. Liberty Victoria is concerned about any situation where the Federal Government can absolve itself of responsibility for ensuring the security of personal data collected for law enforcement and national security purposes (and finds it particularly bewildering given the critique of private sector security presented elsewhere in the Discussion Paper); and
- Liberty Victoria believes that it is inevitable that, once a database of retained communications data is established, efforts will be made to extend its use for new purposes. In this respect, the Discussion Paper proposes no safeguards to ensure that information is used only where there is a demonstrated need.

There is no consideration in the Discussion Paper of any of these far-reaching consequences of a data retention obligation on carriers/CSPs. There also appear to be significant financial consequences which would be imposed on carriers/CSPs which have not been addressed – costs which will inevitably be passed on to end users, raising the costs and reducing the accessibility of telecommunications services.

Liberty Victoria's view is that a compulsory data retention scheme is neither proportionate or justified, and certainly not from any information or evidence provided in the Discussion Paper.

## **2.2 Reforming the lawful access to communications regime**

The Discussion Paper proposes to (a) reduce the number of agencies eligible to access communications information and (b) standardise warrant tests and thresholds under the TIA Act (See Term of Reference A2). It also proposes to (c) expand the basis of interception activities under the TIA Act (See Terms of Reference C14).

### ***Reducing the number of eligible agencies***

Liberty Victoria agrees that lawful access by agencies to telecommunications data ought to be restricted to protect the privacy rights of individuals. Liberty Victoria agrees that reducing the number of agencies able to access sensitive data is, in principle, important and necessary. Liberty Victoria would, however, like to understand further how the Government proposes to determine which agencies are able to access this data, to ensure that there are real and substantive security benefits proportionate to the greater privacy risks that arise when information is more widely disseminated.

The Discussion Paper's suggestion that agencies must have a 'demonstrated need' to access information, while a good suggestion (indeed, a suggestion that one would have hoped already applied to agencies' access to personal information), is too general to offer a detailed response. For example, it does not indicate how 'need' would be demonstrated as opposed to 'operational convenience'.

### ***Standardising warrant tests and thresholds***

Liberty Victoria recognises that there may be operational benefits to law enforcement and national security agencies if the various warrant tests and thresholds were standardised. However, Liberty Victoria emphasises that the range of tests reflect a careful consideration of the impact of various warrants on privacy rights, the operational cost of complying with particular tests, and the security risks which need to be met – and Liberty Victoria is concerned to ensure that any standardisation process does not compromise human rights in the name of operational efficiencies.

Liberty Victoria agrees that there may be examples where the complexity of the TIA Act could be reduced without unjustifiably shifting the balance of the TIA Act further away from human rights. These examples include the following:

- the ambiguity about whether certain offences (such as child exploitation offences) fall within the definition of a ‘serious offence’. Liberty Victoria agrees that this issue needs to be resolved. However, there is a requirement in this instance to balance community standards on what constitutes a serious offence with proportionality considerations. Any lowering of the threshold to widen the scope for telecommunications and data interception should be taken seriously and Liberty Victoria opposes any suggestion that the general threshold should be reduced so it applies to offences with maximum penalties of less than 7 years’ imprisonment; and
- standardising certain formal steps required to obtain a warrant. However, care will need to be taken to distinguish between purely formal requirements which do impose unjustified operational burdens on law enforcement and national security agencies, and requirements which constitute the necessary ‘checks and balances’ that (while they may require additional resources to comply with) are an essential element to keep the warrant regime consistent with human rights.

Liberty Victoria is concerned that the Discussion Paper does not engage with these nuances and tends to take the approach that complexity is inherently undesirable, without consideration to whether it is justified. An example is the Discussion Paper’s suggestion that the same thresholds should apply to both stored communications and real-time access warrants:

*communicants often have the opportunity to review or to delete these communications before sending them, meaning covert access can be less privacy intrusive than real-time listening. However, this logic, while valid several years ago, has become less compelling as technology use and availability has changed.*

However, the Discussion Paper does not go on to explain how technology use and availability has changed or why this affects the logic for different thresholds for different warrants. Liberty Victoria is unconvinced that there are technological changes which justify the Discussion Paper’s conclusion.

Liberty Victoria would not support changes to thresholds which would compromise privacy or which would remove appropriate oversight over the warrant-issuing process. It is not possible from the level of detail provided in the Discussion Paper to determine whether standardisation would have this effect.

### ***Expanding the basis of interception activities***

Liberty Victoria acknowledges the concerns raised in the Discussion Paper about the limitations of the existing interception regime given technological developments. While Liberty Victoria believes any expansion of interception activities should proceed cautiously and with scrutiny, Liberty Victoria is not opposed to further consideration being given to extending interception obligations from carriers/CSPs to content service providers, subject to the adoption of appropriate safeguards and accountability mechanisms.

That is, Liberty Victoria agrees with the Discussion Paper that further consideration should be given to extending interception obligations from the network/services layer to the application layer. As the Discussion Paper notes, interception at the network/services layer often involves casting the net of information to be intercepted too broadly, with a greater risk of capturing irrelevant and innocent communications. Liberty Victoria believes interception at the application layer may result in more targeted and specific warrants which would involve less interference with privacy. If further investigation reveals this is correct, the TIA Act would need to reflect that agencies must use the least intrusive interception option available.

Further, Liberty Victoria does not necessarily see the extension of interception obligations to content service providers as involving any different principles to telephone wiretapping: that is, it may be that a regime could be implemented that would be no broader in terms of the scope of information obtained and the circumstances in which it could be obtained. If it turns out not to be possible to extend the interception concept onto other layers/platforms without expanding the scope or involving significant new questions of principle, then the scope of any expansion would need to be tested and justified against the interference with the human right of privacy.

### **3.3 Streamlining and reducing complexity in the lawful access to communications regime**

The Discussion Paper proposes to (a) simplify the information sharing provisions that allow agencies to cooperate, and (b) remove legislative duplication (see Term of Reference A33).

#### ***Simplifying information sharing provisions***

Liberty Victoria acknowledges that there is an increasing need for agencies defined as 'interception agencies' – including those responsible for national and transnational security and law enforcement investigations – to share information with one another. The nature of transnational security concerns means that agencies other than ASIO and the Australian Federal Police (AFP) are involved in investigations which impact the security of Australia, as well as Australian citizens within Australia and abroad.

However, as noted above in relation to standardisation of the tests and thresholds relating to warrants, detailed information-sharing provisions may reflect a desire to appropriately balance the right to privacy against security considerations. Careful consideration will therefore need to be given about whether the complexity of information-sharing provisions is justified. In Liberty



Victoria's view, any broadening of scope to allow additional information-sharing between agencies should be taken seriously and with the upmost concern for privacy.

Again, while Liberty Victoria recognises the need to facilitate information-sharing between agencies in some cases, there is insufficient detail in the Discussion Paper for stakeholders to comment in detail.

### ***Removing legislative duplication***

Liberty Victoria supports in principle the removal of legislative duplication so that legislation is clearer and better reflects the contemporary environment – and Liberty Victoria believes the example provided in the Discussion Paper of reporting requirements is a good one. Liberty Victoria considers that engagement with the Commonwealth and state/territory Ombudsmen's offices could enable a more flexible reporting regime that focuses on key concerns about the appropriate use of the warrant-issuing powers rather than administrative requirements.

More generally, Liberty Victoria believes frequent amendments can contribute to legislative duplication and can, in fact, be antithetical to the protection of civil liberties by opening the floodgates to amendments based on short-term considerations. From this perspective, Liberty Victoria supports in principle the removal of duplication.

## **3. INTELLIGENCE COMMUNITY LEGISLATION REFORM**

Our submission will focus on the following proposals:

- Amending the ASIO Act to modernise and streamline ASIO's warrant provisions
  - Extension of search warrant duration from 90 days to 6 months
  - Renewal process for warrants
  - Disruption of a target computer for the purposes of a computer access warrant
  - Search of persons independently of a premises search
  - Use of third party computers and communications in transit to access a target computer under a computer access warrant
  - Clarifying that scope of 'incidental power' includes access to third party premises to execute a warrant
- Amending the *Intelligence Services Act* (Cth)
  - New ministerial authorisation ground where the Minister is satisfied that a person is, or is likely to be, involved in intelligence or counter-intelligence activities.

### **3.1 Amending the ASIO Act to modernise and streamline ASIO's warrant provisions**

#### ***Extension of search warrant duration from 90 days to 6 months***

The Discussion Paper proposes to extend the duration of search warrants from 90 days to six months in order to 'mak[e] it consistent with other warrant powers in the ASIO Act' (See Term of

Reference A5). This proposal threatens to undermine judicial scrutiny over search warrants. The lack of any specific rationale for the extension of search warrants in the Discussion Paper is concerning. The Government cites the vague rationale of 'operational benefits' and several 'instances' in which ASIO was unable to execute a warrant within 90 days and had to seek a new warrant.

It is crucial that the exercise of search warrant power be monitored by the judiciary. Search warrants are highly invasive to an individual suspect's privacy. They permit the searching of a suspect's premises or the searching of computers and documents within those premises. The current 90 day limit is a reflection of the high level of privacy invasion in a search warrant and the significant power authorised by such a warrant.

The doubling of the search warrant duration is problematic both in terms of *practical* judicial scrutiny and the *appearance* of judicial scrutiny.

- Practically, a search warrant must be justified on the basis of current evidence. It is foreseeable that the circumstances justifying a search warrant could change over a six month period. What safeguards are there to ensure that the warrant is still justified when executed? The Discussion Paper makes no provision for a 'review' or a 'update' on the progress of executing a search warrant.
- Even if the circumstances have not changed, the extended duration creates the impression that judicial scrutiny over search warrants has been weakened. It sends a signal to ASIO officers, and to the public at large, that search warrants are no different to other types of warrants. This may result in a cultural shift within ASIO in terms of approaching the execution of search warrants with lesser seriousness.

### ***Renewal of warrants***

The Government is seeking to reform the ASIO Act to enable the renewal of warrants (See Term of Reference A5). Currently, ASIO has to apply for a new warrant when one expires. The proposal to renew warrants has the potential to undermine judicial scrutiny in the name of 'modernising and streamlining ASIO's warrant provisions'. We are concerned at the lack of detail in the proposal and the absence of any reference to accountability measures.

The renewal of a warrant is not a minor matter. It extends the power of ASIO officers to interfere in the personal privacy of suspects through the interception of communications, searches of private premises, installation of listening devices, inspection of postal articles and use of tracking devices. All renewals need to be based on clear evidence of the intelligence case and reference to the legislative threshold. Such basic standards should not be regarded as 'excessive' administrative requirements.

The lack of detail about the proposed renewal process in the Discussion Paper is astounding. The following matters are unclear:

- How would renewal differ from the current process of applying for a new warrant?
- Who would grant the renewal? Would it be conducted by a judicial body? If not, why not?

- Would an application to renew require a lower standard of evidence than for a new warrant?
- Would a renewal still have to satisfy the legislative threshold?

We are concerned that the Discussion Paper suggests that the renewal process would not require ASIO to state the intelligence case or the legislative threshold. The Discussion Paper criticises the current process of applying for a new warrant on the basis that it requires ‘excessive administrative resources’ to ‘re-state the intelligence case’ or ‘completely reassess[s] the legislative threshold’ where there has not been a ‘significant change to either’. How would the process of renewal be more ‘streamlined’ if it did not involve cutting the requirement to present the intelligence case and evidence to satisfy the legislative threshold?

### ***Disrupting a target computer***

The Government is considering whether to increase the power of ASIO officers to interfere with a suspect’s computer when executing a computer access warrant (See Term of Reference B11). Currently, ASIO is prohibited from doing anything under a computer access warrant that adds, deletes or alters data or interferes with, interrupts, or obstructs the lawful use of the target computer by other persons (s 25A(5) ASIO Act). Under the proposal to amend section 25A of the ASIO Act, ASIO officers would be permitted to add programs, delete data or any other form of disruption necessary to execute the warrant. Liberty Victoria is concerned that this proposal lacks rigorous justification or clear and detailed accountability measures. The Discussion Paper contains no reference at all to the accountability measures that would guide such power. It simply states, ‘[t]o address this, section 25A could be amended so that the prohibition does not apply to activity proportionate to what is necessary to execute the warrant.’

The power to add or delete files on a suspect’s computer constitutes a serious invasion of a person’s privacy. Such proposed invasion must be justified and the exercise of such power must be strictly monitored.

The following key issues are not considered in the Discussion Paper:

- Evidence justifying the need for the change – the Discussion Paper does not explain why the reform is needed. There are no examples of ASIO officers being prevented from executing computer access warrants. The Discussion Paper simply asserts that ‘use by some targets of sophisticated computer protection mechanisms can adversely impact ASIO’s ability to execute a computer access warrant for the purpose of obtaining access to data relevant to security’. Is this new power necessary? How often is ASIO currently prevented from executing computer access warrants?
- Definition of ‘disrupt’ - the Discussion Paper does not define what kind of conduct – adding, deleting or interfering with data – would be contemplated by the power. Any new power must be specific and clearly defined. Without a clear definition, there is a real risk of abuse of power.
- Detail on the proportionality limits – there is no reference to the test of proportionality that would be used. Would such ‘disruption’ be limited to deactivating computer protection mechanisms on a target computer?

### ***Introduction of person searches***

The Government is considering introducing a new search warrant to enable searches on individual persons (See Term of Reference B11). Currently, under s 25(4A) of the ASIO Act, ASIO only has an incidental power to search a person 'at or near' the premises specified in a premises search. Liberty Victoria strongly objects to the broadening of search powers which would remove the nexus with the named premises.

The extension of ASIO powers in this manner poses a specific threat to civil liberties by enabling ASIO to impinge on the privacy of named persons in a manner that is particularly disruptive to their lives, for example in public spaces. While we recognise that the current 'at or near' requirement poses operational challenges, we believe that the appropriate solution lies with operational tactics, not with legislative amendment.

### ***Use of third party computers***

The Government is seeking the Committee's advice on whether third party computers – operated by innocent, non-suspects – should be used by ASIO officers to access a suspect's computer (See Term of Reference C17). This proposal has the potential for far-reaching privacy consequences for innocent people. It would increase the incidental power of a warrant to infringe upon the privacy and civil liberties of persons not named in the warrant.

Liberty Victoria is concerned about the use of third party computers and communications in transit (collectively referred to a **3PC**) to access a target computer access warrant. The Discussion Paper does not seriously engage with the gravity of the privacy implications. The proposal provides few details and only briefly 'notes' that the proposal 'may have privacy implications', and that 'appropriate safeguards and accountability mechanisms would need to be incorporated into such a scheme'.

The Discussion Paper contains no guidance as to *when* use of a 3PC would be justified, or *how* ASIO would demonstrate that it was justified. Liberty Victoria submits that use of a 3PC could only be justified where:

- there is a high likelihood of an offence being committed by the suspect;
- use of a 3PC is the only way of accessing a suspect computer;
- permitted use would not involve adding, altering, deleting data from the third party computer; and
- interference with the 3PC would be minimised as much as possible.

The Discussion Paper fails to consider a number of key accountability issues relating to the use of 3PC:

- No definition of 'third party' – Liberty Victoria is concerned about the lack of definition of what constitutes a 'third party' in this instance. Liberty Victoria's concerns here relate to the nature of the relationship between the target and the third party (i.e. if it is a family member, or a colleague).
- No definition of 'use' – what kind of use of a 3PC would be permitted? Would it extend to modifying or deleting data on a third party computer?
- No limits on duration of use – what time limits would apply on the use of the 3PC?

- No notification of use – would the third party user be notified before or after the fact?
- No duty to rectify – would there be an obligation on ASIO to rectify any interference made with the 3PC?

### ***Scope of incidental power to include entry into third party premises***

The Government has asked the Committee to consider whether the power under sections 25 and 25A of the ASIO Act to do ‘anything incidental to the exercise of powers under the warrant’ includes entry to a third party’s premises for the purpose of executing a warrant (See Term of Reference C17). Liberty Victoria is concerned that entry into a third party’s premises (**3PP**) involves a serious invasion of individual privacy. Entry to a 3PP is not an ‘incidental’ issue. It is a significant exercise of power in its own right.

We are concerned that the Discussion Paper makes no reference to the high level of potential privacy invasion in the proposal. Similar to the use of a 3PC, the Paper does not indicate *when* use of a third party premises would be justified, or *how* ASIO would demonstrate that it was justified. We submit that use of third party premises could only be justified where:

- there is a high likelihood of an offence being committed by the suspect;
- use of a third party premises is the only way of accessing a target premises;
- permitted use would not involve interfering with the third party premises in any way; and
- interference with the third party premises would be minimised as much as possible.

Other key accountability issues relating to the use of 3PP not considered in the Discussion Paper are:

- No definition of ‘use’ – what kind of use of a 3PP would be permitted?
- No limits on duration of use – what time limits would apply on the use of the 3PP?
- No notification of use – would the third party be notified before or after the fact?
- No duty to rectify – would there be an obligation on ASIO to rectify any interference made with the 3PP?

## **3.2 Amending the *Intelligence Services Act***

### ***New ministerial authorisation ground***

The Discussion Paper proposes an amendment to section 9 of the *Intelligence Services Act* to include a further criteria for Ministerial approval of intelligence-gathering on an Australian person. The additional criteria is a person’s ‘involvement, or likely involvement, in intelligence or counter-intelligence activities’.

Liberty Victoria is concerned about the lack of detail provided as to the meaning of ‘intelligence’ and ‘counter-intelligence’ in this additional ground of authorisation. It is unclear what activities or conduct would fall within this definition. There is a real risk that it could include persons who are involved in the collection of politically sensitive information, for example journalists. It may undermine the right to freedom of speech and expression, protected in article 19 of the

*International Covenant on Civil and Political Rights*, and be an unreasonable restriction on the implied freedom of political communication protected at common law.<sup>4</sup>

## ANNEXURE: THE RIGHT TO PRIVACY AND PERMITTED LIMITATIONS ON HUMAN RIGHTS

Article 17 of the ICCPR provides that:

*No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks upon his honour and reputation.*

A government bears a heavy onus when it seeks to limit human rights. Under the ICCPR, each of the rights can be limited, but only in particular circumstances and to the extent necessary. A restriction must meet certain fundamental criteria. It must:

- be contained in law;
- achieve an objective that is important to a free and democratic society; and
- be proportionate to the achievement of the objective.

First, the restriction must be provided for in law. This means that the laws authorizing the application of restrictions should use precise criteria and not confer unfettered discretion on those charged with their execution.

Second, the restriction must achieve an objective that is important to a free and democratic society (the **supervening objective**). The supervening objective must be sufficiently important to justify limiting the right.<sup>5</sup> Examples of supervening objectives include protection of national security, public order, public safety or the protection of the rights of others. Courts have held that the objective needs to be a ‘pressing and substantial’ objective.<sup>6</sup> The Inter-American Commission on Human Rights has stated that the purpose of national security may be relied upon if:

*...its genuine purpose or demonstrable effect is to protect a country’s existence or its territorial integrity against the use or threat of force, or its capacity to respond to the use or threat of force, whether from an external source, such as military threat, or an internal source, such as incitement to the violent overthrow of the government.*<sup>7</sup>

Third, the means used to achieve the supervening objective – such as the law or the regulation – must be proportionate to the achievement of that objective. This involves considering several issues:<sup>8</sup>

- whether the law is carefully designed to achieve the objective;
- whether the law impairs the right ‘as little as possible’; and
- whether there is proportionality between the effects of the measures and the objective.

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<sup>4</sup> See *Australian Capital Television v Commonwealth* (1992) 177 CLR 106.

<sup>5</sup> *R v Oakes* [1986] 1 SCR 103, [69] – [71] (Dickson CJ), cited with approval by Bell J in *Kracke v Mental Health Review Board* [2009] VCAT 646, [145]. The decision of the Supreme Court of Canada established the ‘Oakes test’, an analysis of the limitations clause of the Canadian Charter of Rights and Freedoms that allows reasonable limitations on rights and freedoms through legislation if it can be demonstrably justified in a free and democratic society.

<sup>6</sup> The Supreme Court in *Canada (Attorney-General) v Hislop* [2007] 1 SCR 429, [44]. See also *R v Oakes* [1986] 1 SCR 103.

<sup>7</sup> Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights*, 2002, para 277.

<sup>8</sup> The following factors are derived from the decision in *R v Oakes* [1986] 1 SCR 103, 43 which contains the most widely accepted test of proportionality in common law human rights jurisdictions. See also UN Human Rights Committee, General Comment 27, para 14.

The onus of establishing that a limitation is reasonable and demonstrably justified falls on the party seeking to rely on the limitation – this is usually the government.<sup>9</sup> The extent of justification required will depend on the seriousness of the limitation. The more serious the limitation on rights, the more important the objective of the limitation of those rights must be to a free and democratic society, and the higher the standard of proof will be for the government.<sup>10</sup>

Thank you for the opportunity to make this submission. Please contact the President of Liberty Victoria, Professor Spencer Zifcak, through the Liberty Victoria office on 9670 6422 or [info@libertyvictoria.org.au](mailto:info@libertyvictoria.org.au) if we can provide any further information or assistance. This is a public submission and is not confidential.

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<sup>9</sup> Ibid, 66. *Kracke v Mental Health Review Board* [2009] VCAT 646, 108.

<sup>10</sup> See Warren CJ in *Re an application under the Major Crime (Investigative Powers) Act 2004* [2009] VSC 381.