



Australian Government
Attorney-General's Department

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

Intelligence Services Legislation Amendment Bill 2011

This is a further supplementary submission to respond to questions taken on notice at the Committee's hearing on 16 June 2011, and to provide further clarification on some of the issues raised at that hearing. Further information on the Bill, including the Department's response to submissions received by the Committee, can be found in the Department's submission and supplementary submission.

Question on notice – definition of 'foreign intelligence' in other countries

Senator Barnett asked about how 'foreign intelligence' is defined in the United Kingdom, New Zealand, Canada and the United States. We can advise that foreign intelligence is defined in the following ways by those countries.

United Kingdom

The United Kingdom Secret Intelligence Service has a statutory basis in the *Intelligence Services Act 1994* (UK) and the *Security Service Act 1989* (UK). The functions of the Secret Intelligence Service are set out in section 1 of the *Intelligence Services Act 1994* as follows:

Section 1

- (1) There shall continue to be a Secret Intelligence Service (in this Act referred to as "the Intelligence Service") under the authority of the Secretary of State; and, subject to subsection
- (2) below, its functions shall be—
 - (a) to obtain and provide information relating to the actions or intentions of persons outside the British Islands; and
 - (b) to perform other tasks relating to the actions or intentions of such persons.
- (2) The functions of the Intelligence Service shall be exercisable only—
 - (a) in the interests of national security, with particular reference to the defence and foreign policies of Her Majesty's Government in the United Kingdom; or
 - (b) in the interests of the economic well-being of the United Kingdom; or
 - (c) in support of the prevention or detection of serious crime.

While there is no definition of 'foreign intelligence' under the *Intelligence Services Act 1994*, warrants can be issued under section 5 of that Act to assist the Intelligence Service in carrying out any of its functions under section 1 above or in carrying out any of its functions under the *Security Service Act 1989*. Section 1 of the *Security Service Act 1989* (UK) sets out the functions of the Secret Intelligence Service as:

(2)The function of the Service shall be the protection of national security and, in particular, its protection against threats from espionage, terrorism and sabotage, from the activities of agents of foreign powers and from actions intended to overthrow or undermine parliamentary democracy by political, industrial or violent means.

(3)It shall also be the function of the Service to safeguard the economic well-being of the United Kingdom against threats posed by the actions or intentions of persons outside the British Islands.

United States

The Foreign Intelligence Surveillance Act 1978 (US) deals with electronic surveillance, in the foreign intelligence context, as well as those applicable to physical searches, the use of pen registers and trap and trace devices under FISA, and access to business records and other tangible things for foreign intelligence purposes. ‘Foreign intelligence information’ is defined in 50 U.S.C. § 1801(e) to mean:

(1) information that relates to, and if concerning a United States person is necessary to, the ability of the United States to protect against—

(A) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power;

(B) sabotage, international terrorism, or the international proliferation of weapons of mass destruction by a foreign power or an agent of a foreign power; or

(C) clandestine intelligence activities by an intelligence service or network of a foreign power or by an agent of a foreign power; or

(2) information with respect to a foreign power or foreign territory that relates to, and if concerning a United States person is necessary to—

(A) the national defense or the security of the United States; or

(B) the conduct of the foreign affairs of the United States.

Canada

The Canadian Security Intelligence Service (CSIS) is Canada’s civilian intelligence service and was established by *the Canadian Security and Intelligence Service Act 1984* (Canada). Section 2 of that Act broadly defines “threats to the security of Canada” to mean the following:

(a) espionage or sabotage that is against Canada or is detrimental to the interests of Canada or activities directed toward or in support of such espionage or sabotage,

(b) foreign influenced activities within or relating to Canada that are detrimental to the interests of Canada and are clandestine or deceptive or involve a threat to any person,

(c) activities within or relating to Canada directed toward or in support of the threat or use of acts of serious violence against persons or property for the purpose of achieving a political, religious or ideological objective within Canada or a foreign state, and

(d) activities directed toward undermining by covert unlawful acts, or directed toward or intended ultimately to lead to the destruction or overthrow by violence of, the constitutionally established system of government in Canada,

but does not include lawful advocacy, protest or dissent, unless carried on in conjunction with any of the activities referred to in paragraphs (a) to (d).

Section 16 of the Act sets out the requirements for the collection of information concerning foreign states and persons. Under section 16 of the Act, the CSIS:

“may, in relation to the defence of Canada or the conduct of the international affairs of Canada, assist the Minister of National Defence or the Minister of Foreign Affairs, within Canada, in the collection of information or intelligence relating to the capabilities, intentions or activities of (a) any foreign state or group of foreign states; or (b) any person other than (i) a Canadian citizen, (ii) a permanent resident within the meaning of subsection 2(1) of the Immigration and Refugee Protection Act, or (iii) a corporation incorporated by or under an Act of Parliament or of the legislature of a province.”

Under section 21 of the Act, the CSIS can apply for a warrant where the Director of the CSIS or any employee designated by the Minister believes, on reasonable grounds, that a warrant is required to enable the Service to investigate a threat to the security of Canada (as defined broadly in section 2 of the Act) or to perform its duties and functions under section 16. These duties and functions are defined broadly to include matters “in relation to the defence of Canada or the conduct of the international affairs of Canada”.

New Zealand

The functions of the New Zealand Security Intelligence Service (NZSIS) are set out in section 4 of the *New Zealand Security Intelligence Service Act 1969* (NZSIS Act)¹ and include the function to obtain, correlate, and evaluate intelligence relevant to security, and to communicate any such intelligence to such persons, and in such manner, as the Director considers to be in the interests of security. Under section 2 of the NZSIS Act, ‘security’ includes:

- (a) the protection of New Zealand from acts of espionage, sabotage, and subversion, whether or not they are directed from or intended to be committed within New Zealand
- (b) the identification of foreign capabilities, intentions, or activities within or relating to New Zealand that impact on New Zealand's international well-being or economic well-being
- (c) the protection of New Zealand from activities within or relating to New Zealand that—
 - (i) are influenced by any foreign organisation or any foreign person; and
 - (ii) are clandestine or deceptive, or threaten the safety of any person; and
 - (iii) impact adversely on New Zealand's international well-being or economic well-being
- (d) the prevention of any terrorist act and of any activity relating to the carrying out or facilitating of any terrorist act.

Under the NZSIS Act, the New Zealand intelligence framework provides for a consistent approach to the collection of intelligence for the protection of New Zealand from activities within or relating to New Zealand that, among other things, impact adversely on New Zealand’s international well-being or economic well-being. NZSIS’s approach to the investigation of threats to New Zealand’s security ensures that it remains responsive to threats from both state and non-state actors, reflecting the modern national security environment.

Like NZSIS, ASIO’s role under the ASIO Act is to identify and investigate threats to security, wherever they arise, and to provide advice to protect Australia, its people and its

¹ <http://www.legislation.govt.nz/act/public/1969/0024/latest/DLM391606.html>

interests. However, in contrast to NZSIS, ASIO is currently restricted by the current definition of foreign intelligence under the ASIO Act which means it is limited to intelligence about foreign governments, government controlled entities and political organisations. Therefore, unlike NZSIS, the ASIO Act provisions do not cover the same range of national security threats, nor do they reflect the modern concept of foreign intelligence as reflected in the Intelligence Services Act. The proposed new definition will reflect the concept of foreign intelligence that is set out in the Intelligence Services Act and also align ASIO's capabilities with other jurisdictions such as New Zealand.

Why is the foreign intelligence amendment needed?

Much of the discussion around this Bill has focused on the justification for the amendments and there has been some concern about being able to determine what extra activities ASIO will be able to carry out under the proposed amendments that it couldn't already undertake under the current legislation.

It is important to understand that these amendments are not, and have never been, about expanding ASIO's powers. ASIO has both a 'security intelligence' function and a 'foreign intelligence' function. Foreign intelligence collection is performed at the request of the Minister for Foreign Affairs or the Minister for Defence, who are responsible for Australia's foreign intelligence agencies. The collection of foreign intelligence is not something ASIO initiates, and it is not ASIO's core focus.

Australia's foreign intelligence agencies collect foreign intelligence under the *Intelligence Services Act 2001*. The functions of the agencies are set out in Part 2 of that Act, for example, the functions of ASIS are defined in section 6 as follows:

Functions of ASIS

- (1) The functions of ASIS are:
 - (a) to obtain, in accordance with the Government's requirements, intelligence about the capabilities, intentions or activities of people or organisations outside Australia; and
 - (b) to communicate, in accordance with the Government's requirements, such intelligence; and
 - (c) to conduct counter-intelligence activities; and
 - (d) to liaise with intelligence or security services, or other authorities, of other countries; and
 - (da) to co-operate with and assist bodies referred to in section 13A in accordance with that section; and
 - (e) to undertake such other activities as the responsible Minister directs relating to the capabilities, intentions or activities of people or organisations outside Australia.

The agencies' collection of foreign intelligence is limited by section 11 of the Intelligence Services Act which provides that 'the functions of the agencies are to be performed only in the interests of Australia's national security, Australia's foreign relations or Australia's national economic well-being and only to the extent that those matters are affected by the capabilities, intentions or activities of people or organisations outside Australia.'

The Bill will amend the *Australian Security Intelligence Organisation Act 1979* to align the definition of ‘foreign intelligence’ and the collection of foreign intelligence under the ASIO Act with the Intelligence Services Act and the *Telecommunications (Interception and Access) Act 1979*. This is not ‘consistency for the sake of consistency’ – rather it reflects that ASIO has long played a role that is intended to complement the foreign intelligence role of the other intelligence agencies. These roles have not been completely aligned because legislation was drafted at different times, reflecting different threat environments.

The amendment in the *Intelligence Services Legislation Amendment Bill 2011* will simply import the same language into the *Australian Security Intelligence Organisation Act 1979*, so ‘foreign intelligence’ has the same meaning across the Acts and is able to be collected in a consistent manner. ASIO’s core focus is, and will continue to be, on security intelligence, such as counter-terrorism and counter-espionage. It is not expected that this amendment will result in significantly more foreign intelligence collection warrants or authorisations being issued under the ASIO Act.

ASIO’s foreign intelligence role complements the functions of the other intelligence agencies, which are responsible for obtaining foreign intelligence outside Australia. ASIO’s foreign intelligence function is intended to enable similar intelligence to be collected where it is necessary to collect foreign intelligence within Australia. ASIO’s foreign intelligence collection function applies where it is necessary to collect foreign intelligence within Australia. The collection of foreign intelligence outside Australia is the responsibility of the foreign intelligence agencies, under the Intelligence Services Act. It is only where it is necessary to collect foreign intelligence within Australia, that consideration would be given to requesting that ASIO exercise its foreign intelligence functions.

For the ASIO foreign intelligence function to operate as a truly complementary function, it needs to reflect the same intelligence and the same purposes for which that intelligence may be obtained under the Intelligence Services Act. If the definition of foreign intelligence in the ASIO Act differs to the Intelligence Services Act, this limits what can be done by ASIO at the request of those other agencies to a narrower range of intelligence than they could obtain outside Australia. If not aligned, there are some potential gaps in Australia’s intelligence coverage. The non-alignment of the foreign intelligence definition has become more prominent over recent years with the rise of individuals and non-state or non-political organisations engaging in activities such as the proliferation of nuclear, biological, chemical and conventional weapons and related technologies.

As we have noted in our earlier submissions, the existing safeguards and requirements will continue to apply. The safeguards under the Intelligence Services Act, including the requirement for a Ministerial authorisation, would continue to apply. This is because ASIO obtains foreign intelligence at the request of the other agencies. Therefore, before making a request of ASIO, those agencies would need to comply with their own legislation. In relation to the collection of foreign intelligence by ASIO, there would be an additional safeguard as the Attorney-General will be required to be satisfied that collecting particular intelligence is in the interests of Australia’s national security, Australia’s foreign relations or Australia’s national economic well-being. In making this decision, the Attorney-General receives advice from the Minister for Defence or the Minister for Foreign Affairs.

How the foreign intelligence provisions currently operate

Since ASIO collects foreign intelligence under warrant from the Attorney-General at the request of the Minister for Foreign Affairs or Minister for Defence, it is necessary and sensible that 'foreign intelligence' means the same thing in both pieces of legislation. A scenario to demonstrate this is as follows:

- Australian Foreign Intelligence Agency X collects foreign intelligence in accordance with its function under the Intelligence Services Act.
- Under the Intelligence Services Act 'foreign intelligence' means 'in the interests of Australia's national security, Australia's foreign relations or Australia's national economic well-being'.
- It becomes evident there is a need for ASIO to collect foreign intelligence in relation to a particular matter within Australia.
- The Minister for Foreign Affairs or Minister for Defence then requests the Attorney-General (and through the Attorney-General, ASIO) to collect the foreign intelligence within Australia in relation to the particular matter.
- ASIO is required to put forward a warrant case under its own legislation, which can cause practical problems given ASIO operates under a different definition of foreign intelligence to the definition under the Intelligence Services Act. The current conditions for issuing a foreign intelligence collection warrant or authorisation under the ASIO Act only cover defence and international relations. On the other hand, the Intelligence Services Act enables agencies to obtain foreign intelligence in the interests of Australia's national security, foreign relations and national economic well-being.

What is meant by national security, foreign relations and national economic well-being

There has been some concern expressed about a possible lowering of the threshold test for the collection of foreign intelligence. As we have stated before, this is already the construct within which Australia's foreign intelligence agencies collect foreign intelligence and which sets the three broad boundaries which have been enshrined in the Intelligence Services Act since 2001. This definition has provided the parameter for the activities of Australia's foreign intelligence collection agencies (ASIS, DSD, DIGO) since their creation.

Collection of 'intelligence about the capabilities, intentions or activities of people or organisations outside Australia' (ie foreign intelligence) is a very broad concept which has been limited by these boundaries under the Intelligence Services Act - together with the national security intelligence priorities and requirements set by the National Security Committee of the Australian Government.

Existing provisions enabling ASIO to collect foreign intelligence within Australia under s27A and s27B of the ASIO Act are already effectively linked to the definition under the Intelligence Services Act, including the concept of "economic well-being" as a parameter.

This is because before a request is made to the Attorney-General by either the Minister for Defence or the Minister for Foreign Affairs for ASIO's complementary assistance under the existing provisions, the relevant foreign intelligence collection agencies can only be working within those parameters before making such a request to ASIO for capability assistance within Australia.

The proposed amendment does not create a broad new power or space for ASIO to engage in new activities or 'economic espionage'. It merely seeks to apply the existing parameters already applicable to foreign powers and political organisations to individual 'non-state' actors as part of the harmonisation of the legislative definitions. This is designed to facilitate more streamlined cooperation between ASIO and the foreign intelligence agencies and minimise the chance of risk of an intelligence failure.

As noted in our earlier submissions, the changing security environment presents a need for updating the ASIO legislation. The current ASIO Act provisions do not cover the same range of national security threats, and do not reflect the modern concept of foreign intelligence as reflected in the Intelligence Services Act. The ASIO Act provisions were drafted at a time when the main national security threats were state-sponsored threats, and therefore focused on defence and international affairs.

When considering decisions made on grounds of national interest in other contexts, courts have generally expressed views indicating that the primary determination of what is in the national interest is for the Minister.²

In a democracy, it is appropriate for the Government of the day to set its priorities and determine what is in the national interest. The types of matters that might be encompassed by the term 'national interest' may include matters on sustaining the economy and the national economic well-being, in addition to matters of importance to Australia's national security or foreign relations. The new range of conditions recognises the broader nature of the contemporary threat environment.

Intelligence that concerns Australia's national economic well-being may include matters on sustaining the economy and the national economic well-being, in addition to matters of importance to Australia's national security or foreign relations. Information in regards to the national economic well-being may include information about the security of our resources, the security of our major information networks and other major issues that may affect the national economic infrastructure. The phrase 'national economic well-being' is used in section 11 of the Intelligence Services Act in defining the limits on the functions of intelligence agencies. In applying this condition to the ASIO Act, this amendment will ensure that both Acts are consistent.

² A supporting case for this is *Wong v MIMIA*, 6 August 2002 per Tamberlin J.

Examples of how the new definition would help Australia's foreign intelligence agencies perform their functions

The following are useful examples of how the proposed amendment would help Australia's foreign intelligence agencies perform their functions.

The following is an example of how the proposed amendment would work to capture non-state actors and is a situation that could potentially come within the definitions of national security, foreign relations or national economic well-being.

The proposed amendment will enable foreign intelligence collection agencies to better counter the activities of weapons proliferators. The proliferation of nuclear, biological, chemical and conventional weapons and related technologies is a complex global issue and the actors involved include individuals and companies working in and across multiple countries. These actors might not be connected to any foreign state but may be profit-driven and engaging in the trade of weapons of mass destruction solely as a commercial transaction without any affiliation with a foreign power. This could jeopardise Australia's national security and could also cause significant damage to Australia's foreign relations and national economic well-being, for example, it could disrupt trade with other countries if Australia was seen to be sanctioning the activities of weapons proliferators.

The following is another example of how the new definition would better enable ASIO to assist Australia's foreign intelligence agencies to perform their functions. The ability for ASIO to collect intelligence on matters pertinent to Australia's national security, foreign relations and national economic well-being would provide, for example, Australian authorities with a better understanding of illegal fishing operations, and enable the relevant Australian authorities to take appropriate action internationally. Illegal fishing puts at risk Australian jobs, investment and the sustainability of fish stocks.

During the hearing, we were asked whether research information could be covered by the new definition. While it would be inappropriate for us to comment on the detail of specific examples, it can be said that if the implications of particular activities are significant enough to affect the national interest or national economic well-being, then clearly such matters could appropriately come within the legislative functions of the agencies. If there were exemptions to the definition of foreign intelligence information, such as exempting research, then this would defeat the purpose of the legislative regime by creating loopholes.

In exercising their powers, agencies are necessarily focused on performing their statutory functions and they do not have the resources or legislative mandate to engage in unwarranted or lower level activity. Agencies would only look into matters of high importance to the national interest. We have pointed to the relevant safeguards that ensure the propriety and legality of ASIO's exercise of their functions and powers, including the monitoring, inspection and inquiry powers of the IGIS.

Safeguards to ensure appropriate use of the foreign intelligence collection function

As the Inspector-General of Intelligence and Security and others have noted, **national** interest and **national** economic well-being are not trivial things. While they may seem broad on their face, they need to be considered in the whole context of the legislation and framework within

with the agencies operate.

This framework includes a considerable number of requirements and safeguards regarding how ASIO may collect foreign intelligence. These include the following:

1. Requirements must be satisfied before a request is made to ASIO

Other agencies need to satisfy their own requirements before making a request to ASIO. In relation to requests to ASIO for assistance within Australia, an important requirement is that Ministerial Authorisations need to be issued for producing intelligence on Australian persons.

Under section 8 of the Intelligence Services Act, the Minister for Defence or the Minister for Foreign Affairs must be satisfied, before any request could be made to ASIO, that an Australian person is engaged in one of the following activities:

- activities that present a significant risk to a person's safety;
- activities acting for, or on behalf of, a foreign power;
- activities that are, or are likely to be, a threat to security;
- activities related to the proliferation of weapons of mass destruction or the movement of goods listed in the Defence and Strategic Goods List (within the meaning of regulation 13E of the Customs (Prohibited Exports) Regulations 1958);
- committing a serious crime by moving money, goods or people;
- committing a serious crime by using or transferring intellectual property;
- committing a serious crime by transmitting data or signals by means of guided and/or unguided electromagnetic energy

Subsection 9(1) of the Intelligence Services Act further limits activities to those which are necessary for the 'proper performance' of a function of the agency concerned. In addition, there must be 'satisfactory arrangements to ensure that nothing will be done in reliance on the authorisation beyond what is necessary for the proper performance of a function', and there must be 'satisfactory arrangements to ensure that the nature and consequences will be reasonable having regard to the purpose for which they are carried out'. Other safeguards and limitations include time periods for authorisation (6 months), and reviews by the Inspector-General of Intelligence and Security who regularly reviews the warrant documentation.

2. Minister makes a request to the Attorney-General

The relevant Minister has to be satisfied of the basis of the request, and needs to explain to the Attorney-General why the request is important in relation to the defence of the Commonwealth or to the conduct of the Commonwealth's international affairs (or as it will be under the proposed amendments, in the interests of Australia's national security, foreign relations or national economic well-being).

3. ASIO has to decide to direct resources to this activity

In making this decision, ASIO has to comply with relevant guidelines and ministerial directions about how it should perform its functions, and also comply with internal protocols and procedures (which have been carefully drawn with a view to ensuring powers are exercised carefully and appropriately). Of course, ASIO also has to consider this in the

context of its limited resources and other intelligence priorities. Warrants are only submitted to the Attorney-General for approval after they been through an exhaustive system of checks within ASIO and the Attorney-General's Department.

4. ASIO has to present a case to the Attorney-General and seek a warrant or authorisation

ASIO has to make a case with supporting material when putting a warrant request to the Attorney-General, who must be satisfied, on the basis of advice received from the relevant Minister, that the collection of foreign intelligence relating to a matter is in the interests of Australia's national security, Australia's foreign relations or Australia's economic well-being.

5. A warrant or authorisation has to be issued by the Attorney-General

The Attorney-General has to be satisfied that the legislative grounds have been met before issuing a warrant or authorisation under section 27A or 27B of the ASIO Act.

6. Reporting requirements

Section 34 of the ASIO Act requires the Director-General of ASIO to report in writing to the Attorney-General in respect of each foreign intelligence collection warrant. The Director-General must report on the extent to which the action taken under the warrant has assisted the Organisation in carrying out its functions. This provides further assurance that foreign intelligence collection by ASIO is appropriate and being used for legitimate purposes.

In relation to the foreign intelligence agencies, section 10A of the Intelligence Services Act requires that each of the agency heads report on authorised activities to their responsible Minister in respect of each activity carried out by the agency in reliance on a Ministerial authorisation under section 9 of the Intelligence Services Act. This provides a further means of ensuring that foreign intelligence collection is appropriate and being used for legitimate purposes.

7. Other protections

As we noted at the hearing, the ASIO Act also includes a range of other protections in the discharge of ASIO's functions.

These include an express protection for lawful advocacy, protest or dissent (section 17A) and a prohibition against the use of foreign intelligence collection warrants for the purpose of collecting information concerning an Australian citizen or permanent resident (subsection 27A(9)).

8. Oversight by the Inspector-General of Intelligence and Security

The Inspector-General of Intelligence and Security regularly reviews ASIO's warrant documentation and in doing so has full access to all the warrant information, including the supporting evidence that was put forward to the Attorney-General. The IGIS looks at propriety which is not just about whether ASIO met the legislative requirements but

encompasses all those other aspects that sit in and around it, including whether ASIO adhered to internal guidelines.

Timing of the Bill

Ensuring national security and intelligence agencies have the ability to respond to threats to our national security is a key priority. The measures in the Bill contribute to this. They will improve the legislation and address some areas identified as important from an operational and practical perspective. In particular, the foreign intelligence amendments will complete the process of aligning the terminology in the Intelligence Services Act and the ASIO Act. This is another step towards more seamless cooperation between relevant agencies, the importance of which has been recognised in various contexts including the National Security Statement and the Smith Review.

Given the security environment and the fact that the measures will improve the practical operation of the legislation, it is important that they now be progressed in a timely way.