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Review of the National Security Legislation Amendment (Comprehensive Review and Other Measures No. 1) Bill 2021

**Submission to the
Parliamentary Joint Committee on Intelligence and Security**

The Hon Dr Christopher Jessup QC
Inspector-General of Intelligence and Security

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1. INTRODUCTION

1. The Inspector-General of Intelligence and Security (the Inspector-General) welcomes the opportunity to make this submission to the Parliamentary Joint Committee on Intelligence and Security's review of the National Security Legislation Amendment (Comprehensive Review and Other Measures No. 1) Bill (NSLAB).
2. The Bill contains 14 Schedules which primarily implement the Government's response to recommendations of the 2019 Comprehensive Review of the Legal Framework of the National Intelligence Community (Comprehensive Review) conducted by Mr Dennis Richardson AC and the 2017 Independent Intelligence Review (IIR) conducted by Mr Stephen Merchant PSM and Mr Michael L'Estrange AO. These amendments largely relate to enhancements and refinements to agency powers and functions, but also include clarifications of key legislative terms and other technical amendments.
3. Under the *Inspector-General of Intelligence and Security Act 1986* (IGIS Act), the overarching purpose of the Inspector-General's activities is to provide assurance that the intelligence agencies within the Inspector-General's jurisdiction act legally and with propriety, comply with ministerial guidelines and directives, and respect human rights. This submission will summarise the Inspector-General's understanding of the operation of the Bill and, where relevant, identify any key implications for oversight (notably, Schedules 1, 2, 4 and 13).

2. OVERVIEW OF THE BILL AND OVERSIGHT IMPLICATIONS

SCHEDULE 1 – EMERGENCY AUTHORISATIONS

4. Schedule 1 of the Bill introduces a new section 9D into the *Intelligence Services Act 2001* (IS Act) which will enable the agency heads of the Australian Secret Intelligence Service (ASIS), the Australian Signals Directorate (ASD) and the Australian Geospatial-Intelligence Organisation (AGO) to give an emergency authorisation to undertake activities for the specific purpose, or for purposes which include the specific purpose, of producing intelligence on an Australian person.
5. Proposed section 9D relating to emergency authorisations would enable agencies to act without ministerial authorisation in emergency situations where there is an imminent risk to the safety of an Australian person and the relevant agency head is satisfied that the person would consent to the relevant agency producing intelligence on that person.¹ This power may be delegated to any person in the agency and is not limited by level or seniority (apart from contractors or consultants).²
6. Within 48 hours of such an emergency authorisation being made, the relevant agency head is required to give the Inspector-General a copy of the authorisation and a summary of the facts of the case that justified giving the authorisation.³ Within 30 days of receiving these documents, the Inspector-General must consider whether the agency head has complied with the requirements of the section, provide the responsible Minister with a report on the Inspector-General's views on the extent of the agency head's compliance with the section, and provide the Committee with a copy of the conclusions of the report.⁴ This process mirrors the Inspector-General's existing role in the review of emergency authorisations issued under subsections 9B(8A) and 9C(6) of the IS Act.

¹ Schedule 1, Item 2.

² Schedule 1, Item 2, proposed s 9D(14).

³ Schedule 1, Item 2, proposed s 9D(5).

⁴ Schedule 1, Item 2, proposed s 9D(8).

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7. Oversight implications: The amendments in Schedule 1 propose a new obligation for the Inspector-General. Consistent with existing practices, the Inspector-General would review any authorisations made under proposed section 9D, including determinations of whether a person would consent to the production of intelligence. The Inspector-General is also likely to consider any delegations made pursuant to proposed subsection 9D(14). This may include reviewing the reasons for delegation and whether the level of persons making decisions pursuant to delegations is appropriate.

SCHEDULE 2 – CLASS AUTHORISATIONS RELATING TO COUNTER-TERRORISM

8. Schedule 2 of the Bill amends the ministerial authorisation framework in section 9 of the IS Act to allow ASIS, ASD and AGO to seek ministerial authorisations to produce intelligence on a class of Australian persons who are, or are likely to be, involved with a listed terrorist organisation.⁵
9. ‘Listed terrorist organisation’ will have the same meaning as in subsection 100.01 of the *Criminal Code* while proposed subsection 9(1AAB) provides a non-exhaustive list of factors that define when a person will be ‘involved with a listed terrorist organisation’. The Bill will also insert new section 10AA into the IS Act which imposes additional requirements for such class authorisations, including that agency heads must keep a list that identifies each Australian which the agency intends to undertake activities on and explains why the agency believes they are a member of the relevant class.⁶ Proposed subsection 10AA(4) requires that the list be available on request to the Inspector-General.
10. Oversight implications: Clear statutory limitations on the extent to which an intelligence agency may exercise powers, especially powers which may result in adverse consequences for an Australian person, are a critical feature in ensuring effective oversight. The proposed list of circumstances which define when a person is taken to be involved with a listed terrorist organisation is non-exhaustive. However, as currently drafted and suggested by the explanatory memorandum⁷, the list evinces an intention by parliament that, for the purposes of subsection 9(1AAB), involvement must be active and intentional—this clear intention will assist in oversight.
11. The Office of the IGIS will also examine lists that are maintained under subsection 10AA(4) as part of its routine inspections into agencies’ compliance with the ministerial authorisation framework, but may also access these lists at any time.

SCHEDULE 3 – AUTHORISATION FOR ACTIVITIES IN SUPPORT OF THE AUSTRALIAN DEFENCE FORCE

12. Schedule 3 of the Bill amends section 8 of the IS Act to enable ASD and AGO to seek ministerial authorisations to undertake activities to produce intelligence on one or more members of a class of Australian persons when these agencies are providing assistance to the Australian Defence Force (ADF) in support of military operations, and when cooperating with the ADF on intelligence matters.⁸ The amendments replicate the existing regime for ASIS to seek such a ministerial authorisation in support of the ADF.
13. Oversight implications: The Office of the IGIS will oversee agencies’ compliance with these provisions in accordance with its usual practices.

⁵ Schedule 2, Item 3.

⁶ Schedule 2, Item 12.

⁷ *Explanatory memorandum*, Notes on clauses, paragraph 61

⁸ Schedule 3, Item 1.

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SCHEDULE 4 – AUTHORISATIONS FOR PRODUCING INTELLIGENCE ON AUSTRALIANS

14. Among other things, Schedule 4 of the Bill amends section 8 of the IS Act to provide that ASIS, ASD and AGO are only ‘producing intelligence’ when undertaking covert and intrusive activities, or requesting a body, authority, organisation or group to undertake such an activity on its behalf.⁹ This Schedule also amends the definition of ‘intelligence information’ in section 3 of the IS Act.¹⁰ The effect of this amendment is that the Privacy Rules, required to be in place in respect of each agency under section 15 of the IS Act, will not apply to information that is produced on an Australian person by non-intrusive and non-covert means.
15. However, it is noted that a broad range of information could be produced by non-intrusive or non-covert means. This information has the potential to be of similar sensitivity to information collected via covert and intrusive means, particularly where such information can practically only be collected and analysed with the benefit of considerable technological and financial resources. The Committee may wish to consider the extent to which it may be appropriate for the Privacy Rules to apply to information other than intelligence information.
16. Oversight implications: The Office of the IGIS will continue to oversee agencies’ compliance with these provisions in accordance with its usual practices.

SCHEDULE 5 – ASIS COOPERATING WITH ASIO IN AUSTRALIA

17. Currently, section 13B of the IS Act permits ASIS to undertake an activity or series of activities outside Australia in support of the Australian Security Intelligence Organisation (ASIO). Schedule 5 of the Bill amends section 13B to enable ASIS also to undertake an activity or series of activities *inside* Australia for the specific purpose, or for purposes which include the specific purpose, of producing intelligence on Australian persons upon written notification from ASIO that ASIO requires the production of such intelligence.¹¹
18. The Bill provides that ASIS will continue to be permitted to provide similar assistance to ASIO in relation to activities outside Australia, upon written notification from ASIO, or where ASIS reasonably believes it is not practicable for ASIO to notify ASIS.
19. Oversight implications: The Office of the IGIS will oversee agencies’ compliance with these provisions in accordance with its usual practices.

SCHEDULE 6 – AGO COOPERATING WITH AUTHORITIES OF OTHER COUNTRIES

20. Currently, paragraph 13(1)(c) of the IS Act requires agencies to seek ministerial approval prior to cooperating with authorities of foreign countries. Schedule 6 of the Bill amends section 13 to provide that AGO may cooperate with authorities of foreign countries without seeking prior ministerial approval in relation to its non-national security related functions—specifically its functions under paragraphs 6B(1)(e), (ea) and (h) of the IS Act in relation to:
- providing non-intelligence related imagery and other geospatial, hydrographic, meteorological and oceanographic products;
 - providing assistance to bodies or persons performing emergency response, safety, scientific research, economic development, cultural or environmental protection functions;

⁹ Schedule 4, Item 3, proposed subsections 8(1A) and (1B)

¹⁰ Schedule 4, Item 1.

¹¹ Schedule 5, Items 1-2.

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- AGO's functions in relation to the Australian Hydrographic Office under the *Navigation Act 2012*.¹²

21. Oversight implications: The Office of the IGIS will oversee agencies' compliance with these provisions in accordance with its usual practices.

SCHEDULE 7 – OFFICE OF NATIONAL INTELLIGENCE COOPERATING WITH OTHER ENTITIES

22. Currently, subsection 13(1) of the *Office of National Intelligence Act 2018* (ONI Act) provides that the Director-General of the Office of National Intelligence (ONI) must approve, in writing, an authority of another country as being capable of assisting ONI in the performance of its functions and the exercise of its powers. Under subsection 13(1), ONI may currently cooperate with public international organisations without the formal written approval of the Director-General.¹³

23. Schedule 7 of the Bill extends the approval requirements in subsection 13(1) to ONI's cooperation with public international organisations as defined in section 70.1 of the *Criminal Code*.

24. Oversight implications: The Office of the IGIS will oversee ONI's compliance with this provision in accordance with its usual practices.

SCHEDULE 8 – SUSPENSION OF TRAVEL DOCUMENTS

25. Currently, section 22A of the *Passports Act 2005* allows the Minister for Foreign Affairs to suspend a person's Australian travel documents (including passports) for a period of 14 days if requested by the Director-General of Security. Similarly, section 15A of the *Foreign Passports (Law Enforcement and Security) Act 2005* enables the Minister to request the surrender of a person's Australian travel documents for a period of 14 days if requested by the Director-General of Security. Such requests can be made if the Director-General suspects that the person may leave Australia to engage in conduct that might prejudice the security of Australia or another country.

26. Schedule 8 of the Bill would amend the *Passports Act 2005*¹⁴ and the *Foreign Passports (Law Enforcement and Security) Act 2005*¹⁵ to extend the period for passport suspension and foreign travel document surrender from 14 to 28 days. The Explanatory Memorandum indicates that this is based on operational experience of the time required for ASIO to prepare a 'full' security assessment for the purposes of the permanent cancellation or long-term surrender of a person's travel document.¹⁶

27. Oversight implications: The Office of the IGIS will oversee ASIO's compliance with these provisions in accordance with its usual practices.

SCHEDULE 9 – IMMUNITIES FOR ONLINE ACTIVITIES

28. The amendments in Schedule 9 of the Bill expand upon amendments in the *Security Legislation Amendment (Critical Infrastructure) Act 2020* (Critical Infrastructure Act). The Critical Infrastructure Act extended the previous immunities for certain computer related offences for ASD in sections 476.5 and 476.6 of the *Criminal Code* to apply where a staff member of ASD acts on a reasonable belief that a computer-related activity occurred outside Australia, even if that activity actually occurred inside

¹² Schedule 6, Item 1, proposed subsections 13(3A) and 13(3B).

¹³ Schedule 7, Items 1 -4.

¹⁴ Schedule 8, Item 1.

¹⁵ Schedule 8, Items 4-6.

¹⁶ *Explanatory Memorandum*, Notes on clauses, paragraph 164.

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Australia. This Schedule will replicate ASD's immunities in the Critical Infrastructure Act for ASIS and AGO.

29. Oversight implications: The Office of the IGIS will oversee agencies' compliance with these provisions in accordance with its usual practices.

SCHEDULE 10 - PRIVACY

30. Schedule 10 of the Bill is divided into four parts.
31. Part 1 of Schedule 10 amends section 15 of the IS Act to require that the rules relating to the communication and retention of intelligence information concerning Australian persons ('privacy rules') that must be made for ASIS, ASD and AGO under section 15 are published on the relevant agency's website.¹⁷ It is noted that, in practice, agencies publish their respective privacy rules on their websites and this amendment legislates this practice.
32. Part 2 of the Schedule inserts, among other things, a new section 41C into the IS Act that requires the responsible Minister for the Defence Intelligence Organisation (DIO) to issue privacy rules that must be published on DIO's website.¹⁸ This provision largely mirrors existing section 15 in the IS Act relating to the making of privacy rules relating to ASIS, ASD and AGO. This includes requirements for the Inspector-General to be consulted in the making of the privacy rules¹⁹ and to be given a copy of the proposed rules²⁰, and for the IGIS to brief the Committee on the content and effect of the rules if the Committee requests such a briefing, or if the rules change.²¹
33. Part 2 of Schedule 10 also amends subsection 35(2B) of the IGIS Act to provide that the Inspector-General must report on the extent of DIO's compliance with the privacy rules in its annual report.²² Existing subsection 35(2B) of the IGIS Act already requires the Inspector-General to report on the extent of ASIS, AGO and ASD's compliance with their respective privacy rules in its annual report.
34. Part 3 of the Schedule amends provisions in the ONI Act relating to ONI's privacy rules. The effect of these amendments is that ONI's privacy rules made under section 53 of the ONI Act will only apply to information relating to ONI's analytical functions in paragraphs 7(1)(c), (d) and (g) of the ONI Act.²³ Specifically, these functions, which relate to products of ONI's Open Source Centre, include:
- to assemble, correlate and analyse information relating to international matters that are of political, strategic or economic significance to Australia, including domestic aspects relating to such matters;
 - to assemble, correlate and analyse information relating to other matters that are of political, strategic or economic significance to Australia if doing so would support the performance of any other function or the Director-General's functions, or complement the work of the national intelligence community;
 - to collect, interpret and disseminate information relating to matters of political, strategic or economic significance to Australia that is accessible to any section of the public.

¹⁷ Schedule 10, Item 2.

¹⁸ Schedule 10, Item 12, proposed s 41C

¹⁹ Schedule 10, Item 12, proposed s 41C(4)(b)

²⁰ Schedule 10, Item 12, proposed s 41C(5)

²¹ Schedule 10, Item 12, proposed s 41C(8)

²² Schedule 10, Items 6-8.

²³ Schedule 10, Items 21-24.

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35. These amendments to the ONI Act will implement the Government's response to recommendation 12 of the Comprehensive Review.
36. Parts 1, 2 and 3 of Schedule 10 also amend section 29 of the IS Act to introduce a function for the Parliamentary Joint Committee on Intelligence and Security to review the agencies' respective privacy rules as made by the relevant Minister.²⁴ Simultaneously, amendments to paragraphs 29(1), (f), (faa) and (fa) clarify that it is not a function of the Committee to review agencies' compliance with the respective privacy rules as this falls within the Inspector-General's oversight remit.²⁵ These amendments will implement the Government's response to recommendation 183 of the Comprehensive Review.
37. Part 4 of Schedule 10 amends section 3 of the IS Act, contingent on the passage of the Intelligence Oversight and Other Legislation Amendment (Integrity Measures) Bill 2020 (Integrity Measures Bill). The Integrity Measures Bill will, among other things, amend the IS Act to introduce a function for the Committee to review the performance by the Australian Transaction Reports and Analysis Centre (AUSTRAC) of its intelligence functions (as defined in that Bill). This amendment in Schedule 10 will clarify that the definition of 'intelligence function' in section 3 of the IS Act applies to AUSTRAC only.²⁶
38. Oversight implications: The Office of the IGIS will oversee agencies' compliance with these provisions in accordance with its usual practices.

SCHEDULE 11 – ASSUMED IDENTITIES

39. Schedule 11 of the Bill amends Part IAC of the *Crimes Act 1914* to include ASD in the assumed identities regime under that Part. This will enable the Director-General of ASD to authorise the acquisition and use of an assumed identity for ASD staff. The assumed identity regime enables authorised officers of certain law enforcement and intelligence agencies to acquire and use false identities for the purpose of exercising powers and performing functions of the respective agency.²⁷ Authorised officers acting lawfully under an identity issued under the scheme will not be found responsible for a Commonwealth, state or territory criminal offence.
40. Oversight implications: Currently the only intelligence agencies that can access the assumed identities regime are ASIO, ASIS and, to a limited extent, ONI. The Office of the IGIS already inspects these agencies' compliance with the assumed identities regime and will apply the same methodology to ASD's use of the regime.

SCHEDULE 12 – AUTHORITIES OF OTHER COUNTRIES

41. Schedule 12 of the Bill amends the definition of 'authority of another country' in section 3 of the IS Act to provide that an 'authority' need not be a body that is established by a law of the relevant country or be connected with an internationally recognised government of the country. The term 'authority of another country' appears throughout the IS Act, for instance paragraphs 6(1)(d) and 13(1)(c).
42. Oversight implications: The Office of the IGIS will oversee agencies' compliance with these provisions in accordance with its usual practices.

²⁴ Schedule 10, Items 3, 10, 15.

²⁵ Schedule 10, Items 4, 11, 16.

²⁶ Schedule 10, Item 26.

²⁷ S 15KB(2) *Crimes Act 1914*

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SCHEDULE 13 – ASIO WARRANT AUTHORISATIONS

43. Schedule 13 of the Bill will amend section 12 of the *Telecommunications (Interception and Access) Act 1979* (TIA Act) to permit the Director-General of Security to authorise a class of persons to exercise authority under a warrant in Part 2-2 of the TIA Act, including foreign intelligence warrants.²⁸ Currently, section 12 permits the Director-General of Security to authorise ‘any persons’ to exercise this authority.
44. This Schedule also amends section 12 of the TIA Act and section 24 of the ASIO Act to provide that where approval is given to a class of persons, holding, occupying or performing the duties of an office or position, to exercise the authority conferred by a relevant warrant under these Acts, such an approval extends to offices or positions that come into existence after the approval is made.²⁹
45. The amendments also introduce a requirement for the Director-General of Security to keep written records identifying each person who has, pursuant to an approval under section 12 of the TIA Act and section 24 of the ASIO Act, exercised the authority under an ASIO warrant.
46. Oversight implications: It is anticipated that the Office of the IGIS will examine records of authorisations made in relation to classes of persons as part of its regular inspection schedule.³⁰ Consistent with existing legal principles related to class authorisations, the Office of the IGIS will pay particular attention to the specificity with which a class is defined, to ensure that it is not inappropriately broad and that all persons to whom the power to exercise the authority of the warrant is delegated can be readily identified at any point in time.

SCHEDULE 14 – TECHNICAL AMENDMENTS RELATED TO THE STATUTORY ESTABLISHMENT OF ASD

47. Schedule 14 of the Bill makes technical amendments to the IS Act to correct a minor referencing error and an omission in the *Intelligence Services Amendment (Establishment of the Australian Signals Directorate) Act 2018*.

²⁸ Schedule 13, Item 4.

²⁹ Schedule 13, Items 1, 5.

³⁰ Schedule 13, Items 2, 5.