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ASIO Submission to the Parliamentary Joint Committee for Intelligence and Security

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

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Introduction

Thank you for the opportunity to provide a submission to the Parliamentary Joint Committee on Intelligence and Security's (PJCIS) Review of the National Security Legislation Amendment (Comprehensive Review and Other Matters No.1) Bill 2021 (the Bill).

This submission addresses the Schedules in the Bill that relate to ASIO, being:

- Schedule 5—The Australian Secret Intelligence Service (ASIS) cooperating with the Australian Security Intelligence Organisation (ASIO).
- Schedule 8—Suspension of travel documents.
- Schedule 13—ASIO authorisations.

All three amendments will enable ASIO to continue to operate effectively, given the complex, challenging and changing security environment.

Schedule 5—ASIS cooperating with ASIO

Cooperation between intelligence agencies is important to protect Australia and Australians from threats to their security. ASIO can undertake activities inside Australia and overseas in accordance with the *Australian Security Intelligence Organisation Act 1979* (ASIO Act). There are circumstances, however, where ASIS will be better-placed to undertake particular activities. In such circumstances, it is in the national interest that ASIO and ASIS can work seamlessly together to achieve a common security outcome.

At present, Division 3 of Part 2 of the *Intelligence Services Act 2001* permits ASIS to assist ASIO to produce intelligence on an Australian person outside Australia without being required to obtain Ministerial Authorisation if ASIO would not have been required to obtain a warrant if it were undertaking the same activities itself.

This cooperation framework was introduced in response to recommendation 39 of the PJCIS's 2013 *Report of the Inquiry into Potential Reforms of Australia's National Security Legislation*, that there should be a 'common standard' for the authorisation of activities involving the collection of intelligence on Australian persons for security purposes.

In practice, this cooperation framework works well for matters that are entirely offshore, by ensuring that ASIS is not prevented from undertaking activities to assist ASIO that ASIO would be able to undertake itself.

However, the fact that the framework only permits activities outside Australia has led to situations where ASIS has been unable to assist ASIO because some part of the activity would occur inside Australia. For example, when assisting ASIO under the framework, ASIS must currently direct its overseas agents not to speak with sources located in Australia even if those sources may have critical intelligence—such as intelligence on terrorist attack planning.

Schedule 5 of the Bill would implement recommendation 18b of the 2017 Independent Intelligence Review and remove this geographic limitation. This will ensure that ASIS is able to assist ASIO to undertake lawful activities to produce intelligence on an Australian person where that assistance is required inside Australia—such as where ASIS needs to task one of its agents to contact a source

located inside Australia. These amendments would not remove any of the key safeguards in the cooperation framework. In particular:

- the amendments do not provide any authority for ASIS (or ASIO) to undertake activities that would otherwise be unlawful inside Australia without a warrant;
- ASIS will only be permitted to undertake activities inside Australia under this framework, in response to a written notice from ASIO stipulating that we require intelligence on a particular Australian person or class of Australian persons; and
- the exception to the requirement for a written notice in section 13B(3) of the ISA Act will continue to only apply to activities undertaken by ASIS outside Australia.

Schedule 8—Suspension of travel documents

The Minister for Foreign Affairs has long-standing powers to cancel a person's passport in a range of circumstances, including if the Director-General of Security suspects on reasonable grounds that the person may travel overseas to engage in conduct that might prejudice the security of Australia or a foreign country—for example, to acquire military and paramilitary capability overseas with a view to then undertaking politically-motivated violence in Australia.

In 2014, the Australian Government introduced amendments to allow the Minister for Foreign Affairs to temporarily suspend a person's passport for 14 days on security grounds, at the request of the Director-General of Security. This power enables the Minister for Foreign Affairs to take temporary action to prevent a person from travelling in cases where ASIO has little or no prior notice of the person's intent to travel overseas to engage in security-related activity.

The 14-day suspension period was intended to allow ASIO to urgently undertake appropriate investigative activities to determine if there are sufficient grounds to recommend that the person's passport be cancelled. Otherwise, the suspension expires and the person may be permitted to travel.

Schedule 8 of the Bill would extend the length of time for which the Minister for Foreign Affairs may suspend a person's passport on security grounds, from 14 to 28 days. These amendments are based on operational experience that the current 14-day suspension period is often insufficient for ASIO to undertake all appropriate investigative steps and provide advice to the Minister for Foreign Affairs on whether the person's passport should be cancelled.

The passport suspension power has not been used during the COVID-19 pandemic. However, we expect the re-opening of international borders to impact our threat environment, even if travel does not return to pre-COVID levels. ASIO assesses that religiously motivated violent extremists may seek to travel to conflict zones when borders reopen. It is also foreseeable that ideologically-motivated violent extremists may seek to travel to acquire military and paramilitary capability, as well as to establish and strengthen networks with offshore extremists.

Schedule 13—ASIO authorisations

The ASIO Act and *Telecommunications (Interception and Access) Act 1979* (TIA Act) require people to be approved, in writing, to exercise the authority conferred by warrants issued to ASIO—such as telecommunications interception or search warrants.

The Comprehensive Review of the Legal Framework for the National Intelligence Community (Comprehensive Review) recognised that limitations must be placed on who may execute a warrant, and that ASIO must diligently apply these controls. The Comprehensive Review also noted that some aspects of the authorising framework create practical difficulties and do not meaningfully enhance accountability, and consequently recommended that amendments be made.

Schedule 13 of the Bill would implement recommendations 36 and 37 of the Comprehensive Review, by:

- in cases where the Director-General of Security (or an authorised officer) has approved a class of persons to exercise the authority of a warrant issued under the ASIO Act, clarifying that the approval extends to positions that fall within the scope of the class that are created after the approval is given—for example, if an additional position is created within one of ASIO’s surveillance teams to support an increased operational tempo; and
- introducing an express requirement for ASIO to keep records of which persons have, in practice, exercised the authority of each warrant issued under the ASIO Act.

Schedule 13 would also implement recommendation 103 of the Comprehensive Review as it relates to ASIO’s warrants, by aligning the approval framework in the TIA Act with the equivalent framework in the ASIO Act. This will ensure there is a consistent approach to approving people to exercise the authority of ASIO warrants across the ASIO Act and TIA Act in advance of a new electronic surveillance Act being introduced.

In particular, the amendments to the TIA Act would provide an express basis for the Director-General of Security (or an authorised officer) to approve a class of persons to exercise the authority of interception warrants—as opposed to authorising each position individually.

The amendments will ensure that the authorising framework for ASIO’s warrants is practicable, while also enabling ASIO to demonstrate accountability in the exercise of our warranted powers.