

OFFICIAL



Australian Government
Australian Signals Directorate

ASD

NATIONAL SECURITY LEGISLATION AMENDMENT (COMPREHENSIVE REVIEW AND OTHER MEASURES NO. 1) BILL 2021

SUBMISSION TO THE PARLIAMENTARY JOINT
COMMITTEE ON INTELLIGENCE AND SECURITY

1 February 2022



NATIONAL SECURITY LEGISLATION
AMENDMENT (COMPREHENSIVE REVIEW AND
OTHER MEASURES NO. 1) BILL 2021

Page 1 of 9

OFFICIAL

OFFICIAL

Overview

1. The Australian Signals Directorate (ASD) welcomes 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 Measures No. 1) Bill 2021 (the Bill).
2. ASD has provided comments on eight of the Bill's 14 schedules relevant to ASD:
 - **Schedule 1** – emergency authorisations;
 - **Schedule 2** – class authorisations relating to counter terrorism;
 - **Schedule 3** – authorisation for activities in support of the Australian Defence Force (ADF);
 - **Schedule 4** – authorisations for producing intelligence on Australians;
 - **Schedule 10** – privacy;
 - **Schedule 11** – assumed identities;
 - **Schedule 12** – authorities of other countries;
 - **Schedule 14** – amendments related to the *Intelligence Services Amendment (Establishment of the Australian Signals Directorate) Act 2018*.
3. These schedules facilitate operational expediency in emergency situations; enable the collection of intelligence through class authorisations; or create legislative alignment between ASD, the Australian Secret Intelligence Service (ASIS) and the Australian Geospatial-Intelligence Organisation (AGO) (collectively IS Act agencies).
4. The Bill implements a number of recommendations proposed by both the Comprehensive Review of the Legal Framework of the National Intelligence Community (Comprehensive Review) and the 2017 Independent Intelligence Review (IIR). This omnibus national security Bill also includes amendments to other legislative provisions which will ensure ASD is both operationally equipped to meet a changing strategic environment, while ensuring high standards of ministerial control and oversight in the public interest.

Schedule 1 – Emergency Authorisations

Summary

1. Schedule 1 enables ASD (and other IS Act agencies) to produce intelligence on an Australian person overseas, without first obtaining ministerial authorisation, in circumstances where there is an imminent risk to that person's safety, and where it is reasonable to expect the person would consent to IS Act agencies taking action. While the Comprehensive Review noted that the emergency

OFFICIAL

authorisation provisions in the *Intelligence Services Act 2001* (IS Act) “generally operate well and are broadly fit for purpose”¹, Schedule 1 addresses an identified gap in the provisions; enabling agencies to take appropriate action without delay and subject to clear safeguards.

Current arrangements

2. Under sections 8 and 9 of the IS Act, ASD must obtain ministerial authorisation before producing intelligence on an Australian person. The Director-General of ASD can only provide emergency authorisation to produce intelligence, for example on an Australian kidnapped overseas, where they are satisfied that the Minister for Defence, the Prime Minister, the Minister for Foreign Affairs, the Attorney-General **and** the Minister for Home Affairs are not readily available or contactable to provide an emergency authorisation (as in sections 9A and 9B of the IS Act).
3. This assurance threshold has the potential to cause delays in intelligence production in situations of extreme time sensitivity, with potential detriment to the safety, wellbeing and likelihood of safe recovery of an Australian person.

Impact of Schedule 1 for ASD

4. The amendments in Schedule 1 enable the Director-General of ASD to authorise ASD to produce intelligence immediately in respect of an Australian person, without first seeking Ministerial approval where certain conditions are satisfied.
5. The amendment enables ASD to act swiftly and expeditiously, for example during the critical first hours of a kidnap, hostage or mass casualty event, to produce intelligence on an Australian overseas which may provide a greater understanding of the situation as it unfolds and increase the likelihood of the safe return of the Australian person.

Key safeguards

6. Consistent with the existing ministerial authorisation framework, under the proposed section 9D of the IS Act, the Director-General of ASD may authorise the production of intelligence on an Australian person only if they are satisfied that the facts would justify the responsible Minister giving an authorisation under section 9, and that the responsible Minister would have given the authorisation. Director-General ASD must be satisfied that: there is, or is likely to be, an imminent risk to the safety of an Australian overseas; it is necessary or desirable to undertake activities for the purposes of producing intelligence on the Australian person; it is not reasonably practicable to obtain the Australian person’s consent to ASD producing intelligence; and, having regard to the

¹ *Comprehensive Review of the Legal Framework of the National Intelligence Community* by Mr Dennis Richardson, Volume 1, paragraph 21.47.

OFFICIAL

nature and gravity of the risk, it is reasonable to believe that the Australian person would consent to the production of intelligence if they were able to do so.

7. Further, notification, consideration and reporting obligations ensure Ministerial and Inspector-General of Intelligence and Security (IGIS) oversight of the exercise of an emergency authorisation under section 9D.

Schedule 2 – Authorisations relating to counter-terrorism

Summary

8. Schedule 2 introduces a counter-terrorism class authorisation to allow IS Act agencies to produce intelligence on one or more members of a class of Australians who are, or are likely to be, involved with a listed terrorist organisation. This schedule implements Recommendation 45 of the Comprehensive Review and is consistent with recommendation 16(a) of the IIR.
9. For the purposes of the authorisation, *listed terrorist organisation* will have the same meaning as the definition of ‘listed terrorist organisation’ in subsection 100.1(1) of the *Criminal Code Act 1995* (Criminal Code). That is, an organisation that is specified by the regulations for the purposes of paragraph (b) of the definition of *terrorist organisation* in section 102.1 of the Criminal Code. This cross referencing provides clarity and certainty for ASD in respect of counter-terrorism activities.

Current arrangements

10. At present, IS Act agencies are not able to seek class ministerial authorisations to produce intelligence on one or more members of a class of Australian persons who are, or are likely to be, involved with a proscribed terrorist organisation. This reduces the ability of ASD to act expeditiously in relation to producing intelligence on Australians involved with a listed terrorist organisation as they are discovered.
11. The requirement to seek individual authorisations is particularly challenging as terrorist organisations move to employing increasingly sophisticated methods of communication; using discreet methods of obfuscation in their communications and transactions. These methods means that the window for producing intelligence on a terrorist organisation’s members, plans or activities can be very limited.

Impact of Schedule 2 for ASD

12. Schedule 2 amends the ministerial authorisation framework in sections 8 and 9 of the IS Act to introduce a counter-terrorism class authorisation for IS Act agencies. This amendment reflects the seriousness of the threat posed to

OFFICIAL

Australia and Australians by terrorist organisations, and the number of Australians with connections to terrorist organisations.

13. The amendment provides ASD the agility necessary to investigate terrorist organisations and identify previously unidentifiable persons with links to terrorist organisations in order to ensure security and law enforcement agencies are best positioned to disrupt terrorist activities.

Schedule 3 – Authorisation for activities in support of the Australian Defence Force (ADF)

Summary

14. Schedule 3 amends section 8 of the IS Act to enable ASD and AGO to seek ministerial authorisation to undertake activities to produce intelligence on members of a class of Australian persons when the agencies are operating in the course of providing assistance to the ADF in support of military operations or cooperating with the ADF on intelligence matters.
15. Schedule 3, which implements Comprehensive Review recommendation 46 and is consistent with recommendation 16(b) of the IIR, provides consistency between IS Act agencies by extending the class authorisation regime for activities to provide assistance to the ADF in support of military activities, and to cooperate with the ADF on intelligence matters.
16. These class authorisations will allow ASD to respond expeditiously to developing threats from previously unidentifiable individuals, and enable ASD to provide more detailed and timely intelligence to support the ADF and its personnel.

Current arrangements

17. Under the current arrangements, **only** ASIS can seek class authorisations for activities when providing assistance to the ADF in support of military operations and when cooperating with the ADF on intelligence matters. Despite both ASD and AGO having statutory functions to provide assistance to the ADF and to cooperate with the ADF on intelligence matters, neither ASD nor AGO are able to seek ministerial authorisations to produce intelligence on one or more members of a class of Australian persons during such a circumstance.
18. Without class authorisations, ASD must seek individual ministerial authorisation to produce intelligence on each Australian person who is determined, for example, to be part of a foreign militia. As such, ASD's ability to provide operationally expedient and decisive intelligence in a high paced, high stakes military setting can be diminished.

Impact of Schedule 3 for ASD

OFFICIAL

19. The ability to seek class authorisations to produce intelligence on one or more members of a class of Australian persons in support of the ADF would support ASD's ability to provide timely intelligence on Australians posing a threat to the ADF or military operations. The amendment provides the agility for ASD to immediately begin producing intelligence where a new threat is identified.

Schedule 4 – Authorisation for producing intelligence on Australians

Summary

20. Schedule 4 implements recommendation 41 of the Comprehensive Review and is consistent with recommendation 16(d) of the IIR. Schedule 4 clarifies the situations in which an IS Act agency is 'producing intelligence' on an Australian or class of Australian persons, triggering the requirement for IS Act agencies to seek ministerial authorisation. This Schedule ties the definition of 'producing intelligence' with a 'prescribed activity', with a 'prescribed activity' meaning a 'covert and intrusive activity, or a series of covert and intrusive activities'.
21. The amendment provides clarity to IS Act agencies and clearly defines the scope and threshold of activities involving an Australian person that require ministerial authorisation.

Current arrangements

22. Currently, ASD must obtain ministerial authorisation before undertaking an activity or series of activities for the specific purpose of producing intelligence on an Australian person. However, the absence of a definition of 'producing intelligence' has led to uncertainty on the threshold of activities that require ministerial authorisation, with the result that authorisations may be sought for a wider range of activities than the legislation seeks to cover, for example routine preliminary inquiries that are neither intrusive nor use covert intelligence collection capabilities.

Impact of Schedule 4 for ASD

23. The Schedule provides clarity for IS Act agencies on which activities, involving an Australian, require ministerial authorisation. It will reduce the instances where IS Act agencies seek authorisations to share information which may fall outside the ordinary understanding or public expectation² of the ministerial authorisations regime – such as sharing newspaper articles, CVs and references on Australian persons. The amendment returns to the original intention of the authorisations regime by clearly placing administrative and

² Ibid, paragraph 19.121.

OFFICIAL

clerical activities and information that is neither covert nor intrusive outside the scope of the ministerial authorisations regime.

Schedule 10 – Privacy

Summary

24. As required by section 15 of the IS Act, the Minister for Defence must make written rules regulating ASD's communication and retention of intelligence information concerning Australian persons. These rules preserve and protect the privacy of Australians consistent with the proper performance of ASD's functions.
25. Recommendation 189 of the Comprehensive Review recommended that ASD, along with ASIO, ASIS, AGO, DIO and ACIC should have legally-binding privacy rules and that these rules be made public (except to the extent that the rules contain classified information). Part 1 of Schedule 10 implements recommendation 189 of the Comprehensive Review by amending section 15 of the IS Act such that the responsible Minister for each of ASIS, ASD and AGO must ensure that the privacy rules are published on the agency's website as to be readily available to the public.

Current arrangements

26. Section 15 of the IS Act requires that the responsible Ministers for IS Act agencies must make written rules, but does not specify that these rules must be published. Currently, the Minister for Defence issues privacy rules to ASD, and requires these rules to be made available through the ASD website.

Impact of Schedule 10 for ASD

27. Schedule 10 will legislate the requirement to publish ASD's privacy rules. This is consistent with ASD's existing privacy rule requirement.

Schedule 11 – Assumed Identities

Summary

28. Schedule 11 amends Part IAC of the *Crimes Act 1914* (Crimes Act) to include ASD in the Assumed Identities scheme, with the ability to acquire and use an assumed identity.

OFFICIAL

29. Under subsection 15KB(2) of the Crimes Act, an authority to acquire or use an assumed identity can only be granted in connection with one or more specific purposes. These purposes include ‘the exercise of powers and performance of functions of an intelligence agency’. Currently, the only intelligence agencies included in the scheme are ASIO, ASIS and ONI. ASD is not currently captured by the definition of ‘intelligence agency’ in Part IAC, despite ASD being defined as an intelligence agency elsewhere in the Crimes Act³. This Schedule seeks to remedy this anomaly to support ASD’s operational requirements.

Current arrangements

30. ASD relies on the use of assumed identities to perform activities related to its functions in circumstances where ASD’s operations would be compromised were the activities to be connected to ASD. Currently, ASIS and ASIO operate assumed identities on ASD’s behalf, in accordance with the Crimes Act and other legislation governing the activities of these agencies.
31. The Director-General of ASIO or ASIS is required to approve a request from ASD for acquisition and use of an assumed identity, and a supervisor from either ASIO or ASIS must be appointed to oversee ASD’s use of the assumed identity.

Impact of Schedule 11 for ASD

32. Under Schedule 11, the Director-General of ASD is included in the definition of a ‘chief officer’ in order to authorise the use of an assumed identity for ASD on its own behalf. The measure will not enable ASD to acquire evidence of an assumed identity; ASIS and ASIO will continue to acquire evidence of an assumed identity on ASD’s behalf. ASD considers this an appropriate limitation, as other agencies have the expertise to acquire evidence of an assumed identity.
33. The amendment places responsibility and accountability on the Director-General of ASD for ASD’s use of assumed identities. This includes responsibility for ensuring the requirements in Part IAC of the Crimes Act are met, including record keeping and auditing.

Schedule 12 – authorities of other countries

Summary

34. Schedule 12 is a clarifying amendment which provides abundant clarity on the definition of an ‘*authority*, of another country’ for the purposes of the IS Act. The amendment states that an authority need not be established by a law of the

³ See section 85ZL of Part VIIC, Pardons, quashed convictions and spent convictions.

OFFICIAL

country nor be connected with an internationally recognised government of the country.

35. The amendment clarifies that an IS Act agency may cooperate with an 'authority of another country' where the internationally recognised government of a country is disputed, disrupted or not in control of the whole of its territory.
36. The effect of the amendment provides certainty for IS Act agencies that, with ministerial authorisation, they may cooperate with authorities that exercise effective or de facto control over all or part of the country and which perform or purport to perform one or more functions which are governmental in nature.

Schedule 14 – amendments related to the *Intelligence Services Amendment (Establishment of the Australian Signals Directorate) Act 2018*

Summary

37. Schedule 14 makes technical amendments to correct a referencing error and a minor omission in the amendments related to the *Intelligence Services Amendment (Establishment of the Australian Signals Directorate) Act 2018*.
38. The amendments will ensure there is a specified time limit on all ministerial authorisations issued under section 9 of the IS Act; noting this six month time limit is already applied in practise. The amendments will also correct a referencing error, clarifying the Director-General of ASD is required to provide a report about any significant cooperation occurring under subsection 13(4) of the IS Act.
39. This amendment is technical in nature and does not grant ASD additional powers.