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Mr Andrew Hastie MP
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Dear Chair

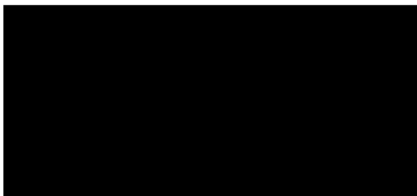
Response to a question taken on notice at the public hearing of 27 November

Thank you for the opportunity to appear at the Committee's public hearing on the Telecommunications and Other Legislation Amendment (Assistance and Access) Bill 2018 on 27 November.

I have enclosed my response to a matter that I took on notice in my answer to a question from Senator McAllister about Schedule 5 to the Bill. This concerns the compliance period for assistance orders under new section 34AAA of the *Australian Security Intelligence Organisation Act 1979* (at pp. 6-7 of the Proof Hansard).

IGIS appreciates the opportunity to participate in the inquiry and would be pleased to provide any further information that the Committee may require.

Yours sincerely



Jake Blight
Deputy Inspector-General

29 November 2018

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ENCLOSURE

Response to a question on notice

Compliance period for ASIO's section 34AAA assistance orders (Proof Hansard, 27 November 2018 at pp. 6-7)

Question

Senator McAllister asked some questions of IGIS about assistance orders under new section 34AAA of the *Australian Security Intelligence Organisation Act 1979 (ASIO Act)* in Schedule 5, and constraints on the period of time in which a person may be required to provide assistance.

Senator McALLISTER: In the case where it's being exercised in conjunction with a warrant, is it the case that, ordinarily, there's a specific time at which everyone understands that a warrant ceases to be in effect?

Mr Blight: A warrant has to be served, and then it's exercised. If you're searching a premises, there will be a point at which the search of that premises is finished.

Senator McALLISTER: Who makes that decision?

Mr Blight : I'd have to take that on notice. There'll be a question of fact, objectively. You couldn't stay for 10 days. The executing officer would effectively have the right to make the decision there.

Senator McALLISTER: I'm not concerned with it in general terms. But, if your evidence is that, for the most part, new section 34AAA would be used in conjunction with a warrant—

Mr Blight : I think that's [for] ASIO.

Senator McALLISTER: and that that in itself presents some kind of time limit, it would be helpful for the committee to understand. It may be that we need to ask that of one of the agencies rather than of you.

We understand that these questions arose from a suggestion of IGIS in submission 52 (at pp. 61-62) that all assistance orders should be subject to the requirement in new subsection 34AAA(3) to expressly specify a compliance period. Currently, the requirements in new subsection 34AAA(3) for an order to specify a compliance period, applies only if a computer or data storage device has been removed from premises under a warrant.

In our supplementary submission 52.1 (at p. 9) IGIS did not agree with a suggestion of the Department of Home Affairs, in supplementary submission 18.3 that, if subsection 34AAA(3) does not apply because a computer or data storage device has not been removed from premises, then 'it is implicit that the person will provide assistance at the time of the warrants executions and in a manner consistent with the issued warrant' (at p. 19). There is nothing in section 34AAA that limits a compliance to the period a warrant is in force and there are legal and practical difficulties in relying on an implied compliance period.

The following response to the question from Senator McAllister also includes some further notes that even if it was possible to imply a compliance period that is the duration of a warrant's execution, that period could be lengthy. For example, while a physical search under a search warrant may be relatively short, that is not the total duration of a search warrant (which for ASIO can be up to 90 days while for police it is 7 days). Furthermore, section 34AAA could be used in conjunction with a range of ASIO warrants including warrants that do not require any physical access to premises such as computer access warrants which can operate for 6 months and enable access to multiple computers repeatedly for that period.

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Response

Who makes the decision that the activities authorised under a warrant are complete?

We understand that the executing officer for a warrant is responsible for making the objective factual assessment that the acts authorised under the warrant have been completed.

For example, if a search warrant is issued under section 25 of the *ASIO Act*, one of the acts that may be specified in that warrant is the act of searching the subject premises under paragraph 25(4)(b). In making a factual assessment of whether the act of searching the subject premises was complete, the executing officer would need to assess whether all relevant things or records had been found; or otherwise whether all places on or in the subject premises at which relevant things or records could be located had been searched.

An executing officer must make this factual assessment within the limits of the authority under the warrant. (For example in the case of a search warrant, the search of the subject premises must be completed within the period of effect of the warrant, and in accordance with any conditions specified in the warrant about the conduct of the search, such as any limitations on the time of day or night during which a search may be conducted.)

An executing officer must also act in accordance with the requirements of the *ASIO Guidelines*, including the requirements in paragraph 10.4 with respect to the timeliness, efficiency and proportionality of collection activities. The Committee may wish to seek more detailed information from ASIO about its operational procedures in this regard.

Legal difficulties in using the execution of a warrant as an ‘implied compliance period’

As noted in our supplementary submission 52.1 (at p. 9), IGIS is concerned that there would be significant risks in attempting to imply a compliance period into a section 34AAA assistance order based on the period of effect of a warrant, or possibly some kind of sub-set of that period. IGIS remains of the view that it would be preferable, for both compliance and oversight, if all assistance orders were expressly required to specify a compliance period.

In our view, there is doubt that section 34AAA could, as a matter of statutory interpretation, support an implication that the compliance period is the time at which a warrant is executed. The text of several provisions in subsection 34AAA(1) appears to contemplate that information and assistance could be compelled under an order both while a warrant is in force but *before* it is executed, and *after* a warrant has been executed and ceases to be in force.

Compulsory assistance before a warrant is executed: subparagraphs 34AAA(1)(a)(i)-(iv)

In particular, subparagraphs 34AAA(1)(a)(i)-(iv) appear capable of authorising the issuing of an assistance order which compels a person to provide information to ASIO to enable ASIO to execute a warrant that is in force, before that warrant is executed.¹ In this scenario, the statutory requirement in subsection 34AAA(3) to impose a compliance period does not apply, because there has necessarily been no removal of a computer, since the assistance is compelled in preparation for the execution of the warrant to enable it to be carried out.

¹ These provisions enable the compulsion of assistance or information that is reasonable or necessary to assist ASIO to access data held in, or accessible from, a computer or data storage device that is: (1) the subject of a computer access, or surveillance device warrant; or (2) is on premises in relation to which a search or surveillance device warrant is in force. These provisions do not require the assistance to be provided *only* at the time at which the warrant is executed (that is, the time of doing the things authorised under the warrant).

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Consequently, the concept of the execution of the warrant does not appear to provide a cogent basis on which to imply a compliance period for the assistance order in such circumstances, and it is difficult to discern an alternative basis on which an assistance period could be implied.

Compulsory assistance after a warrant has expired: ss 34AAA(1)(b) and (1)(c)(i)-(ii)

Further, paragraph 34AAA(1)(b) and subparagraphs 34AAA(1)(c)(i)-(ii) appear capable of authorising the issuing of an assistance order to compel a person to provide assistance to ASIO by copying or converting into intelligible form data that ASIO has *already* lawfully accessed under a warrant, in circumstances in which the warrant itself has expired. (The provisions appear capable of covering circumstances in which the warrant had already expired at the time the assistance order is issued, or if the warrant expires while the assistance order is in force).²

In this scenario, the statutory requirement in subsection 34AAA(3) for the assistance order to specify a compliance period would not apply if there was no removal of a computer from premises. This may conceivably occur if the relevant data was accessed remotely under a computer access warrant, or was copied from a computer found on premises entered under warrant. Subsection 34AAA(3) also would not apply if a computer was removed from premises for the purpose of accessing or copying data, and ASIO had then returned the computer while the warrant was in force. In these circumstances, the (completed) execution of the warrant clearly could not provide a basis for implying a compliance period for the assistance order.

Given the potential for assistance orders to be issued in these circumstances, IGIS considers that it would be preferable to avoid relying on an implied compliance period of some kind. Rather, subsection 34AAA(3) could require the Attorney-General to specifically authorise a compliance period for *all* assistance orders, not merely if a computer is removed from premises. This would ensure that the Attorney-General is specifically informed by ASIO of the intended compliance period and the supporting case for requesting that period; and is specifically asked to make a decision on its necessity and reasonableness.

In addition to providing clear and certain benchmarks for IGIS oversight of ASIO's requests, this could provide a stronger and more consistent safeguard for persons who are subject to an assistance order, so that they can readily ascertain and understand their obligations and potential liabilities. In the analogous context of statutory notice-based information gathering powers (notices to produce documents, provide information or to attend and answer questions) the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* states that provisions conferring powers to issue such notices should require those notices to 'contain all relevant details' including the time and place of an appearance or the deadline for compliance, as applicable.

The following statement in the *Guide* appears to have equal force with respect to section 34AAA assistance orders:

Including all relevant details in a notice ensures that a person who receives a notice is aware of his or her legal rights and obligations in relation to the notice. The legitimacy and enforceability of notices to produce

² These provisions enable the compulsion of assistance or information that is reasonable or necessary to allow ASIO to: (1) copy or data held in or accessible from a computer or data storage device that is the subject of a computer access or surveillance device warrant, or is on premises in relation to which a search or surveillance device warrant is in force; and (2) to convert such data into documentary form or another form intelligible to an ASIO employee or affiliate.

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or attend depends on ensuring the rights and obligations of the person served with the notice are clearly outlined.³

Practical difficulties in using the execution of a warrant as an implied compliance period for assistance orders under section 34AAA

Even if it was legally possible to imply a compliance period into a section 34AAA assistance order by reference to ‘the time of the warrant’s execution’ as suggested in the supplementary Departmental submission, this may produce unintended consequences.

In particular, it may be very difficult to identify precisely what that period of time would be. Any such period may also be protracted, given the lengthy maximum duration of special powers warrants and the range of activities that may be authorised by those warrants. IGIS considers that there would be benefit, from a compliance and oversight perspective, in avoiding these difficulties by simply requiring all assistance orders to specify a compliance period.

Practical difficulties in relation to search warrants

For example, in the case of search warrants issued under section 25 of the *ASIO Act*, these warrants do not become ‘spent’ and cease to have effect once a search of the subject premises is completed under paragraph 25(4)(b). Paragraph 25(4)(d) authorises the removal and retention of records and things found during the search for the purpose of inspecting or examining them. The warrant is arguably being executed for as long as those records or things are being examined or inspected in accordance with the warrant while it is in force (up to 90 days).

Uncertainty may therefore arise if ASIO conducted a search of subject premises during which it copied data from a computer on the premises under subsection 25(5) without removing that computer from the premises; and a section 34AAA assistance order then compelled a person to convert that data into an intelligible form. If ASIO had *also* removed unrelated records and things that it found in the search of the subject premises, for the purpose of inspecting or examining them, then is it intended that the compliance period for the section 34AAA assistance order is the duration of the remaining examination or inspection activity under the search warrant, since the warrant is still being executed while the examination or inspection is being conducted within the warrant period? If a more limited period is intended, then the basis for identifying that period is unclear.

Practical difficulties in relation to computer access warrants

Further, in the case of computer access warrants, it may be very difficult to identify the ‘the time of the warrant’s execution’ because a single computer access warrant can authorise repeated access to a large number of individual computers and premises while the warrant is in force (for up to six months). A ‘computer’ within the meaning of section 22 of the *ASIO Act* can cover one or more individual computers, computer systems, computer networks or any combination. It is conceivable that multiple computers may be accessed continuously while a warrant is in force.

Potential for a protracted compliance period

Further, any implied compliance period by reference to the duration of a special powers warrant could be protracted, given the lengthy maximum duration of those warrants. (This is six months

3 Australian Government, [Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers](#), September 2011, p. 92 at [9.3.3].

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for computer access and surveillance device warrants, and 90 days for search warrants). This may create uncertainty about precisely when, within in that period, a person's assistance may be compelled under an assistance order. While new section 34AAA of the *ASIO Act* is modelled on existing section 3LA of the *Crimes Act*, the latter provision operates in relation to law enforcement search warrants that have a maximum period of effect of seven days from the day after issuing. (See subsection 3E(5A) of the *Crimes Act*.)

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