



Intelligence Services Legislation Amendment Bill 2011

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Law and Bills Digest Section

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Intelligence Services Legislation Amendment Bill 2011

Date introduced: 23 March 2011

House: House of Representatives

Portfolio: Attorney-General

Commencement: The day after Royal Assent

Links: The links to the [Bill, its Explanatory Memorandum and second reading speech](#) can be found on the Bill's home page, or through <http://www.aph.gov.au/bills/>. When Bills have been passed and have received Royal Assent, they become Acts, which can be found at the ComLaw website at <http://www.comlaw.gov.au/>.

Purpose

Among the Bill's more significant provisions are those that enable the Australian Security and Intelligence Organisation (ASIO) to collect a greater range of foreign intelligence than it can at present.

Otherwise, the Bill makes a range of minor amendments in order to refine a number of provisions in:

- the *Australian Security Intelligence Organisation Act 1979* (ASIO Act)
- the *Intelligence Services Act 2001* (IS Act) and
- the *Criminal Code Act 1995* (the Criminal Code Act).

Background

As there is no general theme in the Bill, this Background provides a short outline of the security and intelligence agencies in Australia.¹

The Australian Intelligence Community

The 'Australian Intelligence Community', or AIC, is an informal term used to describe the six Australian security and intelligence agencies:

1. This overview relies mainly on material on the website of the Inspector-General of Intelligence and Security (IGIS), viewed 9 May 2011, <http://www.igis.gov.au/aic/index.cfm>

- the **Office of National Assessments (ONA)** produces all-source assessments on international political, strategic and economic developments to the Prime Minister, senior ministers in the National Security Committee of Cabinet, and senior officials of government departments. ONA operates under its own legislation. ONA also has responsibility for coordinating and evaluating Australia's foreign intelligence activities
- the **Australian Security Intelligence Organisation (ASIO)** is established under the ASIO Act and is Australia's national security service. ASIO's main role is to gather information and produce intelligence that will enable it to warn the Government about activities or situations that might endanger Australia's national security. ASIO also has a provides security assessments to Commonwealth agencies and for state and territory purposes
- the **Australian Secret Intelligence Service (ASIS)** is Australia's overseas secret HUMINT (human intelligence) collection agency. Its mission is to protect and promote Australia's vital interests through the provision of unique foreign intelligence services as directed by Government. ASIS was established in May 1952 and operated under a series of government directives until it was put onto a statutory footing in October 2001, with the coming into effect of the IS Act
- the **Defence Signals Directorate (DSD)** is responsible for the collection, analysis and distribution of foreign signals intelligence (known as sigint); and is the national authority on communications and computer security (known as infosec)
- the **Defence Intelligence Organisation (DIO)** is an intelligence assessment agency that provides services and advice at the national level. Its mandate is to support defence and government decision-making and assist with the planning and conduct of Australian Defence Force operations and
- the **Defence Imagery and Geospatial Organisation (DIGO)** was established by amalgamating the Australian Imagery Organisation and Directorate of Strategic Military Geographic Information, and the Defence Topographic Agency to provide geospatial intelligence, from imagery and other sources, in support of Australia's defence and national interests. The functions and powers of DIGO and DSD, along with those of ASIS, are set out in the IS Act.

In layman's terms, ASIO and ONA exist under the auspices of the Department of Prime Minister and Cabinet, ASIS under the Department of Foreign Affairs and Trade, whereas DSD, DIO and DIGO exist under the Department of Defence.

In general terms, the activities of all these intelligence agencies are subject to scrutiny by the Inspector-General of Intelligence and Security (IGIS).

Committee consideration

The Bill has been referred to the Senate Legal and Constitutional Affairs Legislation Committee for inquiry and report by 21 September 2011. Details of the inquiry and copies of submissions are available at:

http://www.aph.gov.au/Senate/committee/legcon_ctte/intelligence_services/index.htm (viewed 9 May 2011).

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To date², there is only one submission on the Committee's website and that is from the Law Council of Australia. The 'Key provisions' section of this Bills Digest refers to that submission.

Key provisions

Schedule 1—Amendments of intelligence laws

Definitions

Items 1 and 2 insert new definitions of '*Defence Minister*' and '*Foreign Affairs Minister*' respectively into section 4 of the ASIO Act. These definitions are consistent with other legislation.³

Foreign intelligence

Items 3, 7 and 13 are arguably the most substantial amendments in the Bill. Their purpose is to enable ASIO to extend its ability to collect a greater range of foreign intelligence than it can at present.

Section 27A of the ASIO Act currently authorises the Attorney-General to issue a warrant to ASIO (such as a search warrant, computer access warrant or listening device warrant) for the purposes of obtaining 'foreign intelligence' where he or she is satisfied that the collection of that foreign intelligence is important in relation to the defence of the Commonwealth or to the conduct of the Commonwealth's international affairs.⁴

Similarly, section 27B of the ASIO Act currently allows the Attorney-General to issue a general authorisation to ASIO to obtain foreign intelligence on a particular matter where he or she is satisfied that the collection of that foreign intelligence is important in relation to the defence of the Commonwealth or to the conduct of the Commonwealth's international affairs.

'*Foreign intelligence*' is currently defined in section 4 as:

intelligence relating to the capabilities, intentions or activities of a foreign power.

A '*foreign power*' is defined as:

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2. That is, 6 May 2011.
 3. Explanatory Memorandum, Intelligence Services Legislation Amendment Bill 2011, p. 4.
 4. It is of note that subsection 27A(9) provides that the Director-General of ASIO must not request the issue of a warrant under section 27A for the purpose of collecting information concerning an Australian citizen or permanent resident.

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a foreign government, an entity that is directed or controlled by a foreign government or governments, or a foreign political organisation.

Item 3 of the Bill would repeal this definition and substitute a new definition of '*foreign intelligence*' meaning :

intelligence about the capabilities, intentions or activities of people or organisations outside Australia.

Items 7 and 13 amend **sections 27A and 27B** respectively, so that a warrant or authorisation to obtain foreign intelligence is available where the Attorney-General is satisfied that the collection of the intelligence is 'in the interests of Australia's national security, Australia's foreign relations or Australia's national economic well-being'.

The Government's rationale for the new definition of '*foreign intelligence*' is firstly, that it provides a consistent meaning of '*foreign intelligence*' and a consistent approach to foreign intelligence collection in the ASIO Act, the IS Act and the *Telecommunications (Interception and Access) Act 1979*. Secondly, it reflects the changing nature of threats to Australia, since 'activities undertaken by non-State actors, whether individually or as a group, can also threaten Australia's national interest'.⁵ The Explanatory Memorandum also argues that the new condition of intelligence collection, namely where it is 'in the interests of Australia's national economic well-being', is said to 'recognise the broader nature of the contemporary threat environment'.⁶

Law Council of Australia comments

The Law Council has concerns about these amendments and recommends their removal from the Bill. It submits they will mean that search warrants, computer access warrants and surveillance and listening device warrants would be available to ASIO in a very broad range of circumstances. The Law Council's submission states:

The proposed changes will almost render meaningless the threshold test that must be met by ASIO in order to obtain a warrant or authorisation to collect intelligence under 27A and 27B. A warrant or authorisation will be able to be obtained to gather information about the activities of any person or group outside Australia whenever those activities are considered to be somehow relevant to Australia's national security, Australia's foreign relations or Australia's national economic well-being.

Even if it is accepted that the current definition and test need revision in light of the changing nature of threats to Australia, it does not follow that the new definition and test must necessarily be reframed in such broad terms.

5. Explanatory Memorandum, p. 4.

6. Ibid., p. 5.

The new definition and test will afford the Minister and the agency almost unfettered discretion to determine when and how ASIO's powers may be used to gather information about people's activities, communications and relationships abroad.⁷

The submission also argues by way of comparison that the threshold test for obtaining a warrant in relation to domestic matters is significantly more stringent.⁸

The Law Council concludes that these threshold tests are important. If they are framed too broadly they provide no safeguard against the misuse or overuse of ASIO's powers. Further, the effectiveness of the oversight function of the IGIS is seriously undermined because, ultimately, the ASIO Act provides the framework against which that Office assesses the lawfulness and appropriateness of ASIO's activities.⁹

Computer access warrants

Section 25A of the ASIO Act sets out the conditions relating to the issuing of a computer access warrant, with subsection 25A(4) dealing with the things that may be authorised in the warrant. **Item 4** proposes a slight modification to the wording to clarify that computer access warrants issued under section 25A authorise ongoing access to data held in the target computer over the life of the warrant.

ASIO security assessments for AIC staff

Items 16 to 18 make amendments regarding ASIO security assessments for the staff of intelligence agencies. Under Part IV of the ASIO Act, ASIO is empowered to provide security assessments to Commonwealth agencies in relation to what is called 'prescribed administrative action'.¹⁰

A security assessment includes advising whether a particular person should have access to national security information or secure places. If ASIO makes an adverse or qualified assessment of a person, then in general the person must be informed in writing and can apply to the Administrative Appeals Tribunal for a review of that assessment.¹¹

7. Law Council of Australia, *Intelligence Services Legislation Amendment Bill 2011*, Submission to the Senate Standing Committee on Legal and Constitutional Affairs, May 2011, p. 2, viewed 9 May 2011, http://www.aph.gov.au/Senate/committee/legcon_ctte/intelligence_services/submissions.htm

8. Before issuing a search warrant under section 25 of the ASIO Act or a computer access warrant under section 25A, the Minister must be satisfied that there are reasonable grounds to believe that it '*will substantially assist the collection of intelligence ... in respect of a matter that is important in relation to security*'. The Law Council's submission at pp. 2–3 sets out further detail relating to conditions on obtaining warrants for domestic matters.

9. Law Council of Australia, op. cit., p. 3.

10. An expression defined in section 35, ASIO Act.

11. Sections 38 and 54, ASIO Act.

Item 18 amends section 36 of the ASIO Act to exclude from the security assessment provisions in Part IV the communication by ASIO of information relating to the engagement of a person by ASIO (or by another intelligence or security agency within the AIC) as a staff member of ASIO (or that other agency).¹²

The effect of this amendment would be to remove the restrictions on ASIO in sharing information about employment decisions with other AIC members. The amendment would also remove the notification and review rights in these matters for staff and prospective staff of the AIC.

Functions of the Defence Imagery and Geospatial Organisation

Section 6B of the IS Act sets out the functions of the DIGO. **Item 21** inserts a **new paragraph 6B(g)** to provide DIGO with a general function of assisting the Australian Defence Force (ADF) in support of military operations and cooperating with the ADF on intelligence matters.

Grounds for Ministerial authorisations

Under the IS Act, a ministerial authorisation is required for the ASIS, the DSD or the DIGO to undertake intelligence gathering activities on an Australian person. Under paragraph 9(1A)(a), a condition for the issue of such an authorisation is that the minister must be satisfied that the Australian person is, or is likely to be, involved in certain listed activities.

Item 23 inserts **proposed subparagraph 9(1A)(a)(iva)** into the IS Act and provides an additional ground for obtaining ministerial authorisations—that the Australian person is, or is likely to be, involved in activities involving a contravention of a ‘UN sanction enforcement law’. The term ‘*UN sanction enforcement law*’ is defined to have the same meaning as in the *Charter of the United Nations Act 1945* (**item 23**) and according to the Explanatory Memorandum covers things such as providing money and goods to persons and entities contrary to UN sanctions.¹³

Immunity

Section 14 of the IS Act provides immunity from civil and criminal liability for staff members and agents of ASIS, DSD and DIGO for activities carried out by the agencies in the proper performance of their functions, which might otherwise be prohibited by the unintended consequences of certain Australian laws.

12. ‘*Staff member*’ is defined to include an agency head, employee, officer, consultant or person made available to agencies (**item 17, proposed subsection 35(1)**).

13. Explanatory Memorandum, p. 9.

Item 26 would amend this provision to clarify that the immunity has broad application and cannot be overridden by any other Commonwealth, state or territory laws (including future laws) unless that law expressly provides otherwise.

Item 19 makes an equivalent amendment to subsection 476.5 of the Criminal Code (which appears as the Schedule to the Criminal Code Act) clarifying civil and criminal immunity for staff and agents of ASIS, DSD and DIGO for computer-related activities carried out by the agencies in the proper performance of their functions.

Legislative instrument exemptions

Items 20, 22, 27 and 28 insert in the IS Act statements indicating that certain instruments made under the Act are not legislative instruments. For example ministerial directions in relation to ASIS activities, made under paragraph 6(1)(e) of the IS Act, are exempt from the *Legislative Instruments Act 2003*. **Item 20** inserts **proposed subsection 6(3A)** declaring that ministerial directions made under paragraph 6(1)(e) are not legislative instruments.¹⁴

Currently this information can be found in the Legislative Instruments Regulations 2004. However the preferred drafting practice is to include specific provisions in the enabling legislation explicitly declaring whether or not an instrument is a legislative instrument.

Note that these items are purely drafting refinements and do not affect the status of the particular instruments.

14. Paragraph 6(1)(e) of the IS Act states that one of the functions of ASIS is to undertake 'such other activities as the responsible Minister directs relating to the capabilities, intentions or activities of people or organisations outside Australia'.

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