

## **EXPLANATORY STATEMENT**

Issued by authority of the Minister for Foreign Affairs

*Intelligence Services Act 2001*

### ***Intelligence Services Regulations 2021***

The *Intelligence Services Act 2001* (the Act), amongst other functions and purposes, recognises the establishment of the Australian Signals Directorate (ASD) (section 27A) and sets out the functions of ASD (section 7). Paragraph 7(1)(f) of the Act specifically provides that it is a function of ASD to cooperate with and assist bodies referred to in section 13A in accordance with that section. Section 13A provides that an agency governed by the Act may cooperate and assist the bodies listed in subsection 13A(1) in the performance of their functions, subject to any arrangements made or directions given by the responsible Minister for that agency (paragraph 13A(2)(a)) and upon request from the head of the body (paragraph 13A(2)(b)). Paragraph 13A(1)(c) lists a Commonwealth authority, or a State authority, that is prescribed by the regulations for the purpose of that paragraph as a body that an agency may cooperate with and assist.

The purpose of the *Intelligence Services Regulations 2021* (the Regulations) is to prescribe the ‘Home Affairs Department’ for the purpose of paragraph 13A(1)(c) of the Act. ‘Home Affairs Department’ is defined as the Department administered by the Minister administering the *Security of Critical Infrastructure Act 2018* (the SOCI Act). This means that it will be a function of ASD to cooperate with and assist the Department of Home Affairs under paragraph 7(1)(f) of the Act where the Secretary of that Department has requested cooperation or assistance under paragraph 13A(2)(b). The prescription of the Home Affairs Department is specifically limited to ASD, and does not apply in relation to other agencies governed by the Act.

These Regulations are intended to enable ASD under paragraph 7(1)(f) of the Act to cooperate and assist the Home Affairs Department in the exercise of powers and performance of functions under the SOCI Act. This will supplement ASD’s current function to assist the Home Affairs Department under the Act or other legislation (see paragraph 7(1)(e) of the Act in particular).

The *Security Legislation Amendment (Critical Infrastructure) Act 2021* (the SLACI Act) recently passed the Parliament. That Act has made amendments to the SOCI Act to provide for government assistance powers in the event of a serious cyber security incident and a mechanism by which owners and operators of critical infrastructure assets can be required to report cyber security incidents to ASD. The Department of Home Affairs primarily is responsible for the administration of the SOCI Act, including these amendments. These regulations will allow ASD to have the function of assisting the Department of Home Affairs in administering these new cyber security provisions given their specialist knowledge and

expertise in such matters. An exposure draft of the proposed Regulations was released for a two-week consultation period in November 2020, in coordination with the proposed amendments to the SOCI Act. Commonwealth and industry stakeholders did not raise any concerns in response to the draft Regulations.

Details of the Regulations are outlined at [Attachment A](#).

A Statement of Compatibility with Human Rights in accordance with the *Human Rights (Parliamentary Scrutiny) Act 2001* has been prepared at [Attachment B](#). The overall assessment is that the Regulations are compatible with human rights.

The Office of Best Practice Regulation (OBPR) was consulted prior to making the Regulations. As the changes made by the Regulations do not have a regulatory impact on business, individuals or community organisations OBPR advised that a regulation impact statement was not required to be completed (OBPR ID: 44775).

The Act does not specify any conditions that need to be met before making the Regulations.

The Regulations are a legislative instrument for the purposes of the *Legislation Act 2003*, and commence the day after registration.

## **Details of the *Intelligence Services Regulations 2021***

### **Section 1 Name**

This section provides that the name of the instrument is the *Intelligence Services Regulations 2021* (the Regulations).

### **Section 2 Commencement**

Subsection (1) of this section in effect provides that the Regulations will commence on the day after registration of the instrument on the Federal Register of Legislation. Subsection (2) enables the specific date of commencement to be inserted into the table in subsection (1) after the Regulations are made by the Governor-General.

### **Section 3 Authority**

This section provides that the Regulations are made under the *Intelligence Services Act 2001* (the Act). In this regard it is noted that paragraph 43(a) of the Act provides that the Governor-General may make regulations required or permitted to be prescribed under the Act, and paragraph 13A(1)(c) of the Act permits a Commonwealth authority to be prescribed in regulations for the purpose of that paragraph.

### **Section 4 Definitions**

Under this section:

- *Act* is defined to be the *Intelligence Services Act 2001*, which is the Act under which the Regulations are made.
- *Home Affairs Department* is defined to be the Department administered by the Minister administering the *Security of Critical Infrastructure Act 2018* (the SOCI Act). Under the Administrative Arrangements Orders of 18 March 2021 (C2021G00209), this is the Department of Home Affairs.

It is also noted that definitions in the Act will also apply in the Regulations (see paragraph 13(1)(b) of the *Legislation Act 2003*). It follows that the meaning of ‘ASD’ in the Regulations is as defined in section 3 of the Act, being the Australian Signals Directorate whose establishment is recognised by section 27A of the Act.

### **Section 5 Cooperation with other agencies**

Subsection (1) of this section provides that, for the purpose of paragraph 13A(1)(c) of the Act, the Home Affairs Department is prescribed. Subsection (2) provides that subsection (1) only applies in relation to ASD. This means that the Home Affairs Department is not prescribed under paragraph 13A(1)(c) of the Act for the purposes of any of the other agencies regulated by the Act.

The effect of this section is that it is a function of ASD under paragraph 7(1)(f) of the Act to cooperate with and assist the Home Affairs Department in accordance with subsection

13A(2). This means that ASD has the function of cooperating with and assisting the Home Affairs Department subject to any arrangements made or directions given by the Minister for Defence (as the responsible Minister for ASD) and on request from the Secretary of the Home Affairs Department.

The intention of prescribing the Home Affairs Department for this purpose is to enable ASD to assist with the administration of the SOCI Act, including after amendments that may be made to that Act by the Security Legislation Amendment (Critical Infrastructure) Bill 2020.

This section is not intended to restrict or limit any other powers or functions that ASD has to assist the Home Affairs Department under the Act or other legislation (see paragraph 7(1)(e) of the Act in particular).

**Statement of Compatibility with Human Rights**

*Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011*

**Intelligence Services Regulations 2021**

This Disallowable Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

**Overview of the Disallowable Legislative Instrument**

The Security Legislation Amendment (Critical Infrastructure) Bill 2021 (the Amendment Bill) has amended the *Security of Critical Infrastructure Act 2018* (the SOCI Act) to include a range of provisions that permit interaction between the Department of Home Affairs and the Australian Signals Directorate (ASD). These regulations seek to enable the ASD to cooperate with and assist the Department of Home Affairs under that Act.

The *Intelligence Services Regulations 2021* (the Regulations) prescribe the ‘Home Affairs Department’ for the purposes of paragraph 13A(1)(c) of the *Intelligence Services Act 2001* (the Act). ‘Home Affairs Department’ is defined as the Department administered by the Minister administering the *Security of Critical Infrastructure Act 2018* (the SOCI Act). The current Administrative Arrangements Order of 18 March 2021 provides that this is the Department of Home Affairs. The prescription is limited in application to the Australian Signals Directorate (ASD) and does not apply to other agencies governed by the Act.

In effect, prescribing the ‘Home Affairs Department’ for the purpose of paragraph 13A(1)(c) of the Act specifically provides ASD with the function under paragraph 7(1)(f) of the Act to cooperate with and assist the Department of Home Affairs, subject to any arrangements made or directions given by the responsible Minister and upon the request of the Secretary of that Department. Subsection 13A(3) of the Act explains that, without limiting subsection 13A(1), in cooperating with and assisting a body in accordance with that section an agency may make the services of staff members and other resources of the agency available to the body. The intention is for ASD to exercise this function in relation to the Department of Home Affairs’ administration of the SOCI Act, as amended by the Security Legislation Amendment (Critical Infrastructure) Bill 2021 (the Amendment Bill). The *Security Legislation Amendment (Critical Infrastructure) Act 2021* (the SLACI Act) recently passed the Parliament. That Act has made amendments to the SOCI Act to provide for government assistance powers in the event of a serious cyber security incident and a mechanism by which owners and operators of critical infrastructure assets can be required to report cyber security incidents to ASD. The Department of Home Affairs primarily is responsible for the administration of the SOCI Act, including these amendments. It is appropriate for ASD to have the function of assisting the Department of Home Affairs in administering these new cyber security provisions given their specialist knowledge and expertise in such matters.

ASD cooperation with, and assistance to, the Department of Home Affairs and affected entities is for the specific purpose of the administration Government Assistance measures in response to a serious cyber security incident. The provision of any personal information in this context is for the sole purpose of enabling appropriate communication between Government and affected entities as part of the provision of Government Assistance measures. In preparation for such incidents, the Department of Home Affairs will incorporate privacy protections into standard operating procedures and training to explicitly prevent personal information from being requested.

### **Human rights implications**

The Regulations do not engage any of the applicable rights or freedoms. Further information on the human rights implications in relation to the Department of Home Affairs' administration of the SOCI Act, as amended by Amendment Bill, are set out in the Revised Statement of Compatibility with Human Rights included in the Explanatory Memorandum to the Bill.

### **Conclusion**

The Regulations are compatible with human rights as they do not raise any human rights issue.