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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

INTELLIGENCE SERVICES LEGISLATION AMENDMENT BILL 2011

EXPLANATORY MEMORANDUM

(Circulated by authority of the Attorney-General,
the Honourable Robert McClelland MP)

INTELLIGENCE SERVICES LEGISLATION AMENDMENT BILL 2011

OUTLINE

This Bill makes amendments to the *Australian Security Intelligence Organisation Act 1979* (ASIO Act), the *Intelligence Services Act 2001* (IS Act) and the *Criminal Code*. The amendments have been identified through a targeted review and practical experience with the legislation relating to security and intelligence agencies, and are aimed at improving the operation of some provisions of those Acts.

Amendments to the Australian Security Intelligence Organisation Act 1979

The Bill will amend the ASIO Act to align the definition of ‘foreign intelligence’ and the collection of foreign intelligence under the ASIO Act with the IS Act and *Telecommunications (Interception and Access) Act 1979* (TIA Act). This will ensure that the collection of foreign intelligence under the ASIO Act encompasses the same range of intelligence about state and non-state threats as covered by the term ‘foreign intelligence’ in those other Acts. Similar amendments to the TIA Act were made in the *Anti-People Smuggling and Other Measures Act 2010*.

The Bill will also amend the ASIO Act to clarify that a computer access warrant authorises access to data held in the target computer at any time while the warrant is in force. This makes clear that the provision is intended to authorise access to data that is held in the target computer during the life of the warrant, and is not limited to data held at a particular point in time (such as when the warrant is first executed). This amendment is not intended to change the law, but rather to clarify the intent of the provision and ensure consistent language is used throughout the provision.

The Bill will further amend the ASIO Act to exclude the communication of information concerning the engagement or proposed engagement of staff within the Australian Intelligence Community (AIC) from the security assessment provisions in the ASIO Act. This will put ASIO on the same footing as other AIC agencies in relation to sharing information relevant to employment within the AIC.

Amendments to the Intelligence Services Act 2001

The Bill will amend the IS Act to provide the Defence Imagery and Geospatial Organisation (DIGO) with a function to specifically allow DIGO to provide assistance to the Australian Defence Force (ADF) in support of military operations and to cooperate with the ADF on intelligence matters. This is not an extension of the functions of DIGO but a clarification of them and is consistent with the similar function of the Defence Signals Directorate.

The Bill will also provide a new ground for obtaining a Ministerial Authorisation for the purpose of producing intelligence on an Australian person. The new ground will apply where the Minister is satisfied that an Australian person is involved in, or likely to be involved in, activities related to a contravention of a UN sanction enforcement law. There is an increasing focus and requirement for intelligence on goods and money being moved to specific countries contrary to UN sanctions. Some of the existing grounds for Ministerial Authorisations would cover some, but not all, such activities. The proposed amendment will avoid any gaps and will provide transparency as to the grounds for granting Ministerial Authorisations.

The Bill will further amend the IS Act to clarify that the immunity provision in section 14 is intended to have effect unless another law of the Commonwealth, a State or Territory expressly overrides it. This provision provides immunity from civil and criminal activities for a limited range of circumstances directly related to the proper performance by the agencies of their functions. This limited immunity is necessary as certain Australian laws, including State and Territory laws, could impose liability on the agencies. The proposed amendment will not prevent other laws from limiting this immunity. However, the amendment will ensure that any such limitation cannot be done inadvertently, and will require express consideration to be given to whether section 14 should be overridden.

The Bill will also amend the IS Act to place existing exemptions from the *Legislative Instruments Act 2004* in the IS Act rather than in the Legislative Instruments Regulations 2004. This is consistent with the Government's commitment to clearer laws, as the status of certain instruments under the IS Act will be clear on the face of that Act. The existing exemptions apply to instruments made under paragraph 6(1)(e) (Ministerial directions in relation to ASIS activities), section 8 (Ministerial directions to agencies), section 15 (Privacy Rules), and clause 1 of Schedule 2 (guidelines for the use of weapons and self defence techniques). These amendments will not change the existing law.

Amendment to the Criminal Code

An amendment will also be made to the immunity provision for the computer offences in Part 10.7 of the Criminal Code to clarify that the provision is intended to have effect unless another law of the Commonwealth, a State or Territory expressly overrides it. This provision mirrors the immunity provision in section 14 of the IS Act, so it is desirable for these two provisions to maintain consistency.

FINANCIAL IMPACT STATEMENT

The amendments made by the Intelligence Services Legislation Amendment Bill 2011 will have no financial impact.

NOTES ON CLAUSES

Clause 1 Short title

Clause 1 is a formal provision specifying the short title of the Bill, which may be cited as the *Intelligence Services Legislation Amendment Act 2011*.

Clause 2 Commencement

Clause 2 provides for the commencement of the Bill. This Bill will commence on the day after this Act receives Royal Assent.

Clause 3 Schedule(s)

Clause 3 provides that each Act that is specified in a Schedule is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Act has effect according to its terms.

Schedule 1 – Amendments of intelligence laws etc.

Schedule 1 – Part 1 – Amendments

Amendments to the Australian Security Intelligence Organisation Act 1979

Item 1 – Section 4

This item will insert a definition of ‘Defence Minister’ into section 4 of the *Australian Security Intelligence Organisation Act 1979* (ASIO Act). This definition provides that for the purposes of the ASIO Act, Defence Minister means the Minister administering section 1 of the *Defence Act 1903*. This is consistent with the way the Defence Minister is defined in other legislation.

Item 2 – Section 4

This item will insert a definition of ‘Foreign Affairs Minister’ into section 4 of the ASIO Act. This definition provides that for the purposes of the ASIO Act, Foreign Affairs Minister means the Minister administering the *Diplomatic Privileges and Immunities Act 1967*. This is consistent with the way the Foreign Affairs Minister is defined in other legislation.

Item 3 – Section 4 (definition of foreign intelligence)

This item will repeal the current definition of ‘foreign intelligence’ in section 4 of the *Australian Security Intelligence Organisation Act 1979* and substitute a new definition. The new definition defines ‘foreign intelligence’ to mean intelligence about the capabilities, intentions or activities of people or organisations outside Australia. It replaces the existing definition which means ‘intelligence relating to the capabilities, intentions or activities of a foreign power’. A ‘foreign power’ is ‘a foreign government, an entity that is directed or controlled by a foreign government or governments, or a foreign political organisation’. The new definition will encompass intelligence about people, organisations and governments outside Australia (the term ‘people’ encompasses governments, consistent with section 22 of the *Acts Interpretation Act 1901*).

This new definition will ensure that there is a consistent meaning of foreign intelligence and a consistent approach to foreign intelligence collection in the ASIO Act, the *Intelligence Services Act 2001* and the *Telecommunications (Interception and Access) Act 1979*. The amended definition will reflect 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.

Item 4 – Paragraph 25A(4)(a)

This item is intended to standardise the wording used in section 25A of the *Australian Security Intelligence Organisation Act 1979* and 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.

This item will update the language used in paragraph 25A(4)(a) to replace ‘stored in the target computer’ with ‘held in the target computer at any time while the warrant is in force’. The language ‘held’ in a computer is used in subsection 25A(2) and this amendment to subsection 25A(4) will ensure consistency in the language used throughout section 25A. The amendment also updates the language used to make it clear that the original legislative intent of section 25A is to authorise ongoing access to the target computer over the life of the warrant. This amendment is not intended to change the operation of the provision.

Items 5 and 6 – Paragraph 27A(1)(a)

These items are consequential amendments to improve the readability of the relevant provisions and make it clear that references to the Minister are references to the Minister who is responsible for issuing the warrants under this section.

Item 7 – Paragraph 27A(1)(b)

This item will amend the conditions for the issue of foreign intelligence warrants under the *Australian Security Intelligence Organisation Act 1979*.

The purpose of this amendment is to align the conditions for the issue of foreign intelligence warrants under the ASIO Act with corresponding provisions in the *Intelligence Services Act 2001* and the *Telecommunications (Interception and Access) Act 1979*. This will ensure a consistent approach to foreign intelligence collection across all three Acts.

Section 27A provides the circumstances in which the Attorney-General (the issuing Minister) may issue a warrant for foreign intelligence collection. Currently, paragraph 27A(1)(b) provides that a condition for the issue of a foreign intelligence collection warrant is that the Attorney-General must be satisfied, on the basis of advice received from the relevant Minister, that the collection of foreign intelligence relating to that matter is important in relation to the defence of the Commonwealth or to the conduct of the Commonwealth’s international affairs.

This item will amend this condition so that the issuing Minister may issue a warrant for foreign intelligence collection if satisfied, on the basis of advice received from the Defence Minister or the Foreign Affairs Minister, that the collection of foreign intelligence relating to that matter is in the interests of Australia’s national security, Australia’s foreign relations or Australia’s national economic well-being. The new conditions recognise the broader nature of the contemporary threat environment.

Items 8 to 10 – Subsections 27A(1) and (3)

These items are consequential amendments to improve the readability of the relevant provisions and make it clear that references to the Minister are references to the Minister who is responsible for issuing the warrants under this section.

Items 11 to 12 – Paragraph 27B(a)

These items are consequential amendments to improve the readability of the relevant provisions and make it clear that references to the Minister are references to the Minister who is responsible for granting authorisations under this section.

Item 13 – Paragraph 27B(b)

This item will amend the conditions for authorising foreign intelligence collection under the *Australian Security Intelligence Organisation Act 1979*, in the same way as Item 7 amends the conditions for issuing foreign intelligence warrants.

The purpose of this amendment is to align the conditions for authorising foreign intelligence collection under the ASIO Act with the corresponding provisions in the *Intelligence Services Act 2001* and the *Telecommunications (Interception and Access) Act 1979*. This will ensure a consistent approach to foreign intelligence collection across all three Acts.

Section 27B provides the circumstances in which the Attorney-General may issue an authorisation for foreign intelligence collection. Currently, paragraph 27B(b) provides that the Attorney-General must be satisfied, on the basis of advice received from the relevant Minister, that the collection of foreign intelligence relating to that matter is important in relation to the defence of the Commonwealth or to the conduct of the Commonwealth's international affairs.

This item will amend this condition so that the authorising Minister may authorise the collection of foreign intelligence if satisfied, on the basis of advice received from the Defence Minister or the Foreign Affairs Minister, that the collection of foreign intelligence relating to that matter is in the interests of Australia's national security, Australia's foreign relations or Australia's national economic well-being. The new conditions recognise the broader nature of the contemporary threat environment.

Items 14 and 15 – Section 27B

These items are consequential amendments to improve the readability of the relevant provisions and make it clear that references to the Minister are references to the Minister who is responsible for granting authorisations under this section.

Item 16 – Subsection 35(1)

This item will insert a definition of 'agency head' into section 35 of the *Australian Security Intelligence Organisation Act 1979*. It covers the agency head of each of the six Australian Intelligence Community agencies. This definition is for the purposes of the amendment that will be made by Item 18.

Item 17 – Subsection 35(1)

This item will insert a definition of 'staff member' into section 35 of the *Australian Security Intelligence Organisation Act 1979*. This definition is intended to capture a broad range of 'staff members' of the six Australian Intelligence Community agencies. These agencies operate under differing legislative provisions, and therefore have differing employment provisions, so this definition needs to cover all such employment arrangements. It extends to officers, employees, consultants, contractors, persons made available to agencies, and agency heads. This definition is for the purposes of the amendment that will be made by Item 18.

Item 18 – At the end of section 36

This item will amend section 36 to exclude from the security assessment provisions in Part IV of the *Australian Security Intelligence Organisation Act 1979* the communication by ASIO of information relating to the engagement, or proposed engagement, of a person by ASIO or by another intelligence or security agency within the AIC.

The amendment will ensure that ASIO can share information about employment decisions with other members of the AIC. This might include information in response to inquiries about a person's employment or proposed employment with ASIO or another AIC agency, information about security clearances and other related information. Other AIC agencies are already able to share this information and are not subject to the same administrative requirements that apply to ASIO (which includes notification and review rights). Therefore, this amendment will put ASIO on the same footing as other AIC agencies when it comes to sharing information relating to employment within the AIC. This is a very limited category of information, and the amendment will only impact on a small group of persons. Employment decisions within the AIC need to be made carefully, and necessarily the processes take quite some time compared to other Government employment processes in order to ensure suitability of applicants and minimise risk of compromising national security.

Amendments to the Criminal Code Act 1995

Item 19 – After subsection 476.5(2A) of the Criminal Code

This item will amend subsection 476.5 of the *Criminal Code Act 1995* to ensure that this immunity provision is not vulnerable to being inadvertently overridden by subsequent legislation. It is complementary to the amendment made by Item 26.

Subsection 476.5 provides immunity from civil and criminal liability for staff members and agents of ASIS, DSD and DIGO for computer-related 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.

This immunity is only available for activities that are directly related to the proper performance by the agencies of their functions. The purpose of this amendment is to make express the legislative intent that subsection 476.5 has broad application and cannot be overridden by other Commonwealth, State or Territory laws, unless that law expressly states otherwise.

Amendments to the Intelligence Services Act 2001

Item 20 – After subsection 6(3)

This item will insert a new subsection 6(3A) into the *Intelligence Services Act 2001* to make express the status of instruments made under paragraph 6(1)(e) of that Act.

This amendment will provide that a direction given under paragraph 6(1)(e) is not a legislative instrument. A direction made under paragraph 6(1)(e) is currently exempt from the *Legislative Instruments Act 2003*, and this is stated in the *Legislative Instruments Regulations 2004*. Consistent with the recommendations of the 2008 Review into the *Legislative Instruments Act*, there is a preference for exemptions to be included in a primary Act rather than the Legislative Instruments Regulations. This makes laws clearer and means that it is only necessary to consult the primary Act to ascertain whether an instrument is a legislative instrument. Therefore this item moves the exemption from the Regulations into the *Intelligence Services Act 2001*.

The amendment does not change the law as instruments made under paragraph 6(1)(e) are already exempt under the Legislative Instruments Regulations (this is an actual exemption from the operation of the Legislative Instruments Act).

Item 21 – At the end of section 6B

This item will insert a new paragraph 6B(g) into the *Intelligence Services Act 2001* to provide the Defence Imagery and Geospatial Organisation (DIGO) with a general function of assisting the Australian Defence Force (ADF).

Section 6B of the *Intelligence Services Act 2001* sets out the functions of DIGO. The proposed new paragraph 6B(g) specifically allows DIGO to provide assistance to the ADF in support of military operations and to cooperate with the ADF on intelligence matters. This is not an extension of the functions of DIGO but a clarification of them. The function is consistent with a similar function of the Defence Signals Directorate.

Item 22 – At the end of section 8 (before the note)

This item will insert a new subsection 8(5) into the *Intelligence Services Act 2001* to make express the status of instruments made under section 8 of that Act.

This amendment will provide that a direction given under section 8 is not a legislative instrument. A direction made under section 8 is currently exempt from the *Legislative Instruments Act 2003*, and this is stated in the *Legislative Instruments Regulations 2004*. Consistent with the recommendations of the 2008 Review into the *Legislative Instruments Act*, there is a preference for exemptions to be included in a primary Act rather than the Legislative Instruments Regulations. This makes laws clearer and means that it is only necessary to consult the primary Act to ascertain whether an instrument is a legislative instrument. Therefore this item moves the exemption from the Regulations into the *Intelligence Services Act 2001*.

The amendment does not change the law as instruments made under section 8 are already exempt under the Legislative Instruments Regulations (this is an actual exemption from the operation of the Legislative Instruments Act).

Item 23 – After subparagraph 9(1A)(a)(iv)

This item will insert new subparagraph 9(1A)(a)(iva) into the *Intelligence Services Act 2001* to provide an additional ground for granting a Ministerial Authorisation under that section.

Under the *Intelligence Services Act 2001*, a Ministerial Authorisation is required for the Australian Secret Intelligence Service (ASIS), the Defence Signals Directorate (DSD) or the Defence Imagery and Geospatial Organisation (DIGO) to undertake activities for the purpose of producing intelligence on an Australian person. Under paragraph 9(1A)(a), a condition for the issue of such a Ministerial Authorisation is that the Minister must be satisfied that the Australian person is, or is likely to be, involved in one or more of the activities listed in paragraph 9(1A)(a).

This item will amend the grounds for obtaining Ministerial Authorisations to include, as a specific ground, that the Australian person is, or is likely to be, involved in activities involving a contravention of a 'UN sanction enforcement law'. 'UN sanction enforcement law' has the same meaning as in the *Charter of the United Nations Act 1945*, and covers things such as providing money and goods to persons and entities contrary to UN sanctions.

Item 24 – Subsection 9(1B)

This item will insert a definition of 'UN sanction enforcement law' into subsection 9(1B) of the *Intelligence Services Act 2001* for the purpose of the amendment made by Item 23. This definition provides that UN sanction enforcement law has the same meaning as in the *Charter of the United Nations Act 1945*.

Item 25 – Subsection 11(3)

This item will amend subsection 11(3) to include new paragraph 6B(g) of the *Intelligence Services Act 2001*, consequential to the amendment made by Item 21. This will ensure that the cooperation and assistance function of DIGO inserted by Item 21 is not limited by subsection 11(1), and enables DIGO to provide a broad range of cooperation and assistance to the ADF.

Item 26 – After subsection 14(2A)

This item will insert new subsections 14(2AA) and (2AB) into the *Intelligence Services Act 2001* to ensure that the immunity provision in section 14 is not vulnerable to being inadvertently overridden by subsequent legislation.

Section 14 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.

This immunity is only available for activities that are directly related to the proper performance by the agencies of their functions. The purpose of this amendment is to make express the legislative intent that section 14 has broad application and cannot be overridden by other Commonwealth, State or Territory laws, unless that law expressly states otherwise.

Item 27 – At the end of section 15

This item will insert a new subsection 15(7) into the *Intelligence Services Act 2001* to make express the status of instruments made under section 15 of that Act.

This amendment will provide that rules made under section 15 are not legislative instruments. Rules made under section 15 are currently exempt from the *Legislative Instruments Act 2003*, and this is stated in the *Legislative Instruments Regulations 2004*. Consistent with the recommendations of the 2008 Review into the *Legislative Instruments Act*, there is a preference for exemptions to be included in a primary Act rather than the Legislative Instruments Regulations. This makes laws clearer and means that it is only necessary to consult the primary Act to ascertain whether an instrument is a legislative instrument. Therefore this item moves the exemption from the Regulations into the *Intelligence Services Act 2001*.

The amendment does not change the law as instruments made under section 15 are already exempt under the Legislative Instruments Regulations (this is an actual exemption from the operation of the Legislative Instruments Act).

Item 28 – At the end of clause 1 of Schedule 2

This item will insert a new subclause 8 at the end of clause 1 of Schedule 2 of the *Intelligence Services Act 2001* to make express the status of instruments made under subclause 1(6) of Schedule 2 of that Act.

This amendment will provide that guidelines issued under subclause (6) are not legislative instruments. Guidelines issued under subclause (6) are currently exempt from the *Legislative Instruments Act 2003*, and this is stated in the *Legislative Instruments Regulations 2004*. Consistent with the recommendations of the 2008 Review into the *Legislative Instruments Act*, there is a preference for exemptions to be included in a primary Act rather than the Legislative Instruments Regulations. This makes laws clearer and means that it is only necessary to consult the primary Act to ascertain whether an instrument is a legislative instrument. Therefore this item moves the exemption from the Regulations into the *Intelligence Services Act 2001*.

The amendment does not change the law as instruments made under subclause (6) are already exempt under the Legislative Instruments Regulations (noting that this exemption is declaratory and describes the effect of the Legislative Instruments Act).

Schedule 1 – Part 2 – application provisions

Item 29 – Application – paragraph 25A(4)(a) of the ASIO Act

This item is an application provision.

This item will provide that paragraph 25A(4)(a) of the *Australian Security Intelligence Organisation Act 1979*, as amended by this Schedule, applies in relation to a request that is made under subsection 25A(1) of that Act after this Schedule commences.

Item 30 – Application – sections 27A and 27B of the ASIO Act

This item is an application provision.

This item provides that section 27A of the *Australian Security Intelligence Organisation Act 1979*, as amended by this Schedule, applies in relation to a notice that is given under paragraph 27A(1)(a) of that Act after this Schedule commences.

It also provides that section 27B of the *Australian Security Intelligence Organisation Act 1979*, as amended by this Schedule, applies in relation to a notice that is given under paragraph 27B(a) of that Act after this Schedule commences.

Item 31 – Application – paragraph 36(c) of the ASIO Act

This item is an application provision.

This item provides that paragraph 36(c) of the *Australian Security Intelligence Organisation Act 1979*, as added by this Schedule, applies in relation to a security assessment that is furnished by the Organisation after this Schedule commences.

Item 32 – Application – subsection 15(7) of the Intelligence Services Act

This item is an application provision.

This item provides that subsection 15(7) of the *Intelligence Services Act 2001* (IS Act), as added by this Schedule, applies in relation to rules that are made under subsection 15(1) of that Act before or after this Schedule commences. This is necessary to clarify the status of rules made under subsection 15(1) of the IS Act, since the rules have only been stated to be exempt from the *Legislative Instruments Act 2003* since 2010, when an amendment was made to the *Legislative Instruments Regulations 2004*. This retrospective operation is necessary to ensure the validity of actions done in reliance on the existing rules made under subsection 15(1).