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## **Australian Security Intelligence Organisation Amendment Bill 2020**

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**Submission to the  
Parliamentary Joint Committee on Intelligence and Security**

The Hon Margaret Stone AO FAAL  
Inspector-General of Intelligence and Security

3 July 2020

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### 1. Introduction

The Inspector-General of Intelligence and Security (IGIS) welcomes the opportunity to make this submission to the Parliamentary Joint Committee on Intelligence and Security (the Committee)'s inquiry into the Australian Security Intelligence Organisation Amendment Bill 2020 (the Bill).

Information about the role of the IGIS is at **Attachment A**.

Consistent with established practices, this submission does not express a view on the policy aspects of the amendments included in the Bill, except to the extent (if any) that IGIS oversight is affected. Rather, this submission provides an overview of the most significant changes included in the Bill and their implications for IGIS oversight of ASIO's activities.

#### Questioning and apprehension powers

The Bill repeals and replaces the existing compulsory questioning and detention framework in Division 3 of Part III of the *Australian Security Intelligence Organisation Act 1979* (the ASIO Act). Key features of the proposed new framework include:

- the removal of the judicial issuing authority role for questioning warrants, with warrants instead to be issued by the Attorney-General;
- expanded grounds for the issue of questioning warrants, including in relation to espionage, acts of foreign interference, and politically motivated violence (that latter two of which are defined in the ASIO Act);
- expanded application of the questioning framework to minors, including reducing the minimum age from 16 years to 14 years;
- removal of questioning and detention warrants and the ability for a prescribed authority to direct the detention of a person, replaced by an expanded framework for a person to be apprehended by a police officer and brought before a prescribed authority for questioning;
- an explicit ability for questioning to be undertaken post-charge, or post-confiscation proceeding, subject to an additional threshold;
- amendments to the existing powers for a police officer to search the subject of a warrant and seize items found during a search, and a new power to screen persons seeking to enter a place of questioning;
- other procedural amendments, including an ability for warrants to be requested and issued orally; an ability for warrants to be varied by the Attorney-General; broadening the range of people who can be a 'prescribed authority'; and amended provisions concerning the involvement and appointment of lawyers; and
- extension of the sunset date for the provisions by an additional 10 years.

These features are discussed in further detail in this submission in order to give context to discussion of the Bill's oversight arrangements.

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My office was consulted in the development of the Bill in relation to provisions to support IGIS oversight. The provisions to support IGIS oversight are as robust under the amended framework as they are in the existing framework.

Given the serious and unusual nature of the powers, I anticipate that the historical practice of the Inspector-General or a senior staff member attending and closely reviewing the questioning process will continue. I expect to work cooperatively with ASIO on administrative arrangements to ensure that the IGIS receives notice very early in the process when a questioning warrant is being considered so that practical matters, such as IGIS staff travel, can be arranged.

If the framework continues to be used very rarely, on a 'last resort' basis, my office will be able absorb the cost of oversighting the amended questioning framework within existing resources. However, this will need to be reviewed if the framework is to be used more frequently.

### Tracking devices

The Bill also amends the ASIO Act's provisions in relation to tracking devices. This includes introduction of a new mechanism for ASIO to internally authorise the use of a tracking device in certain circumstances, without a warrant being issued by the Attorney-General.

Key features include:

- changes to the ASIO Act's definitions of 'device', 'track' and 'tracking device';
- an ability for the Director-General of Security, or an ASIO employee or ASIO affiliate who holds an SES or equivalent position, to authorise the use of a tracking device in circumstances where ASIO is not required to enter premises or interfere with the interior of a vehicle without permission;
- a lower threshold test compared to the test for a warrant issued by the Attorney-General;
- an ability for internal authorisations to be requested and made either orally or in writing (noting that, unlike other legislative frameworks, there are no statutory criteria to guide the circumstances in which requests and authorisations may be made orally);
- an amendment to enable ASIO to use tracking devices without either a warrant or an internal authorisation in states and territories that do not prohibit their use by ASIO; and
- consequentially, enabling participants in ASIO special intelligence operations to use tracking devices under internal authorisation and expanding the ability of Australian Secret Intelligence Service officers to use tracking devices overseas.

These matters are discussed in further detail in this submission to give context to the oversight arrangements. My office was consulted about oversight arrangements in the development of the provisions, and the Bill contains features that will assist IGIS oversight.

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## 2. Amendments to ASIO's compulsory questioning powers

### 2.1 Background

The existing framework for compulsory questioning powers is contained in Division 3 of Part III of the ASIO Act. It includes provisions for:

- **questioning warrants (QWs)** – which require a person to appear before a prescribed authority for questioning by ASIO immediately, or at a time specified in the warrant; and
- **questioning and detention warrants (QDWs)** – which authorise a person to be taken into custody immediately by a police officer; brought before a prescribed authority immediately for questioning; and detained under arrangements made by a police officer for a period of up to seven days.

The existing framework was established in July 2003, following passage of the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002. That Bill was introduced into the Parliament in the months after the 11 September 2001 terrorist attacks. Reflecting this context, for either type of warrant to be issued an issuing authority must be satisfied that the warrant will substantially assist the collection of intelligence that is important in relation to a terrorism offence.

To the best of my knowledge, no other Five Eyes country has comparable legislation.<sup>1</sup>

#### IGIS oversight of warrants issued to date

As the Committee is aware, ASIO has executed 16 QWs since 2003 and no QDWs. The most recent QW was issued in 2010,<sup>2</sup> and the other 15 warrants were issued between 2004 and 2006.<sup>3</sup> My office was closely involved with oversight of each of these QWs. Although I have reviewed the relevant files, neither I nor my immediate predecessor have had direct experience with the operation of the provisions.

As I noted in a 2017 submission to the Committee, when the QW and QDW provisions were introduced into the ASIO Act the IGIS office developed a checklist to be used by IGIS officers who attended questioning. A copy of that checklist was included in my submission.<sup>4</sup> My submission also noted that a review of IGIS files had found that, where an issue of potential concern was noticed by the Inspector-General or an IGIS officer in relation to a QW, these issues were either raised immediately with the prescribed authority or raised with the Director-General of Security. All issues of substance were also publicly reported in the relevant IGIS annual report or in submissions to the then Parliamentary Joint Committee on ASIO, ASIS and DSD (PJCAAD).<sup>5</sup>

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<sup>1</sup> See also the Attorney-General's Department's submission to the Committee's 2017-18 review of ASIO's questioning and detention powers (*Submission 7.2*), p. 1.

<sup>2</sup> ASIO submission to the Committee's current review (*Submission 3*), p. 6.

<sup>3</sup> Attorney-General's Department submission to the Committee's 2017-18 review of ASIO's questioning and detention powers (*Submission 7*), p. 55.

<sup>4</sup> IGIS submission to the Committee's 2017-18 Review of ASIO's questioning and detention powers (*Submission 1.1*).

<sup>5</sup> IGIS submission to the Committee's 2017-18 Review of ASIO's questioning and detention powers (*Submission 1.1*).

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In 2005, the then Inspector-General, Mr Ian Carnell AM, noted in a submission several procedural and practical issues that he and his predecessor (Mr Bill Blick AM, PSM) had raised in correspondence with the Director-General of Security. These issues included whether lawyers for subjects should be given additional scope to address the prescribed authority; distinguishing between ‘questioning time’ and ‘procedural time’ for the purposes of determining when questioning under a warrant should cease; the provision of legal aid and payment of expenses for subjects; the degree of privacy afforded to subjects to meet their religious obligations, consult their legal representatives or lodge complaints; and the timeliness of reports to the Attorney-General.<sup>6</sup>

The 2005 submission also noted that Mr Carnell and his predecessor had come to the same general conclusion that the questioning of subjects under QWs had been conducted in a professional and appropriate manner. The individuals who had been the subject of questioning had been accorded dignity and respect; the facilities used for questioning had been appropriate; and due consideration had been given to each subject’s physical comfort and religious needs. The existing commitments of subjects had also been properly taken into account in determining the timing of questioning.<sup>7</sup>

### Reviews of the existing framework

The existing framework has been subject to multiple reviews over the period since it was established:

- In accordance with the legislation, the PJCAAD first reviewed the existing framework in 2005, ahead of its sunset date of 22 July 2006.<sup>8</sup> Certain amendments were made to the framework as a result of that review, and the sunset date was extended by a further ten years to 22 July 2016.<sup>9</sup>
- In 2012, the then Independent National Security Legislation Monitor (INSLM), Mr Bret Walker SC, conducted a review of the framework. Mr Walker recommended (among other things), that the provisions for QDWs be repealed and replaced by a narrower detention power under the QW provisions.<sup>10</sup> Those recommendations have not been implemented.
- In 2014, the sunset date for the provisions was further extended to 7 September 2018 following passage of the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014. The legislation also required the INSLM and the Committee to complete statutory reviews prior to the new sunset date.<sup>11</sup>
- In 2016, the then INSLM, the Hon Roger Gyles AO QC, completed his review of the framework. Similarly to his predecessor, Mr Gyles recommended that the QDW provisions be repealed. He recommended that the existing QW provisions be replaced by a compulsory questioning power following the model available under the *Australian Crime Commission Act 2002* as closely as possible.<sup>12</sup>

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<sup>6</sup> IGIS submission to the PJCAAD’s 2005 review of ASIO’s questioning and detention powers (*Submission 74*), p. 6.

<sup>7</sup> IGIS submission to the PJCAAD’s 2005 review of ASIO’s questioning and detention powers (*Submission 74*), pp. 10-11.

<sup>8</sup> PJCAAD, [ASIO’s Questioning and Detention Powers: Review of the operation, effectiveness and implications of Division 3 of Part III in the Australian Security Intelligence Organisation Act 1979](#), November 2005.

<sup>9</sup> See *ASIO Legislation Amendment Act 2006*.

<sup>10</sup> Bret Walker SC, INSLM, [Declassified Annual Report](#), 20 December 2012, pp. 106–107.

<sup>11</sup> *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014*, Schedule 1, items 131A and 133.

<sup>12</sup> The Hon. Roger Gyles AO QC, INSLM, [Certain Questioning and Detention Powers in Relation to Terrorism](#), October 2016, p. 1.

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- The Committee completed its review of the existing framework in 2018. As part of its review, the Committee considered both the INSLM's report, and a range of amendments to the existing regime that were put forward by ASIO.<sup>13</sup> The model proposed by ASIO was significantly different from the current model, and also different from the model recommended by the INSLM. In its report, tabled on 10 May 2018, the Committee supported the repeal of the QDW provisions. The Committee also recommended that the Government develop legislation for a reformed ASIO compulsory questioning framework, and refer that legislation to the Committee for inquiry and report.<sup>14</sup>

Following the Committee's review, the sunset date for the provisions was extended to 7 September 2019.<sup>15</sup> It was subsequently extended to the current date of 7 September 2020.<sup>16</sup>

There has been no further use of QWs since the time of the Committee's last review.

## 2.2 Overview of amendments

The compulsory questioning framework proposed in the Bill includes significant amendments to the current framework. The Bill largely implements features of the model put forward by ASIO in 2017, but with amendments taking into account the comments and recommendations in the Committee's 2018 report.

Consistent with established practices, this submission does not express a view on the policy aspects of these amendments, except to any extent that oversight by my office is affected.

To give context to IGIS oversight of the amended framework, the most significant changes to the existing framework are discussed below.

### Removal of judicial issuing authority

Under the existing provisions of the ASIO Act, QWs and QDWs are issued by a Judge (acting *persona designata*) appointed by the Attorney-General as an issuing authority. An application for such a warrant is made by the Director-General of Security with the consent of the Attorney-General.<sup>17</sup>

The Bill removes the role of the issuing authority, and instead provides that QWs are issued by the Attorney-General.<sup>18</sup>

The issue of QWs by the Attorney-General is consistent with other warrants available to ASIO under the ASIO Act and the *Telecommunications (Interception and Access) Act 1979*. However, it differs from the proposal currently before the Parliament for international production orders to be issued by a

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<sup>13</sup> ASIO submission to the Committee's 2017-18 review of ASIO's questioning and detention powers (*Submission 8.6*), pp. 6–36.

<sup>14</sup> Parliamentary Joint Committee on Intelligence and Security (PJCIS), [ASIO's questioning and detention powers](#), March 2018, p. xi.

<sup>15</sup> *Counter-Terrorism Legislation Amendment Act (No. 1) 2018*, Schedule 1, item 18.

<sup>16</sup> *Australian Security Intelligence Organisation Amendment (Sunsetting of Special Powers Relating to Terrorism Offences) Act 2019*, Schedule 1, item 1. Note also that the *Coronavirus Economic Response Package Omnibus Act 2020* includes a provision that enables a relevant Minister to defer the sunset day for any legislation by up to six months by legislative instrument.

<sup>17</sup> ASIO Act, sections 34D–34G.

<sup>18</sup> Proposed sections 34BA and 34BB.

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nominated member of the Security Division of the Administrative Appeals Tribunal, with the Attorney-General's consent. The removal of the role of the issuing authority also departs from the trend towards increased requirements for external authorisation in other Five Eyes jurisdictions.<sup>19</sup>

### Expanded grounds for issue of warrants

Under the existing framework, a QW may be issued in the narrow circumstances where the issuing authority is satisfied that issuing the warrant will substantially assist the collection of intelligence that is *important in relation to a terrorism offence*.<sup>20</sup> For warrants in relation to persons over the age of 16 but under 18, there is currently a further restriction that the Attorney-General may only consent to a warrant application if satisfied on reasonable grounds that it is *likely that the person will commit, is committing or has committed a terrorism offence*.<sup>21</sup> A terrorism offence is defined in the ASIO Act as an offence against Subdivision A of Division 72 of the *Criminal Code* ('International terrorist activities using explosive or lethal devices'), or an offence against Part 5.3 of the *Criminal Code* ('Terrorism').<sup>22</sup>

The Bill expands the grounds upon which a QW may be issued:

- For *adult questioning warrants*—which may be issued in relation to persons who are at least 18 years old—the Bill proposes that the Attorney-General may issue a warrant if satisfied that there are reasonable grounds for believing that issuing the warrant will substantially assist the collection of intelligence that is *important in relation to the protection of Australia from espionage; acts of foreign interference; or politically motivated violence*.<sup>23</sup> 'Politically motivated violence' is defined in the ASIO Act, and incorporates acts that are terrorism offences as well as a range of other acts.<sup>24</sup> 'Acts of foreign interference' is also defined in the ASIO Act, while 'espionage' is not defined.<sup>25</sup>
- For *minor questioning warrants*—which may be issued in relation to persons who are at least 14 years old—the Bill proposes that the Attorney-General may issue a warrant if there are reasonable grounds for believing that the person *has likely engaged in, is likely engaged in, or is likely to engage in activities prejudicial to the protection of Australia and its people from politically motivated violence*, and that there are reasonable grounds for believing that the warrant will substantially assist the collection of intelligence that is important in relation to protection of Australia and its people from *politically motivated violence*.<sup>26</sup>

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<sup>19</sup> For example, the United Kingdom's the *Investigatory Powers Act 2016* and New Zealand's *Intelligence and Security Act 2017* both require intrusive powers to be approved by the responsible Minister and an independent judicial commissioner.

<sup>20</sup> ASIO Act, sections 34E(1) and 34G(1).

<sup>21</sup> ASIO Act, section 34ZE(4).

<sup>22</sup> ASIO Act, section 4.

<sup>23</sup> Proposed section 34BA.

<sup>24</sup> The definition of 'politically motivated violence' also includes acts or threats of violence or unlawful harm that are intended or likely to achieve a political objective; acts that involve violence or are intended or are likely to involve or lead to violence and are directed at overthrowing or destroying the government or the constitutional system of government of the Commonwealth or of a State or Territory; acts that are offences under certain other provisions, including the 'foreign incursion' offences of the *Criminal Code*; and acts that are punishable under the *Crimes (Internationally Protected Persons) Act 1976* or that threaten or endanger any person or class of persons specified by the Minister by notice in writing given to the Director-General. ASIO Act, section 4.

<sup>25</sup> ASIO Act, section 4.

<sup>26</sup> Proposed section 34BB.

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For both types of warrant, the Attorney-General must also be satisfied that, having regard to other methods (if any) of collecting the intelligence that are likely to be as effective, it is reasonable in all the circumstances for the warrant to be issued.<sup>27</sup>

### Expanded application to minors aged 14 years

Under the existing provisions, the subject of a QW must be at least 16 years of age.<sup>28</sup> The Bill proposes to lower this minimum age to 14 years.<sup>29</sup>

A number of additional safeguards apply in relation to minor questioning warrants. These include:

- In deciding whether to issue the warrant, the Attorney General must consider *the best interests of the person*, taking into account a range of mandatory considerations (including age, maturity, sex, background, physical and mental health, benefit of relationship with family and friends, right to education and right to practice religion).<sup>30</sup>
- At any time after being given notice of the warrant, the subject of a minor questioning warrant may contact a *minor's representative*.<sup>31</sup> This is defined as the subject's parent or guardian; or another person who is able to represent the minor's interests and who is, as far as practicable in the circumstances, acceptable to the subject and the prescribed authority, and is not a police or ASIO officer.<sup>32</sup>
- The minor may be questioned only in the presence of a *minor's representative*.<sup>33</sup>
- The minor may be questioned only for continuous periods of two hours or less, separated by breaks directed by the prescribed authority.<sup>34</sup>

Additionally, the Bill requires that a lawyer for the subject must be present during questioning of any minor.<sup>35</sup> However, this will not necessarily be a lawyer of the subject's choice. The minor must be given facilities to contact a lawyer of their choice, but if the warrant includes an immediate appearance requirement the prescribed authority must appoint a lawyer to represent the subject until their lawyer of choice arrives. The prescribed authority must also appoint a lawyer for the subject if their lawyer of choice has not arrived and the prescribed authority is satisfied that a reasonable time has passed.<sup>36</sup>

The Bill makes clear that a lawyer for the subject will be considered the *minor's representative* if a non-lawyer representative is not present.<sup>37</sup> This means that a minor will lawfully be able to be questioned without a parent, guardian or other preferred representative present, as long as a lawyer for the minor is present (whether that be a lawyer of the subject's choice, or a lawyer appointed by

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<sup>27</sup> Proposed sections 34BA(1)(c) and 34BB(1)d).

<sup>28</sup> ASIO Act, section 34ZE(1).

<sup>29</sup> Proposed section 34BC.

<sup>30</sup> Proposed section 34BB(2)–(3).

<sup>31</sup> Proposed section 34F(1).

<sup>32</sup> Proposed section 34AA.

<sup>33</sup> Proposed section 34BD(2)(a).

<sup>34</sup> Proposed section 34BD(2)(b).

<sup>35</sup> Proposed section 34FA(1).

<sup>36</sup> Proposed section 34FC(2)–(3).

<sup>37</sup> See notes to proposed sections 34FD(2), 34FD(3), and 34FD(4). See also ASIO's submission to the Committee's current review (*Submission 3*), p. 12.

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the prescribed authority). This differs from the existing framework, under which questioning may only take place in the absence of a minor's parent or guardian if questioning in the presence of a parent or guardian is 'not acceptable to the person'.<sup>38</sup>

As a policy matter, I do not express a view on whether questioning in the absence of a minor's parent, guardian or other preferred representative should be permitted. However, I note that the Bill removes the ability for a prescribed authority to direct the detention of a person. These provisions, combined with the ability for the prescribed authority to appoint a lawyer for the subject, will enable questioning to commence immediately from the time at which a minor is brought before a prescribed authority for questioning, before the minor's parent, guardian, or other preferred representative (if applicable) arrives.

If a prescribed authority considers that the conduct of a *minor's representative* is unduly disrupting the questioning, the prescribed authority may direct the representative to be removed, and allow the subject to contact a replacement representative.<sup>39</sup> This mirrors provisions in the existing framework.<sup>40</sup>

In providing oversight of any QW that involves a minor, my office may seek general guidance from appropriate experts to help ensure that the minor's best interests and particular vulnerabilities are taken into account in our oversight of the warrant's execution.

### Apprehension under a questioning warrant

The Bill proposes to remove QDWs from the existing framework. Both the ability for a person to be detained for up to seven days under a QDW, and the ability for a prescribed authority to direct the detention of a subject of either type of warrant, have been removed.

The amended framework will enable the subject of a warrant to be apprehended by a police officer 'in order to immediately bring the subject before a prescribed authority for questioning under the warrant'.<sup>41</sup> Police officers are authorised to use 'such force as is necessary and reasonable' in apprehending or preventing the escape of the subject of a warrant.<sup>42</sup>

Under the amended framework, there are three circumstances in which a person can be apprehended:

#### 1. If pre-authorised by the Attorney-General in a warrant

A police officer may apprehend the subject if a warrant includes an 'immediate appearance requirement' and pre-authorises apprehension.<sup>43</sup> This requires the Attorney-General to be satisfied that there are reasonable grounds for believing that, if the subject of the warrant is not apprehended, the subject is likely to alert another person engaged in activity prejudicial to security; not appear before the prescribed authority; or destroy, damage or alter relevant records or things.<sup>44</sup>

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<sup>38</sup> ASIO Act, section 34ZE(6)(b)(i).

<sup>39</sup> Proposed section 34FG.

<sup>40</sup> ASIO Act, section 34ZR.

<sup>41</sup> Proposed section 34C.

<sup>42</sup> Proposed section 34CD.

<sup>43</sup> Proposed section 34C(1).

<sup>44</sup> Proposed section 34BE(2).

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Although the decisions of the Attorney-General are not within the remit of my office, IGIS oversight of these matters may include reviewing whether the Attorney-General was given adequate information by ASIO to make an informed decision. I would expect reasons specific to the individual case to be recorded in each instance to ensure that, as a matter of propriety, apprehension is not requested by 'default' without careful consideration of each case on its merits.

### **2. Based on a police officer's assessment of the behaviour of the subject**

A police officer may apprehend the subject if a warrant includes an immediate appearance requirement and, at the time the subject is given notice of that requirement, the subject makes a 'representation' that he or she intends to alert another person engaged in activity prejudicial to security; not appear before the prescribed authority; or destroy, damage or alter relevant records or things.<sup>45</sup>

### **3. If a subject fails to appear**

A police office may apprehend the subject of a warrant if he or she fails to appear before a prescribed authority as required under the warrant or under a direction given by the prescribed authority.<sup>46</sup>

I note that there is a clear intention, expressed in the Explanatory Memorandum, that a person who is apprehended will be transported to the place of questioning 'immediately' and 'without unnecessary delay'.<sup>47</sup> However, questioning will only be able to commence immediately if the prescribed authority, as well as any required interpreter, lawyer and/or minor's representative (if applicable), are present. As the Explanatory Memorandum notes:

Practically speaking, a police officer will only be able to apprehend a subject where the prescribed authority will be ready for questioning to commence when the subject arrives before the prescribed authority. If questioning will not be ready to begin when the subject appears before the prescribed authority, the police officer would be unable to apprehend the subject.<sup>48</sup>

A police officer's power to apprehend a person ends when the person appears before a prescribed authority for questioning under the warrant. After this point, the person would be no longer be 'apprehended'. However, the person would not necessarily be at liberty, as they could be subject to directions issued by the prescribed authority for their further appearance for questioning.<sup>49</sup> Failing to comply with such a direction would enable the person to be apprehended once again.<sup>50</sup> Once questioning commences, the person would also be subject to criminal offences if they failed to give the information or produce the things requested by ASIO in accordance with the warrant.<sup>51</sup>

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<sup>45</sup> Proposed section 34C(2).

<sup>46</sup> Proposed section 34C(3).

<sup>47</sup> Explanatory Memorandum, paragraph 223.

<sup>48</sup> Explanatory Memorandum, paragraph 224.

<sup>49</sup> Proposed section 34DE(1)(e).

<sup>50</sup> Proposed section 34C(3).

<sup>51</sup> Proposed section 34GD.

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I expect these matters will be given close attention in the revised written statement of procedures to be followed in the execution of warrants, on which my office is required to be consulted.<sup>52</sup>

### Post-charge questioning

The existing framework is silent on whether ASIO may question a person after that person has been charged with an offence. However, in a majority decision in 2013, the High Court made clear that post-charge compulsory questioning is only permissible where legislation clearly allows it by 'express words or necessary intendment'.<sup>53</sup>

The Bill expressly allows warrants to be issued for questioning post-charge and 'post-confiscation application' (concerning proceeds of crime). For these warrants to be issued, the Attorney-General must be satisfied of the additional threshold that 'it is necessary, for the purposes of collecting the intelligence, for the warrant to be issued even though the person has been charged or the confiscation proceeding has commenced; or that charge or proceeding is imminent'.<sup>54</sup>

Although the decisions of the Attorney-General are not within the remit of my office, IGIS oversight of any post-charge QWs that are issued will include reviewing whether the Attorney-General was given adequate information by ASIO to make an informed decision about this additional threshold. Given the seriousness of compulsorily questioning a person who has been charged with an offence, we will expect the brief prepared by ASIO to give careful consideration in all instances where post-charge questioning is being contemplated as to whether a QW is *necessary*.

The Bill also allows for the pre- or post-charge use or disclosure of questioning material (whether that is pre-charge or post-charge questioning material) for the purpose of obtaining derivative material (e.g. evidence),<sup>55</sup> and for disclosing that material to a prosecutor.<sup>56</sup> A court may also order that questioning material or derivative material may be disclosed to prosecutors, if satisfied that the disclosure is required in the interests of justice.<sup>57</sup> The material may be used by prosecutors as admissible evidence in certain criminal proceedings,<sup>58</sup> including in relation to offences under the Division.<sup>59</sup>

The Bill contains severability clauses, which enable the amended Act to be read as though the above post-charge and post-confiscation application elements had not been included,<sup>60</sup> in the event that the provisions are found to be 'beyond power'.<sup>61</sup>

### Search and seizure, and screening.

The existing framework enables a police officer to conduct an ordinary search or a strip search of a person who is detained, and allows for the seizure of dangerous items and items relevant to the

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<sup>52</sup> Proposed section 34AF.

<sup>53</sup> See *X7 v Australian Crime Commission* [2013] HCA 29.

<sup>54</sup> Proposed sections 34BA(1)(d) and 34BB(1)(e).

<sup>55</sup> Proposed section 34E.

<sup>56</sup> Proposed sections 34EA and 34ED.

<sup>57</sup> Proposed section 34EC.

<sup>58</sup> Proposed sections 34EE(2) and 34EF(3).

<sup>59</sup> Proposed section 34GD(6).

<sup>60</sup> For example, proposed sections 34BA(2), 34BB(2), 34BD(5), 34DB(2), and 34E(4).

<sup>61</sup> See, for example, Explanatory Memorandum, paragraph 152.

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questioning matter.<sup>62</sup> ASIO is authorised to examine any items or things removed from a person during a search, and to retain and copy any seized item that is relevant to the questioning matter.<sup>63</sup>

The Bill removes the power to conduct a strip search, but retains the power for a police officer to conduct an ordinary search or a frisk search of a person who is apprehended. The revised provisions also enable communications devices to be seized by the police officer.<sup>64</sup>

Additionally, the Bill proposes new powers for police officers to screen any persons (other than police or ASIO officers) who are seeking to enter a place where the subject of a QW is appearing, or is due to appear, before a prescribed authority. This includes the power for a police officer to conduct ordinary search or a frisk search for dangerous items or communication devices, which are prohibited from the questioning place. A person may be refused entry to a questioning place if they do not comply with the police officer's requests.<sup>65</sup>

### Oral applications and warrants

Under the existing provisions, warrants may only be applied for or issued in writing. In contrast, the Bill proposes to allow warrants to be applied for and issued either in writing or orally.<sup>66</sup>

The Bill provides that the Director-General of Security may request a QW from the Attorney-General orally (in person, by telephone or by other means of communication) if he or she 'reasonably believes that the delay caused by making a written request may be prejudicial to security'.<sup>67</sup> The Director-General must notify the IGIS before, or as soon as practicable after, the request is made. The Director-General must also make a written record of the request, including the reasons for the oral application, and provide a copy to the Attorney-General and the IGIS as soon as practicable and within 48 hours.<sup>68</sup>

The warrant may be issued orally if the Attorney-General is 'satisfied that there are reasonable grounds on which to believe that the delay caused by issuing a written warrant may be prejudicial to security'. In such cases, the Director-General must make a written record of the warrant as soon as practicable, and no later than 48 hours after it is issued.<sup>69</sup> The Director-General must provide a copy of that written record to the IGIS as soon as practicable.<sup>70</sup>

The Bill's inclusion of clear statutory criteria, and requirements to notify and provide written records to the IGIS, will assist with oversight of these provisions. I will expect these records to be comprehensive and include clear reasoning in support of any claim that the delay caused by issuing a written warrant may be prejudicial to security. We will work closely with ASIO to ensure that, wherever possible, IGIS officials can attend questioning.

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<sup>62</sup> ASIO Act, section 34ZB.

<sup>63</sup> ASIO Act, section 34ZD.

<sup>64</sup> Proposed section 34CC.

<sup>65</sup> Proposed sections 34D and 34DA.

<sup>66</sup> Proposed section 34B(2).

<sup>67</sup> Proposed section 34B(2).

<sup>68</sup> Proposed section 34B(5)-(6).

<sup>69</sup> Proposed section 34BF(1), (3).

<sup>70</sup> Proposed section 34HB(b).

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### Variation of warrants

The Bill proposes that variations to existing warrants may be made by the Attorney-General, on request of the Director-General of Security, either in writing or orally.<sup>71</sup>

There are no specific limits on the types of variations that may be made to existing warrants. However, the total period during which a warrant is in force must not be extended beyond 28 days.<sup>72</sup>

Similarly to an initial warrant, the Director-General must notify the IGIS before, or as soon as practicable after, an oral request for the variation of a warrant is made. A written record of the request must be made and provided to the Attorney-General and the IGIS as soon as practicable, and within 48 hours.<sup>73</sup> If the variation is issued orally, the Director-General must cause a written record of that variation to be made within 48 hours.<sup>74</sup> A copy of the variation, or written record of the variation, must be given to the IGIS as soon as practicable.<sup>75</sup> These notification requirements will assist IGIS oversight of warrants as they are varied, which will be important in ensuring IGIS officials can fulfil their responsibilities.

### Eligibility requirements for prescribed authorities

The Bill significantly expands the categories of persons who are eligible to be appointed by the Attorney-General as prescribed authorities.

Under the existing framework, only the following persons are eligible to be appointed:

- a person who has served as a Judge of a 'superior court' for more than five years, and no longer holds that commission; or
- if insufficient numbers of the above are available, a currently serving Judge of a state or territory Supreme Court or District Court; or
- if insufficient numbers of the above are available, a President or Deputy President of the Administrative Appeals Tribunal (AAT) who has been enrolled as legal practitioner for at least five years.<sup>76</sup>

The Bill removes the 'cascading' nature of these provisions, and allows for an expanded range of persons to be appointed. These include:

- a person who has served as a Judge of a 'superior court' for more than five years, and no longer holds that commission; or
- a President or Deputy President of the AAT who has been enrolled as legal practitioner for at least five years; or

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<sup>71</sup> Proposed section 34BG(1).

<sup>72</sup> Proposed section 34BG(8).

<sup>73</sup> Proposed section 34BG(4)-(5).

<sup>74</sup> Proposed section 34BG(7).

<sup>75</sup> Proposed section 34HB(d).

<sup>76</sup> ASIO Act, section 34B.

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- an enrolled legal practitioner, with a practising certificate, who has engaged in practice for at least 10 years.<sup>77</sup>

However, unlike the existing framework, the Bill also provides that certain categories of people are ineligible to be appointed, including ASIO officers, Australian Government Solicitor lawyers, IGIS officials, law enforcement officers and staff members of other intelligence and security agencies. The Bill also requires prescribed authorities to disclose any conflicts of interest in relation to their duties.<sup>78</sup> In my view, these limits are appropriate.

### Lawyers, and ability to appoint a lawyer

Timely access to independent legal advice is an important safeguard in any legal process, especially where compulsory questioning is involved, and of course it is not the role of IGIS officials to provide that legal advice.

The Bill amends the existing provisions in relation to a subject's contact with, and representation by, a lawyer.

The subject of a warrant may contact a lawyer for the purpose of obtaining legal advice at any time after being given notice of the warrant.<sup>79</sup> Similarly to the existing provisions, a prescribed authority may direct that the subject be prevented from contacting a particular lawyer if satisfied that a person involved in an activity prejudicial to security may be alerted; or a record or other thing may be destroyed, damaged or altered.<sup>80</sup>

The Bill also contains new provisions to regulate the circumstances in which a person may be questioned in the absence of a lawyer, or a lawyer of their choice. For adult questioning warrants:

- if the subject voluntarily chooses, they may be questioned in the absence of a lawyer;<sup>81</sup>
- if the warrant includes an immediate appearance requirement, and the subject requests a lawyer to be present, the prescribed authority must direct that the subject be given facilities to contact a lawyer of their choice, and appoint a lawyer to act for the person until their lawyer of choice arrives (and is briefed by the appointed lawyer);<sup>82</sup> and
- if the warrant does not include an immediate appearance requirement, and the subject requests a lawyer to be present, the prescribed authority must direct that the subject be given facilities to contact a lawyer of their choice, and must defer questioning for such time as the prescribed authority considers reasonable to enable a lawyer for the subject to be present. Questioning may occur in the absence of a lawyer after that reasonable time has passed and the lawyer is still not present.<sup>83</sup>

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<sup>77</sup> Proposed section 34AD(1).

<sup>78</sup> Proposed section 34AD(2)-(8).

<sup>79</sup> Proposed section 34F(1). However, if the prescribed authority is satisfied that the subject has had reasonable opportunity to contact a lawyer, he or she may direct that the subject be prevented from contacting a lawyer (adult questioning warrants only), or if a non-appointed lawyer is already present, that the subject be prevented from contacting another lawyer (see proposed section 34F(2)-(3)).

<sup>80</sup> Proposed section 34F(4).

<sup>81</sup> Proposed section 34FA(2)(a).

<sup>82</sup> Proposed section 34FB(2).

<sup>83</sup> Proposed section 34FB(3).

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For minor questioning warrants:

- a lawyer for the subject *must* be present during questioning;<sup>84</sup>
- if the warrant includes an immediate appearance requirement, the prescribed authority must direct that the subject be given facilities to contact a lawyer of their choice, and appoint a lawyer to act for the person until their lawyer of choice arrives (and is briefed by the appointed lawyer);<sup>85</sup> and
- if the warrant does not include an immediate appearance requirement, the prescribed authority must direct that the subject be given facilities to contact a lawyer of their choice, and must defer questioning for such time as the prescribed authority considers reasonable to enable the lawyer to be present. If that reasonable time has passed and the lawyer of choice is still not present, the prescribed authority must appoint a lawyer to act for the person until their lawyer of choice arrives (and is briefed by the appointed lawyer).<sup>86</sup>

The Bill provides that a prescribed authority must provide reasonable opportunity for a subject's legal advisor to advise the subject during breaks in questioning. A subject's legal advisor must not intervene in questioning except to request clarification of an ambiguous question, or to request a break in questioning in order to advise the subject. During a break, the legal advisor may request an opportunity to address the prescribed authority on a matter.<sup>87</sup>

Similarly to existing provisions, if the prescribed authority considers that the legal advisor's conduct is unduly disrupting the questioning, the authority may direct the legal advisor to be removed and allow the subject to contact another legal advisor.<sup>88</sup>

### Further extension of the sunset date

The Bill extends the current sunset date for the provisions by ten years, from 7 September 2020 to 7 September 2030.<sup>89</sup>

## 2.3 IGIS oversight of the amended framework

The purpose of IGIS oversight is to consider whether the ASIO's activities are conducted with legality, with propriety and with due regard to human rights.

In considering issues of legality and propriety, we look at whether ASIO complies with relevant legislation and the Minister's Guidelines to ASIO made under section 8A of the ASIO Act. Additionally, we consider ASIO's compliance with any relevant internal policies and procedures. In relation to oversight of QWs, this includes compliance with the required written statement of procedures to be followed in the exercise of authority under a QW.<sup>90</sup>

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<sup>84</sup> Proposed section 34FA(1).

<sup>85</sup> Proposed section 34FC(2).

<sup>86</sup> Proposed section 34FC(3).

<sup>87</sup> Proposed section 34FF(2)-(4).

<sup>88</sup> Proposed section 34FF(6)-(7).

<sup>89</sup> Proposed section 34JF.

<sup>90</sup> Proposed section 34AF.

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The role of the IGIS forms one part of the oversight structure for ASIO's compulsory questioning framework. Other parts include the role of the Attorney-General (and, in the existing framework, the role of the judicial issuing authority) in the issue of warrants, and the role of the prescribed authority in presiding over questioning sessions and issuing directions. Consistent with the existing framework, the IGIS does not oversee the decisions of the Attorney-General or the prescribed authority.

### Legislative provisions to support IGIS oversight are retained

The Bill retains existing provisions for IGIS oversight of ASIO's activities in connection with QWs. These include:

- The requirement in clause 34AF for the Director-General of Security to consult the IGIS about the preparation of a written statement of procedures to be followed in the exercise of authority under a QW (and the requirement that such a statement of procedures be in force before a QW may be issued by the Attorney-General).<sup>91</sup>
- An explicit statement in clause 34H that contravention of the written statement of procedures may be the subject of a complaint to the IGIS (without limiting the ability to complain about other aspects of ASIO's activities).
- Explicit provisions in clause 34CB to make clear that the Bill's prohibition on an apprehended subject contacting another person does not affect the subject's ability to contact the IGIS and requiring that, if requested, the subject must be given facilities for contacting the IGIS.
- A requirement in clause 34DC that, when the subject of a QW first appears before a prescribed authority, the prescribed authority must inform the subject of their right to make a complaint to the IGIS about ASIO, orally or in writing.
- A requirement in clause 34DI that a person exercising authority under a QW must give the subject facilities for making a complaint or giving information to the IGIS, if the subject makes such a request and questioning is deferred by the prescribed authority.
- An exception to the secrecy offences in clause 34GF enabling any person to make a disclosure in the course of exercising a power (including a power to make a complaint or to give information), or performing a function or duty, under the IGIS Act.<sup>92</sup>
- An explicit provision in clause 34JB enabling an IGIS official to be present at the questioning or apprehension of a person, for the purposes of the IGIS official exercising a power or performing a function or duty as an IGIS official.
- A specific role for the IGIS in clause 34DM, which provides that where the IGIS has a concern about impropriety or illegality in connection with the exercise of powers under a warrant, he or she may raise that concern with the prescribed authority. The prescribed authority must consider the IGIS's concern and may give a direction to suspend the questioning (or other exercise of power under the warrant) until the concern has been satisfactorily addressed.
- A requirement in clause 34HB for the Director-General of Security to, as soon as practicable, give the IGIS:

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<sup>91</sup> See proposed sections 34BA(1)(e) and 34BB(1)(f).

<sup>92</sup> Proposed section 34GF(5), definition of 'permitted disclosure', paragraph (a)(iv).

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- a copy of each warrant request;
- a copy of each warrant, or written record of the warrant;
- a copy of each request to vary a warrant;
- a copy of each variation to a warrant, or written record of the variation;
- a statement containing details of any seizure or apprehension associated with the warrant;
- a statement describing any action taken by the Director-General of Security as a result of a concern raised by the IGIS; and
- a copy of any video recording made in connection with the QW.

Additionally, as noted earlier in this submission, the Bill requires ASIO to notify the IGIS of any oral request for a warrant to be issued or varied, either before or as soon as practicable after that request is made. The Director-General of Security must provide a written record of the request as soon as practicable, and no later than 48 hours after the request is made.<sup>93</sup>

Oversight by the IGIS will be further assisted by the Bill's retention of a requirement that the Director-General of Security must, for each QW, give the Attorney-General a report that includes details of the extent to which the action taken under the warrant has assisted ASIO in carrying out its functions. The Bill specifies that this report must be provided within three months of the warrant ceasing to be in force, and must include details of any apprehension or seizure that took place under the warrant.<sup>94</sup>

The above features of the Bill supplement the IGIS's broader powers under the IGIS Act in relation to all operational activities of ASIO (and the other five Australian intelligence agencies within the IGIS's jurisdiction). The Bill is explicit that the amended Division does not affect the IGIS's functions or powers under the IGIS Act.<sup>95</sup> This includes sections 9B and 19A of the IGIS Act, which the Bill amends to provide that the Inspector-General may, after notifying the Director-General of Security, at any reasonable time enter any place where a person is being questioned or apprehended in relation to a QW, for the purpose of an inspection or an inquiry (respectively).

### **Minister's Guidelines to ASIO**

Among other things, the Minister's Guidelines to ASIO made under section 8A of the ASIO Act include a requirement of proportionality—that is, that any means used for obtaining information must be proportionate to the gravity of the threat posed and the probability of its occurrence.

IGIS has previously advised the Committee of the need for the 2007 Attorney-General's Guidelines to ASIO to be updated to take into account the range of new intrusive powers, and the changed security

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<sup>93</sup> Proposed sections 34B(5)-(6) and 34BG(4)-(5).

<sup>94</sup> Proposed section 34HA.

<sup>95</sup> Proposed section 34JA(1).

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and technological environment, since they were last issued more than a decade ago.<sup>96</sup> We understand that a revised version of the Guidelines is currently being considered.

Compulsory questioning and detention is the most intrusive power available to ASIO, and it is currently only available for the collection of intelligence in relation to a terrorism offence. Broadening the availability of compulsory questioning powers to ASIO's investigations of espionage, acts of foreign interference, and politically motivated violence (albeit without the detention elements) will necessarily alter what will be considered a proportional use of the powers. If the Bill is passed by the Parliament, consideration could be given as to whether any further guidance should be included in the Minister's Guidelines on how proportionality is to be assessed by ASIO.

**Administrative matters**

Given the serious and unusual nature of the powers, I anticipate that the historical practice of the Inspector-General or a senior staff member attending and closely reviewing the questioning process will continue. I expect my office to work cooperatively with ASIO on administrative arrangements to ensure that the IGIS receives notice very early in the process when a QW is being considered so that practical matters, such as IGIS staff travel, can be arranged. We will also work cooperatively with ASIO to ensure that the written statement of procedures to be followed in the exercise of authority under a QW are appropriately tailored to the amended framework.

If the framework continues to be used very rarely, on a 'last resort' basis, my office will be able absorb the cost of overseeing the amended questioning framework within existing resources. However, this will need to be reviewed if the framework is to be used more frequently.

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<sup>96</sup> See IGIS submission to the Committee's review of the mandatory data retention regime (*Submission 36*), p. 12; IGIS submission to the Committee's review of the amendments made by the Telecommunications and Other Legislation Amendment (Assistance and Access) Act 2018 (*Submission 28*), p. 5; IGIS submission to the Committee's review of the Telecommunications Legislation Amendment (International Production Orders) Bill 2020, (*Submission 27*), p. 10.

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### 3. Internal authorisation framework for tracking devices

#### 3.1 Background

Prior to 2014, it was unlawful for an ASIO officer, employee or agent to use a tracking device without either a warrant (issued by the Attorney-General) or the consent of the person being tracked.<sup>97</sup>

Amongst other changes, the National Security Legislation Amendment Bill (No. 1) 2014 removed this general prohibition on the use of tracking devices. This allowed for devices to be used without a warrant in a wider range of circumstances. As the then IGIS, Dr Vivienne Thom AM, noted in her submission to the Committee's review of that Bill, it appeared that a warrant would only be required where some other Commonwealth, State or Territory law prevented the use of the device (for example, because use of the device involved trespass to property).<sup>98</sup>

In practice, ASIO has continued to seek warrants for the use of tracking devices in all states and territories.<sup>99</sup>

In June 2019, my office concluded an inspection project focusing on ASIO staff access to surveillance devices and other technical devices used for surveillance. The project considered the risk that devices maintained by ASIO could be misused for unauthorised purposes, and examined whether accountability measures and other risk controls adequately address this risk. The office concluded that the inherent risk of ASIO devices being misused for unauthorised purposes is low due to the complementary effect of risk controls that primarily address operational security and financial accountability risks. However, the project identified opportunities for ASIO to better manage this risk, in particular by ensuring that controls relevant to the risk of unauthorised misuse are clearly established in associated policies and procedures, and that these policies and procedures are easily accessed and applied by staff working with such devices.<sup>100</sup>

#### 3.2 Overview of amendments

The Bill proposes a range of further amendments to the provisions that govern ASIO's use of tracking devices. Primarily, the Bill enables ASIO to internally authorise the use of a tracking device without a warrant in certain circumstances. According to the Explanatory Memorandum, the amendments are intended to:

improve ASIO's ability to monitor potential security threats and to bring ASIO's ability to use surveillance devices in line with those of its law enforcement partners

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<sup>97</sup> Former section 26A of the ASIO Act.

<sup>98</sup> IGIS submission to the inquiry into the National Security Legislation Amendment Bill (No. 1) 2014 (*Submission 4*), p. 11. New section 26E of the ASIO Act also preserved ASIO's ability to install, use or maintain a tracking device where a person has given their consent.

<sup>99</sup> The use of surveillance devices may be authorised by warrants issued by the Attorney-General under either section 26 of the ASIO Act ('Issue of surveillance device warrants'); or section 27C of the ASIO Act ('Issue of identified person warrants') with subsequent authorisation by the Director-General or Attorney-General under section 27F of the ASIO Act ('Authority under identified person warrant—surveillance devices').

<sup>100</sup> IGIS, *Annual Report 2018-19*, p. 36.

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and

will ensure ASIO has greater operational ability to respond to time critical threats, mitigate the risk to ASIO operatives engaging in physical surveillance and help resolve the operational difficulties faced by ASIO when engaged in joint operations with law enforcement agencies, which already have equivalent powers.<sup>101</sup>

Although I note the functions of ASIO, as an intelligence agency, are distinct from the functions of law enforcement agencies, I do not express a view on the policy question of whether ASIO's powers in relation to tracking devices should be equivalent to those of law enforcement.

Some key oversight-related elements of the proposed amendments are discussed below.

**Changes to definitions of 'device', 'track' and 'tracking device'**

The Bill amends the ASIO Act's existing definitions of 'device', 'track' and 'tracking device' as follows:<sup>102</sup>

- The definition of 'device' is changed from 'includes instrument, apparatus and equipment' to 'includes instrument, apparatus, equipment *and any other things (whether tangible or intangible)*'.<sup>103</sup>
- The definition of 'track' is changed from 'be aware of the movement of the object or person from place to place' to 'determine or monitor the location of the person or object; *or the status of the object*'.<sup>104</sup>
- The definition of 'tracking device' is changed from 'a device or substance that, when installed in or on an object, enables a person to track the object or a person using or wearing the object'; to '*any device* capable of being used (whether alone or in conjunction with any other device) to track a person or an object'.<sup>105</sup>

The Explanatory Memorandum indicates that the amendment to the definition of 'tracking device' is intended to 'enable ASIO to maintain the effectiveness its intelligence gathering techniques and capabilities' and to 'ensure that ASIO is able to conduct its operations in the most efficient and effective way, with the ability to use any technology it has access to, where appropriate and subject to strict accountability requirements and restrictions'.<sup>106</sup> The amendments are also intended to 'better align with the definitions of different surveillance devices within the ASIO Act, and between the ASIO Act and the *Surveillance Devices Act 2004*'.<sup>107</sup>

The amended definitions are more technologically neutral and broader in scope than the existing definitions. The amended definitions will therefore allow for a broader range of activity to be authorised under a warrant or an internal authorisation than would have been possible under the existing definitions. My office will give close attention to the legality and propriety of any novel use of

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<sup>101</sup> Explanatory Memorandum, paragraph 13.

<sup>102</sup> These definitions are contained in section 22 of the ASIO Act.

<sup>103</sup> Schedule 2, item 2.

<sup>104</sup> Schedule 2, item 4.

<sup>105</sup> Schedule 2, item 5.

<sup>106</sup> Explanatory Memorandum, paragraph 649.

<sup>107</sup> Explanatory Memorandum, paragraph 650.

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the tracking device provisions that extends beyond the traditional understanding of the term ‘tracking device’.

### Level of authorisation

Under the existing ASIO Act, warrants in relation to tracking devices (and other surveillance devices) are issued by the Attorney-General, on application by the Director-General of Security.

The Bill will enable an ASIO employee or ASIO affiliate to request an authorising officer to give an internal authorisation for the use of a tracking device in relation to a particular person, or an object or class of object.<sup>108</sup> ‘Authorised officer’ is defined to mean the Director-General, or an ASIO employee or ASIO affiliate who holds an SES or equivalent position.

Internal authorisations may not be used to authorise the installation, use or maintenance of a tracking device where ASIO is required to enter premises or interfere with the interior of a vehicle without permission.<sup>109</sup> In instances where such actions are necessary, ASIO will continue to require a surveillance device warrant to be issued by the Attorney-General. The Bill also establishes a new form of warrant, issued by the Attorney-General, which will authorise the recovery of a tracking device that was installed under internal authorisation (or otherwise without a warrant) if the recovery of that device may involve entering premises or interference with a vehicle.<sup>110</sup>

### Threshold test

Under the existing ASIO Act, there are two types of warrants which may authorise the use of tracking devices in relation to a security matter:

1. *Identified person warrants* issued under section 27C of the ASIO Act, under which the Attorney-General may give conditional approval for ASIO to use a range of powers in relation to a particular person, including the use of one or more kinds of surveillance device.<sup>111</sup> Once such a warrant has been issued, the Director-General of Security may subsequently authorise the use of a surveillance device to track the identified person.
2. *Surveillance device warrants* issued under section 26 of the ASIO Act, in relation to a particular person, a particular premises, or an object or class of object.

For either type of warrant to be issued, the Attorney-General must be satisfied of a similar test:

- a) that ASIO’s use of a surveillance device **‘will, or is likely to, [substantially] assist the Organisation in carrying out its function of obtaining intelligence relevant to security’**; and
- b) that the person in relation to whom the warrant is sought (or the person likely to use the object or class of object in relation to which the warrant is sought) **‘is engaged in or is**

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<sup>108</sup> Proposed section 26G.

<sup>109</sup> Proposed section 26K. This section also prevents internal authorisations from being used to authorise the ‘remote installation of a tracking device, or enhancement equipment in relation to the device’; the use of a tracking device to ‘listen to, record, observe or monitor the words, sounds or signals communicated to or by a person’; and the doing of any thing that, apart from the internal authorisation, ASIO could not do without a computer access warrant.

<sup>110</sup> Proposed section 26R.

<sup>111</sup> ASIO Act, section 27C(2).

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*reasonably suspected by the Director-General of being engaged in, or of being likely to engage in, activities prejudicial to security*.<sup>112</sup>

These tests are similar to the tests that applied to tracking device warrants issued under the ASIO Act prior to 2014.<sup>113</sup>

The Bill's proposed test for an internal authorisation is lower than that for a warrant under the ASIO Act. The proposed test is that the authorising officer is satisfied that there are reasonable grounds for believing that ASIO's use of a tracking device in relation to a particular person, object or class of object **'will, or is likely to, substantially assist the collection of intelligence in respect of the security matter'** (a matter that is 'important in relation to security').<sup>114</sup> There is no requirement for the authorising officer to be satisfied that the particular person in relation to whom an authorisation is sought (which may be a body politic or corporate, rather than an individual)<sup>115</sup> may be *engaged in* activities prejudicial to security, nor that a specified object or class of object is likely to be used by a person engaged in activities prejudicial to security.

### Oral requests and authorisations

The existing provisions in the ASIO Act do not provide for warrants in relation to surveillance devices to be applied for, or issued, orally. However, as noted above, once a conditional approval for use of a surveillance device has been given by the Attorney-General under an identified person warrant, the use of a surveillance device may subsequently be authorised internally by the Director-General of Security (in writing). Further, section 29 of the ASIO Act allows for warrants to be issued by the Director-General for a period of up to 48 hours in an 'emergency'—where 'security will be, or is likely to be, seriously prejudiced' if the action to be authorised by the warrant does not commence before the warrant can be issued and made available by the Attorney-General.<sup>116</sup>

Contrasting with this approach, the Bill proposes that internal authorisations for tracking devices will be able to be both requested and made either orally or in writing.<sup>117</sup>

There are no statutory criteria to guide the circumstances in which requests and authorisations may be made orally. This differs from other recent legislation and proposed legislation providing for oral applications, including:

- the Bill's proposed amendments to the QW framework, which allow for warrants to be applied for or issued orally if there are reasonable grounds on which to believe that the delay caused by making a written request, or issuing a written warrant, may be prejudicial to security;<sup>118</sup>

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<sup>112</sup> ASIO Act, sections 26(3)(a) and 27C(2).

<sup>113</sup> Former section 26B of the ASIO Act.

<sup>114</sup> Proposed section 26G(6).

<sup>115</sup> *Acts Interpretation Act 1901*, section 2C.

<sup>116</sup> ASIO Act, section 29(1).

<sup>117</sup> Proposed section 26G(3).

<sup>118</sup> Proposed sections 34B(2)(b) and 34BF(1)(b).

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- the Telecommunications Legislation Amendment (International Production Orders) Bill 2020, which requires applications made by telephone to include particulars of the ‘urgent circumstances’ that made an oral application necessary;<sup>119</sup> and
- the *Telecommunications and Other Legislation Amendment (Assistance and Access) Act 2018*, which provides that technical assistance requests and technical assistance notices must not be given orally unless an imminent risk of serious harm to a person or substantial damage to property exists; the request or notice is necessary for the purpose of dealing with that risk; and it is not practicable in the circumstances to give the request or notice in writing.<sup>120</sup>

The Explanatory Memorandum indicates that the ability to orally request internal authorisations ‘creates the operational agility ASIO employees or affiliates require in carrying our surveillance to respond to time critical threats’.<sup>121</sup> This reference to time critical threats is not replicated in the Bill.

Oral requests are required to contain the same information as written requests, and a written record of the oral request must be made within 48 hours after the request is made.<sup>122</sup> Similarly, where an authorisation is given orally, a written record of the authorisation that specifies the same information as a written authorisation must be made within 48 hours of it being given.<sup>123</sup> These requirements for written records will be important for IGIS’s oversight of the provisions. I will expect written records to be comprehensive and include clear reasons for the request or authorisation being made orally.

### Circumstances in which a warrant or internal authorisation is not required

The Bill inserts a ‘relationship with other laws’ provision which states:

Nothing in this Division makes the use, installation, maintenance or recovery by the Organisation of a surveillance device unlawful if the use, installation, maintenance or recovery would not otherwise be unlawful under any other applicable law of the Commonwealth, a State or a Territory (including common law).<sup>124</sup>

The Explanatory Memorandum notes that this amendment is intended to clarify that ‘the surveillance device framework is permissive and provides a mechanism to obtain a warrant or internal authorisation for the use of a surveillance device in circumstances where it would otherwise be unlawful in certain states and territories’.<sup>125</sup>

While some states and territories prohibit the use of a tracking without a warrant, authorisation, or other lawful authority,<sup>126</sup> other states and territories either have not legislated to prohibit the use of

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<sup>119</sup> Our submission to the Committee’s review of that Bill (*Submission 27*, pp. 13–14) noted that the Committee may wish to consider including statutory guidance on what will constitute ‘urgent circumstances’.

<sup>120</sup> *Telecommunications Act 1997*, section 317M(2).

<sup>121</sup> Explanatory Memorandum, paragraph 659.

<sup>122</sup> Proposed section 26G(5).

<sup>123</sup> Proposed section 26H(5).

<sup>124</sup> Schedule 2, item 16 of the Bill.

<sup>125</sup> Explanatory Memorandum, paragraph 15.

<sup>126</sup> For example, section 9 of the *Surveillance Devices Act 2007* (NSW) prohibits the installation, use or maintenance of a tracking device, except if that installation, use or maintenance is in accordance with a warrant, emergency authorisation, a law of the Commonwealth or for a ‘lawful purpose’.

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tracking devices,<sup>127</sup> or have legislation that exempts ASIO from the effect of such a prohibition.<sup>128</sup> This means that, in the absence of provisions to the contrary in Commonwealth legislation, ASIO would be authorised to use tracking devices in certain states and territories without either a warrant or internal authorisation, as long as there is no contravention of other laws involved (such as those regulating trespass to property or interference with a vehicle).

Under existing arrangements, my office is able easily to identify where the use of a tracking device has been authorised by a warrant. The standard of record-keeping for warrants is high, and IGIS staff inspect a sample of warrants that involve the use of tracking devices. Although, in our experience, ASIO's record-keeping standards in other areas can vary, I expect ASIO will continue to lift its standards, including in relation to tracking devices that are used under an internal authorisation.<sup>129</sup> This will be supported by the clear record keeping requirements in the Bill.

However, I note the possibility of training and compliance difficulties arising if there are inconsistencies in ASIO practices between jurisdictions, and there could be legal and other complexities when targets move across state or territory boundaries. I would expect ASIO to maintain clear policies in these respects and to consider risks before adopting any policy of using tracking devices without a warrant or internal authorisation in any jurisdiction. To assist oversight, I would also expect ASIO to keep clear written records detailing the reasons for progressing without a warrant or internal authorisation, and to clearly document any such use of tracking devices within each operational plan. It may be appropriate for these matters to be further addressed in the next version of the Minister's Guidelines to ASIO.

### Implications for other legislative frameworks

The Bill's amendments in relation to ASIO's use of tracking devices have implications for other legislative frameworks overlooked by my office. For example:

- ASIO's special intelligence operation (SIO) regime allows the Attorney-General to authorise an ASIO employee or ASIO affiliate to engage in certain, specified conduct that would otherwise be subject to civil or criminal liability. Under the Bill, ASIO will be able to internally authorise a participant in an SIO to use a tracking device as part of the operation, even if the use of a tracking device was not included in the scope of conduct authorised by the Attorney-General. My office will review any use of internally authorised tracking devices in special intelligence operations through its usual oversight processes.

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<sup>127</sup> For example, the *Crimes (Surveillance Devices) Act 2010* (ACT) provides a framework for warrants and emergency authorisations to authorise the use of tracking devices by law enforcement officers, but does not prohibit the installation, use or maintenance of such devices without a warrant, emergency authorisation or other lawful authority.

<sup>128</sup> For example, section 8 the *Surveillance Devices Act 1999* (Vic.) prohibits the installation, use or maintenance of a tracking device, except under warrant, emergency authorisation or in accordance with a law of the Commonwealth (or other specified laws); but section 5 of the Act provides that the Act does not apply to anything done in the course of duty by the Director-General or an officer or employee of ASIO.

<sup>129</sup> The *IGIS Annual Report 2017-18* (p. 17) noted that deficiencies in record keeping were evident in almost all areas inspected in ASIO during the reporting period, but that ASIO had instituted a number of measures to improve these practices. The *IGIS Annual Report 2018-19* (p. 27) noted that inspections continued to identify minor record-keeping issues; however, the overall standard of record-keeping had improved.

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- The *Intelligence Services Act 2001* enables the Australian Secret Intelligence Service (ASIS) to undertake certain activities outside Australia in relation to Australian persons to support ASIO in the performance of its functions.<sup>130</sup> However, the provisions expressly do not authorise ASIS to undertake activities for which ASIO would require a warrant to undertake.<sup>131</sup> By enabling ASIO to use tracking devices without a warrant, the Bill will therefore also enable ASIS to use tracking devices in relation to Australian persons outside Australia to support ASIO in the performance of its functions. If the Bill passes, my office will discuss these implications further with ASIS to ensure that any additional legality and propriety issues are considered.

### 3.3 IGIS oversight of internal authorisations

My office has sufficient powers under the IGIS Act to oversee the legality and propriety of ASIO's use of tracking devices under the internal authorisation provisions. Tracking a person's location, regardless of the technology used, is an inherently intrusive activity. Like other intrusive powers available to ASIO, ASIO's use of tracking devices under the internal authorisation framework will be given close oversight by my office.

My office was consulted about oversight arrangements in the development of the proposed amendments. There are several features of the proposed amendments that will assist IGIS oversight:

- clear statutory requirements outlining the information to be included in a request for an internal authorisation,<sup>132</sup> in the authorisation itself,<sup>133</sup> and in any requests for variation;<sup>134</sup>
- statutory requirements for written records to be made, within 48 hours, of any internal authorisations or variations that are requested or made orally (as discussed above);<sup>135</sup>
- a requirement for ASIO to keep a register of requests for internal authorisations, including the name of the person who made the request, the security matter in respect of which the request was made, the day on which the authorisation was given or refused, the name of the authorising officer, the day on which the authorisation ceased to be in force or was discontinued, and the location at which any record relating to the request is kept by ASIO;<sup>136</sup> and
- a requirement for the Director-General of Security to give a report to the Attorney-General within three months of the expiry of each internal authorisation including the extent to which the authorisation has assisted ASIO in carrying out its functions, the security matter in respect of which the authorisation was given, the name of any person whose location was tracked, the period in which the tracking device was used, details of any object in or on which a tracking device was installed, details of the compliance with any restrictions or conditions to which the authorisation was subject, and details of any variations that were made.<sup>137</sup> I will expect these reports to be supported by detailed records of all instances in which tracking devices have

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<sup>130</sup> *Intelligence Services Act 2001*, section 13B.

<sup>131</sup> *Intelligence Services Act 2001*, section 13D.

<sup>132</sup> Proposed section 26G(4).

<sup>133</sup> Proposed section 26H(2).

<sup>134</sup> Proposed section 26N(3).

<sup>135</sup> Proposed sections 26G(5), 26H(5), 26N(4) and 26N(9).

<sup>136</sup> Proposed section 26Q.

<sup>137</sup> Proposed section 34AAB.

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been used, including the particular ASIO employees or ASIO affiliates who exercised authority under the internal authorisation.<sup>138</sup>

The Bill will also require ASIO's annual report to include the number of requests made for internal authorisation, and the number of authorisations given.<sup>139</sup> However, as I have noted for the Committee's consideration in other contexts,<sup>140</sup> there is no requirement for this statistical information in ASIO's annual report to be made public.

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<sup>138</sup> Proposed section 26M provides that the authority conferred by an internal authorisation or by the Bill's provisions for the recovery of a tracking device may be exercised on behalf of ASIO by an ASIO employee or an ASIO affiliate. 'ASIO affiliate' is broadly defined in section 4 of the ASIO Act to include *any person* performing functions or services for ASIO in accordance with a contract, agreement or other arrangement.

<sup>139</sup> Schedule 2, item 21 of the Bill.

<sup>140</sup> See IGIS submission to the Committee's review of the mandatory data retention regime (*Submission 36*), p.11; IGIS submission to the Committee's inquiry into the impact of the exercise of law enforcement and intelligence powers on the freedom of the press (*Submission 28*), p. 8; IGIS submission to the Committee's review of the Telecommunications Legislation Amendment (International Production Orders) Bill 2020 (*Submission 27*), p. 15.

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## **Attachment A: Role of the Inspector-General of Intelligence and Security**

The Inspector-General is an independent statutory officer who reviews the activities of the following agencies:

- Australian Security Intelligence Organisation (ASIO);
- Australian Secret Intelligence Service (ASIS);
- Australian Signals Directorate (ASD);
- Australian Geospatial-Intelligence Organisation (AGO);
- Defence Intelligence Organisation (DIO); and
- Office of National Intelligence (ONI).

The Office of the IGIS is part of the Attorney-General's portfolio, and was previously located in the Prime Minister's portfolio from its commencement on 1 February 1987 until 10 May 2018. The IGIS is not subject to direction from any Minister on how responsibilities under the *Inspector-General of Intelligence and Security Act 1986* (IGIS Act) should be carried out.

The IGIS Act provides the legal basis for the IGIS to conduct inspections of the intelligence agencies and to conduct inquiries of the Inspector-General's own motion, at the request of a Minister, or in response to complaints. The overarching purpose of the IGIS's activities is to ensure that each intelligence agency acts legally and with propriety, complies with ministerial guidelines and directives, and respects human rights. A significant proportion of the resources of the Office are directed towards ongoing inspection and monitoring activities, so as to identify issues, including about the governance and control frameworks within agencies, before there is a need for major remedial action.

The inspection role of the IGIS is complemented by an inquiry function. In undertaking inquiries, the IGIS has strong investigative powers, including the power to require any person to answer questions and produce relevant documents, take sworn evidence, and enter agency premises. IGIS inquiries are conducted in private because they almost invariably involve classified or sensitive information, and the methods by which it is collected. Conducting an inquiry is resource intensive but provides a rigorous way of examining a complaint or systemic matter within an agency. The Inspector-General also receives and investigates complaints and public interest disclosures about the intelligence agencies. These come from members of the public and from current and former agency staff.

In response to the recommendations of the *2017 Independent Intelligence Review*, the Government announced that, subject to the introduction and passage of legislation, the jurisdiction of the IGIS will be extended to include the intelligence functions of the Department of Home Affairs, Australian Federal Police, Australian Criminal Intelligence Commission and Australian Transaction Reports and Analysis Centre. Resources for the IGIS have been increased to allow the office to sustain a full time equivalent staff of 55.