



Australian Government
Department of Home Affairs



Submission to Review of the National Security Legislation Amendment (Comprehensive Review and Other Measures No. 2) Bill 2023

Parliamentary Joint Committee on Intelligence and Security

6 April 2023

Table of Contents

1.	Introduction	4
2.	The Bill	4
2.1.	Schedule 1, Part 1—Powers and functions of the Attorney-General	5
2.2.	Schedule 1, Part 2—Defences for certain national infrastructure related offences	5
2.3.	Schedule 1, Part 4—Spent convictions	5
2.4.	Schedule 1, Part 6—Investigations by the Ombudsman	5
2.5.	Schedule 1, Part 8—Review under the archives law	6

List of Abbreviations

Term	Meaning
AAT	Administrative Appeals Tribunal
AGO	Australian Geospatial-Intelligence Organisation
Archives Act	<i>Archives Act 1983</i>
ASD	Australian Signals Directorate
ASIO	Australian Security Intelligence Organisation
ASIO Act	<i>Australian Security Intelligence Organisation Act 1979</i>
ASIS	Australian Secret Intelligence Service
The Bill	National Security Legislation Amendment (Comprehensive Review and Other Measures No. 2) Bill
Comprehensive Review	<i>Comprehensive Review of the Legal Framework of the National Intelligence Community</i>
Crimes Act	<i>Crimes Act 1914</i>
Criminal Code	<i>Criminal Code Act 1995</i>
The Department	Department of Home Affairs
DIO	Defence Intelligence Organisation
FOI Act	<i>Freedom of Information Act 1982</i>
IGIS	Inspector-General of Intelligence and Security
Law Officers Act	<i>Law Officers Act 1964</i>
Minister's Guidelines	<i>Minister's Guidelines in relation to the performance by the Australian Security Intelligence Organisation of its functions and exercise of its powers</i>
NIC	National Intelligence Community
ONI	Office of National Intelligence

1. Introduction

1. The Department of Home Affairs (the **Department**) welcomes the opportunity to provide a submission to the Parliamentary Joint Committee on Intelligence and Security's review of the National Security Legislation Amendment (Comprehensive Review and Other Measures No. 2) Bill 2023 (the **Bill**).
2. The Department notes the Bill will strengthen the legal framework of the National Intelligence Community (**NIC**) by implementing recommendations of the *Comprehensive Review of the Legal Framework of the National Intelligence Community* (**Comprehensive Review**) led by Mr Dennis Richardson AC.
3. The Department welcomes and supports further action to implement recommendations of the Comprehensive Review.
4. The Department supports targeted reforms to legislation governing Australia's intelligence agencies to address critical challenges they face and to ensure that the legal framework of the NIC keeps pace with an increasingly complex operational environment. The Department also notes that alongside the measures in the Bill, Australia's intelligence agencies remain subject to a range of strict safeguards, independent oversight, and transparency and accountability mechanisms under Australian law.

2. The Bill

5. The Bill proposes a number of amendments that would affect the operations of the Australian Security Intelligence Organisation (ASIO), noting the Department is responsible for policy and administration of the Australian Security Intelligence Organisation Act 1979 (ASIO Act) and the Telecommunications (Interception and Access) Act 1979 (to the extent it relates to ASIO). Amendments requiring security matters under the Archives Act 1983 (Archives Act) to be heard in the Security Division of the Administrative Appeals Tribunal (AAT) impact the Department to the extent the Department produces and handles security records as defined in the Bill.
6. As such, in framing this submission the Department has specifically considered amendments:
 - a. removing the ability of the Attorney-General under the Law Officers Act 1964 (Law Officers Act) to delegate his or her powers under the ASIO Act (recommendation 18);
 - b. removing the ability for the Executive to confer the powers vested in the Attorney-General in relation to ASIO onto another minister, except through legislative amendment, unless the Prime Minister is satisfied that exceptional circumstances exist (recommendation 19);
 - c. extending the existing defence in the Criminal Code Act 1995 (Criminal Code) under section 474.6 for ASIO officers so that it applies to all offences in section 474.6 (relating to interference with facilities) and providing a defence for ASIO officers for the offences in sections 477.2 (unauthorised modification of data to cause impairment) and 477.3 (unauthorised impairment of electronic communication) (recommendation 66);
 - d. expanding the exclusions in the spent convictions scheme under Part VIIC of the Crimes Act 1914 (Crimes Act) to enable ASIO to use, record and disclose spent convictions information (recommendation 136);
 - e. excluding the Australian Secret Intelligence Service (ASIS), Australian Geospatial-Intelligence Organisation (AGO), Australian Signals Directorate (ASD), Defence Intelligence Organisation (DIO) and Office of National Intelligence (ONI) from the jurisdiction of the Commonwealth Ombudsman (recommendation 167);
 - f. requiring all security matters under the Archives Act to be heard in the Security Division of the AAT (recommendation 191); and
 - g. amending the Freedom of Information Act 1982 (FOI Act) and Archives Act to provide that the Inspector-General of Intelligence and Security (IGIS) is only obliged to provide evidence that would or could arise from the release of material where the matter involves one or more of the agencies the IGIS oversees (recommendation 192).

2.1. Schedule 1, Part 1—Powers and functions of the Attorney-General

7. Schedule 1, Part 1 of the Bill implements recommendation 18 of the Comprehensive Review by amending the Law Officers Act to remove the ability of the Attorney-General to delegate his or her powers under the ASIO Act (with the exception of financial assistance powers). The Department supports these amendments. Given the role of the Attorney-General as Australia's First Law Officer and the significance of the powers in the ASIO Act, it is appropriate that the Attorney-General should not be able to delegate his or her powers in relation to ASIO.
8. In addition, Schedule 1, Part 1 of the Bill also implements recommendation 19 of the Comprehensive Review to remove the ability for the Executive to confer powers vested in the Attorney-General with respect to ASIO onto another minister, except through legislative amendment, unless the Prime Minister is satisfied that exceptional circumstances exist. As aforementioned, the Department considers this amendment consistent with the Attorney-General's special role as Australia's First Law Officer.

2.2. Schedule 1, Part 2—Defences for certain national infrastructure related offences

9. Schedule 1, Part 2 of the Bill implements recommendation 66 of the Comprehensive Review by extending the existing defence for ASIO officers under section 474.6 of the Criminal Code so that it applies to all offences in section 474.6 (relating to interference with facilities) and provides a defence for ASIO officers for the offences under sections 477.2 (unauthorised modification of data to cause impairment) and 477.3 (unauthorised impairment of electronic communication).
10. As noted in the Comprehensive Review, due to developments in technology, the activities that ASIO needs to undertake to effectively discharge its functions require additional targeted legal defences in the Criminal Code. The proposed amendments to the Criminal Code would enable ASIO to use more efficient and effective methods when conducting its functions under the ASIO Act, including to protect the covert nature of activities where necessary. All ASIO activities are conducted in line with the Minister's Guidelines in relation to the performance by the Australian Security Intelligence Organisation of its functions and exercise of its powers (Minister's Guidelines), issued by the Minister for Home Affairs. In particular, the Department notes the Minister's Guidelines are binding on ASIO and require ASIO to only undertake activities that are reasonable, necessary, and proportionate and using the least intrusive method available.

2.3. Schedule 1, Part 4—Spent convictions

11. Schedule 1, Part 4 of the Bill implements recommendation 136 of the Comprehensive Review by expanding the exclusions in the spent convictions scheme under Part VIIC of the Crimes Act to enable ASIO to use, record and disclose spent convictions information.
12. Proposed amendments to expand exclusions in the spent convictions scheme under the Crimes Act would allow ASIO access to information necessary to perform its functions under the ASIO Act, and protect Australia and Australians from threats to their security. As noted by the Comprehensive Review, it is appropriate that ASIO has access to this information in order to perform its functions. In particular, the Department notes the exclusion from the spent convictions scheme for ASIO is consistent with the exclusions available for other agencies who also require this information to conduct their functions, such as law enforcement agencies excluded under section 85ZZJ of the Crimes Act.

2.4. Schedule 1, Part 6—Investigations by the Ombudsman

13. Schedule 1, Part 6 will implement recommendation 167 of the Comprehensive Review by excluding ASIS, AGO, ASD, DIO and ONI from the jurisdiction of the Commonwealth Ombudsman.

14. While these agencies are currently within the legal jurisdiction of the Commonwealth Ombudsman, by convention the Commonwealth Ombudsman does not investigate action taken by these agencies. This convention reflects that the IGIS is Australia's dedicated intelligence oversight body, and as such the IGIS is best equipped to provide oversight of these agencies.
15. The Department supports the approach to formalise in law the current convention that these agencies are not overseen by the Commonwealth Ombudsman, appropriately leaving that oversight role to the IGIS. The Department acknowledges the clarity that this provides and the potential to reduce any perceived or actual duplication and inefficiency in oversight.
16. The Department notes this amendment does not change oversight arrangements for ASIO, which is currently excluded from the jurisdiction of the Commonwealth Ombudsman by virtue of the Ombudsman's Regulations 2017.

2.5. Schedule 1, Part 8—Review under the archives law

17. Schedule 1, Part 8 will implement recommendation 191 of the Comprehensive Review, requiring all security matters under the Archives Act to be heard in the Security Division of the AAT.
18. These amendments will preserve existing arrangements for Archives Act decisions relating to ASIO records, which are already required to be heard in the Security Division. However, these amendments would provide better protections and consistency in proceedings relating to the handling of security records for records originating from elsewhere across the NIC.
19. These amendments will also provide greater assurances around the treatment of sensitive information originating in the Home Affairs Portfolio by ensuring security records are appropriately handled in a secure way in the AAT.
20. Schedule 1, Part 8 will also implement recommendation 192 of the Comprehensive Review by amending the FOI Act and Archives Act to provide that the IGIS is only obliged to provide evidence addressing damages that would or could arise from the release of material where the matter involves one or more of the agencies subject to IGIS oversight.
21. These amendments do not raise any significant concerns for the Department.