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Australian Government

Australian Security
Intelligence Organisation

ASIO submission to the Parliamentary Joint Committee on Intelligence and Security

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

April 2023



Ref no. PCS 2023-02

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Introduction

1. Thank you for 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). The Bill includes amendments to implement a number of recommendations of the Comprehensive Review of the Legal Framework of the National Intelligence Community (the Comprehensive Review).
2. This submission addresses the following measures in the Bill that relate to ASIO:
 - Schedule 1 Part 2 – Defences for certain national infrastructure related offences
 - Schedule 1 Part 4 – Spent convictions
3. This submission also outlines the following measures which relate to ASIO, but do not alter current arrangements.
 - Schedule 1 Part 1 - Powers and functions of the Attorney-General
 - Schedule 1 Part 6 – Investigations by the Ombudsman
 - Schedule 1 Part 8 – Review under the archives law

Schedule 1 Part 2 – Defences for certain national infrastructure related offences

4. As part of our role to protect Australia and Australians from threats to their security, ASIO conducts a range of activities to identify and understand security threats.
5. Identifying and locating subjects of interest is a core part of this role. A person's digital footprint – for example which devices they are using and where those devices are located – provides key enabling information.
6. ASIO also needs to understand who else might be in the vicinity before conducting activities – to make sure we don't unnecessarily impact unrelated third parties in the area and to prevent our covert activity from being detected.
7. Finally, we need to make sure we protect our staff, sensitive capabilities and operations. As the Director-General of Security noted in his Annual Threat Assessment in February 2023:
 - a. Our staff work in a complex environment where "spies want to target them and extremists want to kill them". Consequently, we need to make sure that we understand what threats might exist before our staff are put in harm's way.
 - b. ASIO must do things "Australia's adversaries believe are impossible", so "it is vital to safeguard the tools, techniques and technologies" that allow us to keep Australians safe from threats to their security.
8. Due to developments in technology, the activities ASIO needs to undertake to effectively discharge its functions require additional, targeted legal defences. The inclusion of new defences would enable ASIO to use more efficient and effective methods when conducting

functions under the ASIO Act 1979, including to protect the covert nature of activities where necessary.

9. The proposed amendments ensure that ASIO officers have the necessary legal protections to protect Australia and Australians from threats to their security – while also protecting themselves and our sensitive capabilities.
10. All activities would continue to be conducted in line with the Guidelines issued by the Minister for Home Affairs which require ASIO to only undertake activities which are proportionate, and use the least intrusive method available.

Relevant findings of the Comprehensive Review

11. The Comprehensive Review recommended that:
 - a. Recommendation 66: The defence in subsection 474.6(7) of the Criminal Code should be extended for ASIO so that it applies to all offences in section 474.6 (interference with facilities). The defence should only be available where ASIO officers are acting in the course of their duties, and where that conduct is reasonable in the circumstances for the purpose of performing those duties.
12. The Comprehensive Review further agreed that ASIO-specific defences were also needed for offences in section 477.2 (unauthorised modification of data to cause impairment) and section 477.3 (unauthorised impairment of electronic communication).
13. The Review noted that extending the defences as proposed would enable ASIO to “address the challenges of next generation technology” and that “these challenges simply did not exist when the offences were introduced in 2004”.
14. The Review further observed that the targeted defences to the above offences would allow ASIO officers to undertake necessary activity both under and without a warrant. It noted that when ASIO is acting without a warrant, ASIO must carefully consider whether the use of these techniques in the circumstances is necessary, proportionate, reasonable and justified.
15. ASIO notes that these guiding principles are consistent with the existing requirements in the Guidelines issued by the Minister for Home Affairs, which require ASIO to only undertake activities which are proportionate, and use the least intrusive method available.

Schedule 1 Part 4 – Spent convictions

16. As a security agency, ASIO works closely with law enforcement and other government agencies to protect Australia and Australians from threats to their security.
17. Spent conviction information has the potential to help inform ASIO’s understanding of security threats, including in relation to people who might also be the subject of a law enforcement investigation.

18. However, currently, these agencies are not able to share spent conviction information – relating to older, less serious convictions – with ASIO, other than for the purposes of assessing the suitability of prospective employees or consultants.

Relevant findings of the Comprehensive Review

19. The Comprehensive Review noted that “excluding ASIO from the spent convictions regime, thereby allowing ASIO to take spent convictions into account, for the purpose of performing its security intelligence functions, is a legitimate and proper use of spent conviction information”.
20. It consequently recommended that:
- a. Recommendation 136: Exclusions in the spent convictions scheme in Part VIIC of the *Crimes Act 1914* should be expanded to enable ASIO to use, record and disclose spent conviction information for the performance of its functions.

Schedule 1 Part 1 - Powers and functions of the Attorney-General

21. Consistent with recommendations 18 and 19, the Bill limits the circumstances in which the Attorney-General’s powers in respect to ASIO can be conferred on another Minister through an action of the Executive, or delegated to an officer of the Commonwealth.
22. In practice, the amendments do not change the long-standing arrangements in which only the Attorney-General authorises warrants and special intelligence operations for ASIO.

Schedule 1 Part 6 – Investigations by the Ombudsman

23. Consistent with recommendation 167, the Bill includes amendments to clarify that intelligence agencies that fall within the oversight of the Inspector-General of Intelligence and Security are excluded from the jurisdiction of the Commonwealth Ombudsman.
24. The amendments do not change the oversight arrangements for ASIO, which is currently excluded from the Ombudsman’s jurisdiction under the Ombudsman Regulations 2017.

Schedule 1 Part 8 – Review under the archives law

25. Consistent with recommendation 191, the Bill includes amendments allowing all security matters under the *Archives Act 1983* to be heard in the Security Division of the Administrative Appeals Tribunal (AAT).
26. This amendment does not change existing arrangements for matters relating to ASIO records, which are already required to be heard in the Security Division of the AAT.