

OFFICIAL



Australian Government

**Australian Security
Intelligence Organisation**

ASIO supplementary 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 2023-05

OFFICIAL

OFFICIAL

1. Thank you for the opportunity to provide a further 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. This submission addresses questions raised during the public hearing as to the circumstances where it would be necessary for an ASIO affiliate to rely on the additional legal defences proposed in line with Recommendation 66 of the Comprehensive Review.
3. The term ASIO affiliate is defined in section 4 of the *ASIO Act 1979* as "a person performing functions or services for the Organisation in accordance with a contract, agreement or other arrangement". In practice, this could include persons such as secondees, contractors, consultants or human sources.
4. Consistent with the Comprehensive Review, the amendments provide ASIO employees and ASIO affiliates with targeted legal defences for specific offences in Part 10.6 and 10.7 of the *Criminal Code Act 1995*, not a broad immunity from criminal liability for those offences. This means that the defences are limited to those specific offences, and must be individually justified.
5. The Bill proposes that the defences would only be able to be relied on by ASIO employees and ASIO affiliates when acting in good faith in the course of their duties, and that the conduct is reasonable in the circumstances for the purpose of performing that duty. As the Explanatory Memorandum notes, in the case of ASIO affiliates, this would require them to be performing functions or services for ASIO, and acting in accordance with their contract, agreement or other arrangement.
6. For example, it may be necessary to have a human source operate technical equipment on ASIO's behalf to identify and locate a device in circumstances where they have physical access that ASIO is otherwise unable to achieve. In these circumstances, the human source would be conducting activities at the direction of ASIO, and within strict constraints.
7. In other circumstances, a human source might be able to facilitate ASIO's access to a facility or area for ASIO to conduct the activities. Without being included in these targeted defences, there is a risk a human source could be liable for ancillary offences (such as aiding or abetting the commission of an offence) when assisting ASIO to undertake these activities.
8. In all cases, ASIO will keep detailed records of circumstances where ASIO affiliates rely on the defences to enable oversight activities.
9. All activities – regardless of whether they are conducted by ASIO employees or ASIO affiliates – must be conducted in line with the proposed safeguards built into the legislation; namely that they must be acting in good faith in the course of their duties as an ASIO employee or affiliate, and their conduct must be reasonable in the circumstances for performing those duties.
10. Further, ASIO must also comply with the Minister's Guidelines which require that any means used for obtaining information must be proportionate to the gravity of the threat posed and its likelihood, including any potential impact on third parties, and using the least intrusive method available. These requirements apply to all ASIO activities for obtaining intelligence relevant to security, whether conducted by ASIO employees or ASIO affiliates.

OFFICIAL

OFFICIAL

11. Finally, all ASIO activities are overseen by the Inspector-General of Intelligence and Security for legality and propriety, and who has powers akin to a standing Royal Commission.
12. If necessary, ASIO would be happy to provide a classified briefing to assist the Committee in their review.

OFFICIAL