



Australian Government
Attorney-General's Department

April 2023

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

Introduction

The Attorney-General's Department welcomes the Parliamentary Joint Committee on Intelligence and Security's (PJCIS) review of the *National Security Legislation Amendment (Comprehensive Review and Other Measures No. 2) Bill 2023* (the Bill).

The Bill will enhance the legal framework of the National Intelligence Community (NIC) by implementing 10 recommendations (Recommendations 18, 19, 66, 136, 145, 167, 186, 188, 191 and 192) of the *Comprehensive Review of the Legislative Framework Governing the National Intelligence Community* (Comprehensive Review) within the Attorney-General's portfolio.

Comprehensive Review

The Comprehensive Review was conducted by Mr Dennis Richardson AC, former Secretary of the Departments of Defence and Foreign Affairs and Trade (DFAT), Ambassador to the United States and Director-General of the Australian Security Intelligence Organisation (ASIO). Commenced in June 2018 and handed to the then government in December 2019, the Comprehensive Review was the most recent in-depth review of Australia's national security laws since the Royal Commissions conducted by Justice Robert Hope in the 1970s and 1980s.¹ Mr Richardson reviewed the issues facing the NIC and the effectiveness of the legal framework supporting Australia's intelligence agencies. In his report, Mr Richardson made 203 recommendations about this legal framework.

¹ Commonwealth, Royal Commission on Intelligence and Security (1974-77) (First Hope Commission); Commonwealth, Royal Commission on Australia's Security and Intelligence Agencies (1983-84) (Second Hope Commission).

The terms of reference of the Comprehensive Review were broad, directing the Review to consider:

- the legislation relating to the 6 Australian Intelligence Community agencies, as well as the Australian Federal Police, Australian Criminal Intelligence Commission, Australian Transaction Reports Centre (AUSTRAC) and the Department of Home Affairs, to the extent their legislative provisions relate to the intelligence activities of these four agencies
- the appropriateness of maintaining the current distinction between foreign intelligence and security intelligence, and legislative distinctions and restrictions relating to intelligence collection onshore and offshore
- whether Australia should adopt a common legislative framework, as has been done in the United Kingdom and New Zealand
- improvements that could be made to ensure that the legislative framework for the NIC facilitates coordination and appropriate control, supports effective cooperation, liaison and information sharing, supports the intelligence purposes, functions, administration and staffing of each agency, and provides accountability and oversight, and
- any specific proposals for reform.

In conducting the Comprehensive Review, Mr Richardson consulted widely, engaging with all NIC agencies, the Inspector-General of Intelligence and Security (IGIS), the PJCIS, Commonwealth agencies, state and territory governments, international counterparts and the public. Mr Richardson also met periodically with the then Attorney-General and consulted with the then Shadow Attorney-General.

The Comprehensive Review affirmed the principles that Justice Hope delivered 40 years ago. This includes foundational principles that agencies must operate in accordance with the law, with propriety and political impartiality, in a manner that respects human rights and fundamental freedoms, and must be accountable for their conduct. Consistent with those principles, the Comprehensive Review made significant recommendations for legal reform, including those matters addressed in this Bill.

The Bill

The Bill will:

- remove the ability of the Attorney-General to delegate their powers under the *Australian Security Intelligence Organisation Act 1979* (ASIO Act) to Commonwealth officials, with the exception of financial assistance powers (**Recommendation 18** of the Comprehensive Review)
- remove the ability of the Executive to confer the 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 (**Recommendation 19** of the Comprehensive Review)
- insert new defences into *Criminal Code Act 1995* (Criminal Code)—sections 474.6 (interference with facilities), 477.2 (unauthorised modification of data to cause impairment) and 477.3 (unauthorised impairment of electronic communication) (**Recommendation 66** of the Comprehensive Review)
- expand the exclusions to the spent convictions scheme in the *Crimes Act 1914* (Crimes Act) to enable ASIO to use, record and disclose spent conviction information (**Recommendation 136** of the Comprehensive Review)
- require the IGIS to report annually on public interest disclosures (PIDs) received by, and complaints made to, the IGIS (**Recommendation 145** of the Comprehensive Review)
- exclude the Australian Secret Intelligence Service (ASIS), Australian Geospatial-Intelligence Organisation (AGO), Australian Signals Directorate (ASD), Office of National Intelligence (ONI) and Defence Intelligence Organisation (DIO) from the Commonwealth Ombudsman's (Ombudsman) jurisdiction (**Recommendation 167** of the Comprehensive Review)

- remove the AGO's exemption under the *Freedom of Information Act 1982* (FOI Act) in relation to documents that have originated with or been received by the Australian Hydrographic Office in the performance of its functions under the *Navigation Act 2012* (Navigation Act) (**Recommendation 186** of the Comprehensive Review)
- align the protections afforded to suspicious matter reports and suspect transaction reports of the AUSTRAC under the FOI Act (**Recommendation 188** of the Comprehensive Review)
- require all proceedings in relation to security records under the *Archives Act 1983* (Archives Act) to be heard in the Security Division of the Administrative Appeals Tribunal (AAT) (**Recommendation 191** of the Comprehensive Review), and
- require the IGIS only be obliged to provide evidence in proceedings under the Archives Act and FOI Act when the material concerned relates to one or more of the agencies the IGIS oversees (**Recommendation 192** of the Comprehensive Review).

The Bill will also make two amendments that were not considered by the Comprehensive Review to amend the *Intelligence Services Act 2001* (IS Act) to:

- increase the membership of the PJCIS from 11 to 13 members and increase flexibility in the composition of the PJCIS, and
- provide greater certainty regarding the level of detail required to describe the directed activities in a Ministerial direction under paragraph 6(1)(e).

The Department consulted closely with all NIC agencies, the IGIS and Ombudsman, in developing the Bill, and all are supportive of the Bill as drafted. The Department also consulted with the Departments of the Prime Minister and Cabinet, Defence, Foreign Affairs and Trade, Home Affairs and Infrastructure, Transport, Regional Development, Communications and the Arts who are also supportive of the Bill.

Measures in the Bill

Schedule 1, Part 1

Recommendation 18

Schedule 1, Part 1 of the Bill amends the *Law Officers Act 1964* (Law Officers Act) to remove the ability of the Attorney-General to delegate his or her powers under the ASIO Act to unelected officials (with the exception of financial assistance powers). This amendment implements Recommendation 18 of the Comprehensive Review, which states:

*'The Law Officers Act should be amended to remove the ability for the Attorney-General to delegate his or her power to issue warrants under the ASIO Act to the Solicitor-General, Secretary of the Attorney-General's Department or any other officer of the Commonwealth. The current prohibition in respect of warrants issued under the Telecommunications (Interception and Access) Act 1979 (TIA Act) should remain in respect of the new electronic surveillance framework.'*²

The Comprehensive Review considered that given the special role of the Attorney-General as Australia's First Law Officer and the significance of the powers in the ASIO Act, there are no circumstances in which the Attorney-General should be able to delegate their power for issuing ASIO warrants.³ As currently drafted,

² Dennis Richardson, AC, *Comprehensive Review of the Legal Framework of the National Intelligence Community* (Comprehensive Review) (2019) Volume 1, pg 314.

³ Comprehensive Review Volume 1, para 14.44.

section 17 of the Law Officers Act could allow delegation of the Attorney-General's powers to any official, regardless of level, position or department.⁴ The Department accepts the Comprehensive Review's assessment that this is not consistent with the principles of ministerial responsibility and accountability and the significance of the powers contained in the ASIO Act.

Recommendation 18 only expressly concerned the Attorney-General's power to *issue warrants* under the ASIO Act. In addition to the power to issue warrants, under the ASIO Act the Attorney-General is empowered to authorise Special Intelligence Operations,⁵ appoint prescribed authorities for the purpose of overseeing the execution of ASIO questioning warrants,⁶ give consent to institute prosecutions against secrecy provisions⁷ and authorise and determine guidelines concerning financial assistance to persons subject to questioning warrants.⁸ Consistent with the principles underlying Recommendation 18, the Bill removes the ability for the Attorney-General to delegate all their powers under the ASIO Act, with the exception of financial assistance powers and consent to institute prosecutions against secrecy provisions.

The authorisation of special intelligence operations is similar to the power to issue warrants as it also involves authorisation for ASIO officers and affiliates to engage in conduct which would otherwise be subject to civil or criminal liability. As such it is appropriate that this power is also not able to be delegated. The appointment of prescribed authorities in relation to ASIO's questioning warrants is a power most appropriately exercised by the Attorney-General so the ability to delegate will be removed. Prescribed authorities oversee the execution of the warrants and make directions concerning questioning.

It is appropriate that the Attorney-General continue to have the ability to delegate powers and functions under subsections 34JE(3) and (4) of the ASIO Act as these subsections relate to the provision of financial assistance to a person who is the subject of a questioning warrant in respect of the subject's appearance before a prescribed authority for questioning under warrant, rather than relating to ASIO's use of powers. The only current delegation under section 17 of the Law Officers Act of the Attorney-General's powers in the ASIO Act concerns financial assistance for questioning and apprehension matters under ASIO Act subsections 34JE(3) and (4). The ASIO Act provides that the power to provide consent to institute prosecutions against secrecy provisions can currently be exercised by 'a person acting under the Attorney-General's direction'.⁹ As this delegation is already expressly provided for in the ASIO Act, it will continue to have operation after the amendment to the Law Officers Act.

The proposed approach to the restriction on the power to delegate is also consistent with the existing exemption in relation to all TIA Act powers under section 17 Law Officers Act.¹⁰ It is also consistent with the proposed approach in response to Recommendation 19 which refers to '[t]he Attorney-General's powers in respect of ASIO'.

⁴ *Law Officers Act 1964* (Cth) s 17.

⁵ *Australian Security Intelligence Organisation Act 1979* (Cth) s 35A.

⁶ *Australian Security Intelligence Organisation Act 1979* (Cth) s 34AD.

⁷ *Australian Security Intelligence Organisation Act 1979* (Cth) s 18C.

⁸ *Australian Security Intelligence Organisation Act 1979* (Cth) s 34JE.

⁹ *Australian Security Intelligence Organisation Act 1979* (Cth) s 18C.

¹⁰ *Law Officers Act 1964* (Cth) s 17(6).

Recommendation 19

Schedule 1, Part 1 of the Bill would also amend the *Acts Interpretation Act 1901*, the ASIO Act, and the *Telecommunications (Interception and Access) Act 1979* to remove the ability for the Executive to confer the 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. This amendment implements Recommendation 19 of the Comprehensive Review, which states:

*'The Attorney-General's powers in respect of ASIO should not be able to be conferred on another minister through an action of the Executive. Legislative amendment should be required. The ability of the Governor-General in Council to make a substituted reference order in respect of the Attorney-General's role in exceptional cases should be retained, but only used in exceptional circumstances, such as where there is no Attorney-General.'*¹¹

As above, given the special role of the Attorney-General as Australia's First Law Officer and the significance of the powers in the ASIO Act, there are limited circumstances in which the Attorney-General's powers under the ASIO Act should be conferred on another minister without express approval of the Parliament.¹² The Governor-General's power to alter ministerial arrangements, on advice from the Executive, under section 19B of the *Acts Interpretation Act 1901* currently means the Attorney-General's role with respect to ASIO could be so transferred.¹³ The Bill will ensure that legislative amendment is required to confer the Attorney-General's powers in respect of ASIO on another minister, except where exceptional circumstances exist.

The Bill requires the Prime Minister to be satisfied that exceptional circumstances exist, rather than that the Governor-General be satisfied of this as implied in the recommendation. This is consistent with long-standing legal advice that decision-making power should be conferred on the appropriate minister rather than the Governor-General.¹⁴ The Prime Minister is the appropriate minister to determine whether exceptional circumstances exist given that the Prime Minister is responsible for the allocation of ministerial responsibilities and the unique role of the Attorney-General in executive government.

Exceptional circumstances is not defined in the Bill or the Explanatory Memorandum in order to not unduly constrain when this power could be exercised. However, an example of exceptional circumstances could include where there is no Attorney-General, as stated in the Comprehensive Review and provided in the Bill's explanatory memorandum.

Schedule 1, Part 2

Schedule 1, Part 2 of the Bill would insert a new defence in the Criminal Code under section 474.6 for ASIO officers for the offences in subsections 474.6(1) and (3) (relating to interference with facilities) and provide a defence for ASIO officers for the offences in section 477.2 (unauthorised modification of data to cause impairment) and section 477.3 (unauthorised impairment of electronic communication). This amendment implements Recommendation 66 of the Comprehensive Review, which states:

¹¹ Comprehensive Review Volume 1, pg 315.

¹² Ibid.

¹³ Ibid; *Acts Interpretation Act 1901* (Cth) s 19B.

¹⁴ *Drafting Direction 3.4 Conferral and exercise of powers (including by Governor-General)*, Office of Parliamentary Counsel, [Part 1 \(Advice of the Australian Government Solicitor in 1997; 12 December 1997 Ref: OGC97076500\)](#).

*'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 purposes of performing those duties.'*¹⁵

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, including to protect the covert nature of activities where necessary.¹⁶ While the wording of the recommendation is limited to section 474.6, discussion in paragraph 24.56 of the Comprehensive Review's report clearly contemplates that defences to offences in Parts 10.6 and 10.7 of the Criminal Code are also needed. Following consultation with ASIO and the Department of Home Affairs, the Department is satisfied that additional defences in sections 477.2 and 477.3 are necessary, appropriate and effectively balance national security interests against the individual's right to privacy. These defences reflect the current and foreseen requirements of ASIO and will best allow it to perform its security functions in the national interest.

Schedule 1, Part 3

Schedule 1, Part 3 of the Bill would amend the IS Act to provide that the PJCIS is to consist of 13 members, comprised of at least 2 Government senators, 2 Government members of the House of Representatives, 2 non-Government senators and 2 non-Government members of the House of Representatives. The remaining 5 members could be drawn from either chamber. The quorum requirement would also increase from 6 to 7 members. The Bill does not amend the requirement for the Government to hold a majority.

This amendment is intended to allow for greater flexibility in determining PJCIS membership while retaining the requirement for representation of both the Senate and House of Representatives, and Government and non-Government members. It also raises the quorum requirement accordingly. Oversight and accountability by an expanded PJCIS will provide confidence to the Australian public that intelligence and security agencies are subject to robust parliamentary oversight.

Schedule 1, Part 4

Schedule 1, Part 4 of the Bill would expand 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. This amendment implements Recommendation 136 of the Comprehensive Review, which states:

*'Exclusions in the spent convictions scheme in Part VIIC of the Crimes Act should be expanded to enable ASIO to use, record and disclose spent conviction information for the performance of its functions.'*¹⁷

The Commonwealth spent convictions scheme aims to prevent discrimination on the basis of previous convictions by limiting the use and disclosure of older, less serious convictions and findings of guilt.¹⁸ Currently, certain agencies, primarily law enforcement,¹⁹ have exemptions to the scheme which allow them

¹⁵ Comprehensive Review Volume 2, pg 192.

¹⁶ Comprehensive Review Volume 2, paras 24.51-24.54.

¹⁷ Comprehensive Review Volume 3, pg 51.

¹⁸ *Crimes Act 1914* (Cth) Volume 2 s 85ZV; Comprehensive Review Volume 3, para 33.123.

¹⁹ *Crimes Act 1914* (Cth) Volume 2 s 85ZZH, 85ZZJ; *Crimes Regulations 2019* (Cth) Schedule 2.

to use spent conviction information in the performance of their functions.²⁰ Excluding ASIO from the spent conviction scheme will allow ASIO to use, record and disclose spent conviction information to better perform its security functions. Further, it will rectify an existing discrepancy whereby law enforcement agencies are able to use, record and disclose spent conviction information for investigations or the prevention of a crime, while ASIO is prohibited from doing the same in the performance of its functions.²¹

In accordance with paragraph 85ZZ(1)(b) of the Crimes Act, the Information Commissioner has advised the Department that ASIO's exclusion from the spent convictions scheme should be granted and has specified no restriction should be placed on the exclusion beyond the wording of the Bill.²²

Schedule 1, Part 5

Schedule 1, Part 5 of the Bill would amend the *Inspector-General of Intelligence and Security Act 1986* (IGIS Act) to require the IGIS to report annually on PIDs received by, and other complaints made to, the IGIS. This amendment implements Recommendation 145 of the Comprehensive Review, which states:

*'The IGIS should be subject to a legislative requirement to report annually on public interest disclosures received by, and complaints about similar conduct made to, the IGIS.'*²³

The IGIS already undertakes a practice of reporting annually on the nature of PIDs it receives to provide transparency about the *Public Interest Disclosure Act 2013* (PID Act) and its application to agencies within its jurisdiction.²⁴ Requiring the IGIS to report on PIDs and other complaints received in its annual report will formalise current PID reporting practices, and introduce greater consistency with the legislative annual reporting requirements imposed on the Commonwealth Ombudsman.²⁵ Moreover, requiring the IGIS to publish this information would further enhance the transparency of the IGIS' administration of PID complaints-management schemes.

Given the covert nature of the functions and powers of the intelligence agencies that fall within the IGIS's jurisdiction, it is important for transparency for the IGIS to include as much information as possible about its activities and findings about intelligence agency activities, and the PIDs it receives regarding those agencies, without disclosing information that would compromise national security or the privacy of individuals.

New subsection 35(2AB) of the IGIS Act would provide that the IGIS must include in an annual report the following information about the complaints the IGIS has received during the period to which the report relates:

- the number of complaints made to the Inspector-General under Division 2 of Part II of the IGIS Act during the period to which the report relates
- the kinds of matters to which the complaints related
- the actions taken by the Inspector-General in response to the complaints, including the number of inquiries conducted by the Inspector-General in response to the complaints, and
- a summary of the actions taken by the relevant intelligence agencies in response to the complaints and to the Inspector-General's conclusions and recommendations as a result of the inquiries.

²⁰ Comprehensive Review Volume 3, para 33.125.

²¹ *Crimes Act 1914* (Cth) s 85ZZH, 85ZZJ.

²² *Crimes Act 1914* (Cth) s 85ZZ(1)(b).

²³ Comprehensive Review Volume 3, pg 131.

²⁴ Comprehensive Review Volume 3, paras 35.182, 35.187.

²⁵ *Public Interest Disclosure Act 2013* (Cth) s 76(1).

New subsection 35(2AC) of the IGIS Act would provide that the Inspector-General must include in an annual report the following information about PIDs:

- the number of disclosures of information received by, including but not limited to disclosures of information allocated to, the Inspector-General under the PID Act during the period to which the report relates
- the kinds of disclosable conduct with which the information was concerned
- the actions taken by the Inspector-General to handle the disclosures, including the number of inquiries conducted by the IGIS under the IGIS Act and the number of investigations conducted by the IGIS under the PID Act
- a summary of the actions taken by the relevant intelligence agencies in response to the disclosures, the Inspector-General's conclusions and recommendations as a result of the inquiries or investigations, and any other matters set out in reports relating to the inquiries or investigations, including the matters that must be set out in an investigation report under section 51 of the PID Act.

The Attorney-General would continue to have the ability under existing subsection 35(5) of the IGIS Act to make such deletions from the copy of the report that is tabled in Parliament as the Attorney-General considers necessary in order to avoid prejudice to security, the defence of Australia, Australia's relations with other countries, law enforcement operations or the privacy of individuals.

Schedule 1, Part 6

Schedule 1, Part 6 of the Bill would amend the *Ombudsman Act 1976* to exclude ASIS, AGO, ASD, ONI and DIO from the Commonwealth Ombudsman's jurisdiction. This amendment implements Recommendation 167 of the Comprehensive Review, which states:

*'ASIS, AGO, ASD, ONI and DIO should be excluded from the Ombudsman's jurisdiction.'*²⁶

By convention, the Commonwealth Ombudsman already does not investigate action taken by ASIS, AGO, ASD, DIO or ONI, although these agencies are currently within its legal jurisdiction.²⁷ These agencies are overseen by the IGIS, Australia's dedicated intelligence oversight body. This amendment will formalise the Commonwealth Ombudsman's existing approach while maintaining the strong oversight provided by the IGIS.

Part 6 also excludes ASIO from the Ombudsman's jurisdiction under the Ombudsman Act. Though ASIO is already excluded from the Ombudsman's jurisdiction through the *Ombudsman Regulations 2017* (Ombudsman Regulations),²⁸ Part 6 ensures that ASIO's exclusion is consistent with ASIS, AGO, ASD, ONI and DIO. The Ombudsman Regulations will be amended at a later date to omit ASIO's exclusion in the regulations.

Schedule 1, Part 7

Recommendation 186

Schedule 1, Part 7 of the Bill would amend the FOI Act to remove the AGO's exemptions in relation to documents that have originated with, or been received from, the Australian Hydrographic Office (AHO) in

²⁶ Comprehensive Review Volume 3, pg 244.

²⁷ Comprehensive Review Volume 3, para 40.30.

²⁸ *Ombudsman Regulations 2017* (Cth) s 6(a).

the performance of its functions under subsection 223(2) of the Navigation Act. This amendment implements Recommendation 186 of the Comprehensive Review, which states:

*'The FOI Act should be amended to remove the AGO's exemption in respect of its non-intelligence function.'*²⁹

The AHO is a part of the AGO.³⁰ The AHO produces a number of non-intelligence documents as part of its role in providing Australia's national nautical charting service under the Navigation Act.³¹ Following the transfer of the AHO's functions to the AGO (in October 2017), these non-intelligence documents are all currently exempt from the FOI Act due to the AGO's blanket exemption.³² This exemption is appropriate in relation to the AGO's intelligence functions where sensitive information, if released, could cause harm to Australia's national security. However, the functions of the AHO (which is part of the AGO) under subsection 223(2) of the Navigation Act are not intelligence functions. This amendment is intended to improve transparency by ensuring that documents related to the non-intelligence functions of the AHO are not automatically exempt from the operation of the FOI Act. This amendment will retain the exemption from the FOI Act for AGO staff that work under the AHO but conduct activities in the performance of AGO's functions under section 6B of the IS Act.

Recommendation 188

Schedule 1, Part 7 of the Bill would also ensure the protections afforded under the FOI Act to AUSTRAC suspicious matter reports, suspect transaction reports, and information given to AUSTRAC in response to a notice under section 49 of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (AML/CTF Act), are aligned and apply regardless of the agency holding the documents. This amendment implements Recommendation 188 of the Comprehensive Review, which states:

*'In respect of AUSTRAC, consistent protections should be afforded to Suspicious Matter Reports and Suspicious [sic] Transaction Reports under the FOI Act.'*³³

The FOI Act currently protects AUSTRAC suspicious matter reports, suspect transaction reports and information given to AUSTRAC in response to a notice under section 49 of the AML/CTF Act, only when they are held by AUSTRAC and not when they are held by another agency.³⁴ The suspicious matter reports and suspect transaction reports contain sensitive information from reporting entities that are critical to AUSTRAC's intelligence role, while information given in response to a notice under section 49 of the AML/CTF Act may include information that is relevant to, or facilitative of, an active investigation. This amendment recognises that suspicious matter reports and suspect transaction reports require protection, regardless of the agency they are in the possession of. This amendment is consistent with the FOI Act's treatment of other documents. For example, section 7(2A) provides that any agency is exempt from the operation of the FOI Act in relation to an intelligence agency document that has originated with, or has been received from, any of the listed intelligence agencies.³⁵

²⁹ Comprehensive Review Volume 4, pg 39.

³⁰ *Intelligence Services Act 2001* (Cth) s 6B(3).

³¹ *Navigation Act 2012* (Cth), s 223.

³² Comprehensive Review Volume 4, para 43.91.

³³ Comprehensive Review Volume 4, pg 44.

³⁴ Comprehensive Review Volume 4, paras 43.121 – 43.124; *Freedom of Information Act 1982* (Cth) Sch 2 Part II Div 1.

³⁵ *Freedom of Information Act 1982* (Cth) s 7(2A).

Schedule 1, Part 8

Recommendation 191

Schedule 1, Part 8 of the Bill would amend the *Administrative Appeals Tribunal Act 1975* and the Archives Act to require all proceedings in relation to security records under the Archives Act be heard in the Security Division of the AAT. This amendment implements Recommendation 191 of the Comprehensive Review, which states:

*'All security matters arising under the Archives Act should be heard in the Security Division of the AAT.'*³⁶

Currently, the AAT's power under the Archives Act to review a decision of the National Archives of Australia in respect of access to a record of ASIO is the only class of decision under the Archives Act that may be exercised by the AAT only in the Security Division. This results in inconsistency in proceedings relating to ASIO records, in comparison to records of the rest of the NIC. The Security Division must be constituted by at least one presidential member. Requiring all proceedings in relation to security records under the Archives Act to be heard in the Security Division will also have practical benefits in utilising tribunal members and staff that have experience with national security proceedings, as well as more efficient processes and procedures.

The amendment would ensure that proceedings concerning all exempt records under paragraphs 33(1)(a) and (b) of the Archives Act are heard in the Security Division. Paragraphs 33(1)(a) and (b) concern:

- records which contain information or a matter, the disclosure of which could reasonably be expected to cause damage to the security, defence or international relations of the Commonwealth (33(1)(a)), or
- information or a matter that was communicated by a foreign entity to an Australian Commonwealth entity, which the foreign entity advises is confidential and the confidentiality of which is reasonable to maintain (33(1)(b)).

Paragraphs 33(1)(a) and (b) of the Archives Act are intended to capture all security matters arising under the Archives Act in accordance with Recommendation 191 of the Comprehensive Review.

The amendment would also include records that did not originate with NIC agencies, which will ensure that all relevant exempt records are captured, including where information provided by NIC agencies is included in a record of another department or agency.

Recommendation 192

Schedule 1, Part 8 of the Bill would also amend the FOI Act and Archives Act to require the IGIS only be obliged to provide evidence in proceedings under these Acts when the material in the proceedings is claimed to be an exempt document under FOI Act section 33 and it relates to one or more of the agencies the IGIS oversees. This amendment implements Recommendation 192 of the Comprehensive Review, which states:

'The FOI Act and the Archives Act should be amended so that the IGIS is only required to provide evidence that addresses the damage that would, or could reasonably be expected to,

³⁶ Comprehensive Review Volume 4, pg 44.

*arise from the release of material where the matter involves one or more of the agencies that the IGIS oversees.*³⁷

When an applicant requests review of a decision under the FOI Act or Archives Act and the record in question is claimed to be an exempt document on the grounds of FOI Act section 33, the Information Commissioner or the AAT currently must seek advice from the IGIS and the IGIS must comply, unless the IGIS forms the opinion they are not appropriately qualified to do so.³⁸ This requirement forces the IGIS to turn their mind to any matter related to the security, defence or international relations of the Commonwealth that is brought for review, even when significantly outside of the scope of their responsibility and expertise. When the matter is one that does not concern one of the agencies the IGIS oversees, this presents a significant administrative burden that presents no added value or benefit.³⁹ This amendment ensures the IGIS is only required to appear before the IC or AAT when the request concerns an agency the IGIS oversees, and provides discretion in all other cases.

Schedule 1, Part 9

Schedule 1, Part 9 of the Bill would amend the IS Act to provide certainty regarding the level of detail required to describe the directed activities (which can be of a specific or general nature, or by way of a class or classes) in a Ministerial direction under paragraph 6(1)(e).⁴⁰

Practice to date of Ministerial directions under IS Act paragraph 6(1)(e) has been for the Foreign Minister to direct ASIS to undertake activities predominantly with reference to a purpose. This amendment makes clear the Minister may direct ASIS to undertake an activity or activities which can be of a specific or general nature, or by way of a class or classes of activities. Review and consideration of the provision has identified the need for greater certainty about the level of detail required to specify activities in a direction. The amendment is intended to make clear that the Minister may direct ASIS to undertake an activity or activities which can be of a specific or general nature, or by way of a class or classes. Where a class has been specified by the Minister, ASIS will be responsible for satisfying itself that a proposed activity falls within the specified class.

The amendment would not change the existing limitations on ASIS in the performance of its functions under the IS Act, such as the limitations in subsections 6(4), (5B) and (6) and sections 11 and 12.

³⁷ Comprehensive Review Volume 4, pg 61.

³⁸ *Archives Act 1983* (Cth) s 50A; *Freedom of Information Act 1982* (Cth) s 55ZB.

³⁹ Comprehensive Review Volume 4, 43.215.

⁴⁰ *Intelligence Services Act 2001* (Cth) s 6(1)(e).