

Australian Government Response to the Parliamentary Joint Committee on Intelligence and Security Report: *Review of proposed amendments to the Home Affairs and Integrity Agencies Legislation Amendment Bill 2017*

On 6 March 2018, the Parliamentary Joint Committee on Intelligence and Security (the Committee) commenced an inquiry into proposed Government amendments to the Home Affairs and Integrity Agencies Legislation Amendment Bill 2017 (the Bill). This followed the Committee's review of the Bill as it was introduced into the Parliament on 20 December 2017. On 28 March 2018, the Committee tabled its final report on the Bill, which made one recommendation – that the amendments be introduced and passed by the Parliament.

The Home Affairs Portfolio was established on 20 December 2017 and brings together Australia's national security, law enforcement and criminal justice, immigration, and emergency management functions and agencies under a single portfolio.

This arrangement enhances the Government's ability to respond to emerging threats — including terrorism, organised crime and foreign interference — through comprehensive policy development, consolidated and better integrated strategic coordination, and the targeted allocation of resources to ensure a safer, more secure Australia. It is a direct response to the evolving and dynamic security environment we face.

The Bill will facilitate the transfer of the Australian Security Intelligence Organisation (ASIO) into the Home Affairs Portfolio and enshrines a significant integrity and oversight role for the Attorney-General in the legislation governing Australia's security and intelligence agencies. It also clarifies the Attorney-General's responsibility for the Inspector-General of Intelligence and Security and the Independent National Security Legislation Monitor.

The amendments, taken as a whole with the Bill, amend 36 Acts to ensure Ministerial and Departmental functions and powers affected by this significant change in national security arrangements are clear on the face of Commonwealth legislation. Their addition enables the Parliament to consider all legislation affected by this Machinery of Government change at one time. This includes clarifying which Minister, Secretary or Department exercises certain powers and functions consistent with the principles of interpretation in the *Acts Interpretation Act 1901*, and removes the need to refer to the Substituted Reference Order and Attorney-General's Authorisation made on 20 December 2017.

In line with the Committee's recommendation, the Government will introduce the amendments to the Bill as soon as practicable in the next Parliamentary sittings.

In regard to the Committee's comment that "further clarification of the respective roles of the Minister for Home Affairs and the Attorney-General would assist the Parliament in its debate of the proposed amendments", additional information in relation to the Acts identified at paragraph 1.31 of the report is set out below.

The Government thanks the Committee for its consideration of the proposed amendments to the Bill, and its valuable bipartisan support for this historic national security reform.

Additional information on specified ministerial roles and responsibilities

Legislation (and administrative responsibility under the Administrative Arrangements Order (AAO))	Ministerial roles and functions: AG and MHA
<p>Australian Security Intelligence Organisation Act 1979 (ASIO Act)</p> <p>- Section 38 (withholding notice regarding adverse security assessment)</p> <p><i>This Act is currently administered by the Attorney-General (AG) under the AAO. It is intended that the AAO will be amended following passage of this bill to transfer responsibility for this Act to the Minister for Home Affairs (MHA).</i></p>	<ul style="list-style-type: none"> • The ASIO Act defines the Australian Security Intelligence Organisation's (ASIO) role, functions and remit, and establishes ASIO's special powers. • The MHA will exercise all powers and functions under the ASIO Act, except those which explicitly remain with the AG, reflecting his or her role as First Law Officer with responsibility for integrity and oversight: being consulted on ASIO guidelines (s 8A); issuing ASIO warrants (including questioning, and questioning and detention warrants) and authorising special intelligence operations (Part III, Divisions 2, 3 and 4); consenting to the prosecution of certain offences (s18C and 92(3)); requiring the Administrative Appeals Tribunal (AAT) (and the Inspector General of Intelligence and Security (IGIS)) to inquire into certain matters and publishing findings (s65). • As the Minister responsible for ASIO (and national security policy and operations more broadly) the MHA is best placed to determine whether a security assessment should be withheld for security reasons (s 38). The basis for making such a determination is focused on security, and there is no general discretion. The Minister needs to be satisfied that either: <ul style="list-style-type: none"> (a) withholding notice is essential to the security of the nation, or (b) disclosure of the assessment would be prejudicial to the interests of security.
<p>Administrative Appeals Tribunal Act 1975 (AAT Act)</p> <p>- Sections 38A (Director-General to lodge material); 39B (Public Interest Certificates); 43AAA (Tribunal findings – security assessments)</p> <p><i>The AG administers this Act under the AAO.</i></p>	<ul style="list-style-type: none"> • The AAT Act provides for the establishment, structure and management of the AAT. The Act and associated regulations set out the core powers and procedures of the AAT. • In the Bill, the only powers or functions that will transfer to the MHA under the AAT Act are: the issue of 'public interest certificates' relating only to the AAT's review of ASIO security assessments in the Security Division (s39B), and receipt of copies of AAT findings in relation to reviews of ASIO security assessments (s43AAA(4)). The reference to the Minister at s38A relates to the Minister who is specified at s38 of the ASIO Act (see above). The issue of 'security/defence certificates' under s39A is undertaken by the 'ASIO Minister' (which is currently the AG, but will be the MHA following passage of the bill). • Section 39B of the AAT Act applies only in the limited circumstance of a proceeding in the Security Division to which section 39A – review of a ASIO security assessment – applies (s39B(1) refers).

<p>AAT Act (cont...)</p>	<ul style="list-style-type: none"> • It is appropriate that the MHA issue a public interest certificate in these limited circumstances, which are directly connected to (a) the performance by ASIO of its functions as well as (b) national security – matters with which the Minister with responsibility for ASIO (and national security policy and operations more broadly) is most familiar. • Under s43AAA(4) it is appropriate the MHA should receive any copy of the AAT findings in respect of ASIO, given his or her responsibility for the agency. The AG would continue to receive a copy of the AAT's comments on procedures or practices in relation to ASIO (s43AAA(8)) which is appropriate given the AG's responsibilities relating to integrity and oversight of security and intelligence agencies.
<p>A New Tax System (Family Assistance) Act 1999; Paid Parental Leave Act 2010 and Social Security Act 1999</p> <p>- Welfare cancellation notices on security grounds</p> <p><i>The Minister for Social Services administers these Acts under the AAO.</i></p>	<ul style="list-style-type: none"> • Under each of these Acts, currently the AG may issue a security notice in relation to an individual. The effect of such a notice is that the individual will not receive welfare payments. In the Bill, the power to issue security notices under these Acts will transfer from the AG to the MHA. Other powers in these Acts remain unchanged. The AG will no longer exercise any powers under these Acts. • The power to issue a notice in respect of individuals who are of security concern is appropriately exercised by the MHA, as the Minister responsible for ASIO and national security more broadly. <ul style="list-style-type: none"> ○ In issuing a notice, the Minister must consider whether a social security payment is being 'used for a purpose that might prejudice the security of Australia or a foreign country'. They must also consider advice from the Department of Social Services on the effect of welfare cancellation on a person's dependents.
<p>Criminal Code Act 1995 (Criminal Code)</p> <p>- Consenting to requests for interim control orders (under Part 5.3)</p> <p><i>The AG administers this Act under the AAO.</i></p>	<ul style="list-style-type: none"> • The AG continues to administer the Criminal Code under the AAO, but the AG and MHA share policy responsibility for the Act. It is appropriate that the exercise of powers and functions reflect the respective policy responsibilities. <ul style="list-style-type: none"> ○ Other powers that transfer from the AG to the MHA under the Criminal Code include under Chapter 4 (plastic explosives), Chapter 9 (serious drug offences) and Chapter 10 (telecommunications service offences). • Following the AAO amendment on 20 December 2017, the MHA now has responsibility for national security (including counter-terrorism efforts) and law enforcement policy and operations. It is appropriate that he or she exercise relevant ministerial powers in Part 5.3 of the Criminal Code (terrorism provisions) except the ability to appoint issuing authorities in Division 105, which will continue to be done by the AG as First Law Officer. • The Ministerial functions and powers in Part 5.3 of the Criminal Code are important, but they are not extraordinary. <ul style="list-style-type: none"> ○ The Minister is not the final decision maker in relation to the issuing of control orders under these provisions – the decision is made by a Court.

<p>Criminal Code (cont....)</p>	<ul style="list-style-type: none"> ○ The Court must be satisfied of a range of matters before making an order, including that the order will substantially assist in preventing a terrorist act, and the terms of the order are reasonable for the purpose of protecting the public. ● Part 5.3 of the Criminal Code is based on a reference of power from the states and territories. Accordingly, the proposed amendments have been approved by a majority of states and territories as required by subsection 100.8(2). ● The role of the Minister in consenting to applications for control orders under the terrorism provisions of the Criminal Code may be differentiated from the AG's role in consenting to applications for questioning and detention warrants under the ASIO Act, on the basis those warrants authorise more intrusive activity (including detention) – the propriety of which deserves consideration by the AG.
<p>Proceeds of Crime Act 1987; Proceeds of Crime Act 2002 (POCAs)</p> <p><i>The MHA administers these Acts under the AAO</i></p>	<ul style="list-style-type: none"> ● The POCAs provide a scheme to trace, restrain and confiscate the proceeds of crime against Commonwealth law. In some circumstances the Acts can also be used to confiscate the proceeds of crimes committed against foreign law or the proceeds of crimes committed against State law (if those proceeds have been used in a way that contravenes Commonwealth law). The Acts also provide a scheme that allows confiscated funds to be given back to the Australian community in an endeavour to prevent and reduce the harmful effects of crime in Australia. ● The administration of both Acts transferred from the AG to the MHA under the AAO amendment made on 20 December 2017. ● The MHA exercises all powers under the Acts, except those which remain with the AG relating to his or her responsibility for administering the <i>Mutual Assistance in Criminal Matters Act 1987</i>. <ul style="list-style-type: none"> ○ For example, the AG may authorise payments in and out of the Confiscated Assets Account if they relate to a mutual assistance request (ss297 (c) and (d) of POCA 2002) ● It is appropriate that the Acts sit with the Minister who is responsible for law enforcement policy and operations (including the Australian Federal Police (AFP)). The restraint and confiscation of property which is the proceeds of crime is closely linked to the investigative process – for example, the Commonwealth multi-agency Criminal Assets Confiscation Taskforce is led by the AFP. ● Decisions relating to the restraint (freezing) or confiscation (forfeiture) of assets are made by a Court (not the Minister).