



Attorney-General

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Senator Dean Smith
Chair
Senate Scrutiny of Bills Committee
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Dear Chair

I refer to the Senate Scrutiny of Bills Committee's (the Committee) request in *Scrutiny Digest 5 of 2023*, dated 11 May 2023, for further information on the *National Security Legislation Amendment (Comprehensive Review and Other Measures No. 2) Bill 2023* (the Bill).

I appreciate the time the Committee has taken to consider the Bill. Please see below my response in relation to the questions raised by the Committee.

Paragraph 1.116 – Reversal of the evidential burden of proof

The Committee has sought further advice as to why determining whether conduct of an Australian Security Intelligence Organisation (ASIO) officer is reasonable is considered peculiarly within the knowledge of the defendant.

Schedule 1, Part 2 of the Bill would add a defence in sections 474.6, 477.2 and 477.3 of the *Criminal Code Act 1995* (Criminal Code) in relation to the offences in subsections 474.6(1) and (3), 477.2(1), and 477.3(1) of the Criminal Code, respectively. The defence would apply where ASIO employees or affiliates are acting in good faith in the course of their duties and the conduct is reasonable in the circumstances for performing that duty. This Part would implement **recommendation 66** of the Comprehensive Review of the Legal Framework of the National Intelligence Community (Comprehensive Review).

Subsections 474.6(1) and (3) of the Criminal Code provide for offences for tampering with, or interfering with, a facility owned or operated by a carrier, a carriage service provider or a nominated carrier. Subsection 477.2(1) provides an offence for unauthorised modification of data to cause impairment. Subsection 477.3(1) provides an offence for unauthorised impairment of electronic communication.

Proposed subsections 474.6(4A), 477.2(2) and 477.3(2) will place the evidential burden of proof on the defendant to establish the reason why the defendant engaged in the conduct. The reason why a person engaged in conduct is information that will be peculiarly within their knowledge. Reversing the burden of proof will better enable the reason for the relevant conduct to come to light as the defendant is best placed to point to evidence as to why they engaged in the relevant conduct, including to demonstrate why, in their view, the conduct was reasonable in the circumstances. In addition, those matters concern the actions of a person in the course of their duties for ASIO, which will be highly classified to protect operational security.

As such, the reason for engaging in conduct may not be clear on its face without operational knowledge. The matters to be proved would be both peculiarly within the knowledge of the defendant and proof by the prosecution of the matters would be extremely difficult or expensive whereas it could be readily and cheaply provided by the accused.

As the committee has noted, the question of whether conduct of the ASIO officer is ‘reasonable’ is an objective test. The assessment of whether such action was reasonable will depend on facts and circumstances known to the defendant at the time they took the action. Such facts and circumstances may include:

- Operational context, including the defendant’s assessment of how their conduct in the circumstances falls within internal organisational protocols, such as guidelines on the appropriate use of devices. This context and assessment may include classified or operationally sensitive information.
- Professional judgement of the defendant in deciding to engage in conduct that enlivens these offences, as opposed to utilising other methods available to them. This may include facts known uniquely to the person at the time they took the action, which may have informed their assessment of why the conduct was proportionate, necessary or justified.

Once the defendant has adduced evidence that suggests a reasonable possibility that their conduct was reasonable, or pointed to evidence already adduced by the prosecution that suggests that reasonable possibility, the onus will shift back to the prosecution to prove beyond reasonable doubt that the conduct was not reasonable. Whether the conduct was reasonable will ultimately be a matter for the trier of fact to determine.

Paragraph 1.117 – Amending the bill to provide that reasonable conduct by an ASIO officer is specified as an element of the offence, rather than as exceptions to the offence

The Committee also suggests that it may be appropriate for the Bill to be amended to provide that reasonable conduct by an ASIO officer is specified as an element of the offence, rather than as an exception to the offence.

If the evidential burden was not reversed, the prosecution would have to prove beyond reasonable doubt that the defendant was aware there was a risk the conduct was not reasonable in the circumstances for the purposes of performing the defendant’s duties for ASIO. This is an unjustifiably difficult onus for the prosecution to discharge. If the burden is not deferred to the defendant, there is risk of a significant burden (including impact to resourcing and timing) being placed on prosecutors to establish a matter that is peculiarly within the knowledge of, and could be easily pointed to by, the defendant.

Inserting defences as proposed, rather than being an element of the offence, enables the evidential burden of proof for the defence to be reversed to address the difficulty that is otherwise faced by the prosecution. The proposed defences place the onus on the defendant to point to evidence that suggests a reasonable possibility that their action was reasonable in the circumstances, in recognition that the reasons for the conduct will be peculiarly within their knowledge. Importantly, once this evidence is adduced, the onus will shift back to the prosecution to prove beyond reasonable doubt that the conduct was not reasonable.

This approach also reflects similar defences in place for intelligence and law enforcement officers in regards to certain telecommunications offences in the Criminal Code, that is, that the conduct is reasonable in the circumstances for the person performing that duty (such as subsection 474.6(7) of the Criminal Code).

This approach is consistent with the Attorney-General's Department's *Guide to framing Commonwealth offences infringement notices and enforcement powers*, which provides that a matter should only be included in an offence-specific defence, as opposed to being specified as an element of the offence, where:

- it is peculiarly within the knowledge of the defendant, and
- it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter.

Paragraph 1.124 – Privacy and exclusions to the spent convictions scheme

The Committee has requested advice as to why it is appropriate for ASIO or an ASIO officer to have the power to disclose, file, or record, or use information relating to spent convictions. The Committee has also requested detail be included in the Bill's explanatory memorandum regarding safeguards that exist for individuals who will be affected by proposed section 85ZZJA of the *Crimes Act 1914* (Crimes Act), whether these safeguards are contained in law or policy, and to whom ASIO officers may disclose information about an individual's spent conviction.

Part VIIC of the Crimes Act sets out the Commonwealth spent convictions scheme. Division 3 of Part VIIC provides that a person is not required to disclose a spent conviction in specified circumstances. Division 6 of Part VIIC sets out a number of exclusions to the scheme that enable or required the disclosure of spent conviction information in certain circumstances, including exclusions to work with children (Subdivision A), work with persons with disability (Subdivision AA) and other purposes (Subdivision B). There are also a number of exclusions for other prescribed persons or bodies under Schedule 2 of the *Crimes Regulations 2019*.

Part 4 of Schedule 1 of the Bill will expand the exclusions in the spent convictions scheme under the Crimes Act (Part VIIC) to enable ASIO to use, record and disclose spent conviction information. This Part implements **recommendation 136** of the Comprehensive Review, which recommended that '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.'

Excluding ASIO from the spent convictions scheme will allow ASIO to receive, use, record and disclose spent convictions information to better perform its functions and exercise its powers, including cooperating with law enforcement. As stated in the Comprehensive Review, there are certain communal interests which override an individual's interest in having their conviction spent. The public interest in ASIO having access to information to use in protecting Australia, its people and its interests from threats to security outweighs an individual's interest in not having their convictions taken into account by ASIO when performing its functions. It will also rectify an existing discrepancy whereby law enforcement agencies are able to use, record and disclose spent convictions information for investigations or the prevention of a crime, while ASIO is prohibited from doing the same in the performance of its functions.

ASIO will only be able to use, record and disclose spent conviction information when it is done for the purposes of the performance of the functions or the exercise of the powers of ASIO. This ensures that the protections of the spent convictions scheme cannot be circumscribed to share spent conviction information with other agencies generally. This exclusion is in accordance with advice from the Information Commissioner that ASIO's exclusion should be granted with no restrictions or safeguards beyond the wording of the Bill.

The exclusion provided by the amendment in the proposed section 85ZZJA extends only to the use of information by ASIO. Spent conviction information obtained by other agencies from ASIO in the course of the performance of the functions or the exercise of the powers of ASIO

would remain subject to the protection of the spent conviction scheme as those agencies are not excluded.

ASIO's use of spent conviction information must also be conducted in line with the Guidelines issued by the Minister for Home Affairs (the Minister's Guidelines). The Minister's Guidelines require ASIO to consider the proportionality of its activities, and conduct those activities with as little intrusion into the privacy of affected individuals as is reasonably required. Further, the Minister's Guidelines require that the least intrusive techniques for collecting information should be used before more intrusive techniques. The Minister's Guidelines also require the Director-General of Security to take all reasonable steps to ensure that ASIO's collection, retention, use, handling and disclosure of personal information is limited to what is reasonably necessary to perform its functions. Additionally, I am advised that ASIO will draft internal policy guidance for how the exclusion will be applied in practice in preparation for when the Bill enters into force to further support the adherence of ASIO to the spent conviction scheme.

The actions of ASIO and the National Intelligence Community are subject to the oversight of the Inspector-General of Intelligence and Security.

I thank the Committee for raising these issues for my attention and trust this response is of assistance.

Yours sincerely

THE HON MARK DREYFUS KC MP
9 / 6 / 2023