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Chair
Parliamentary Joint Committee on Intelligence and Security
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By email to: pjcis@aph.gov.au

Dear Mr Khalil,

Review of the Australian Security Intelligence Organisation Amendment Bill 2023

Thank you for the opportunity to make this submission to the Parliamentary Joint Committee on Intelligence and Security's review of the Australian Security Intelligence Organisation Amendment Bill 2023 (the Bill). I make no comment on the policy underlying the Bill, and note that my Office was broadly consulted by the Department of Home Affairs and the Attorney-General's Department during the development of the Bill on issues relevant to my Office.

The Inspector-General of Intelligence and Security (IGIS) is an independent statutory office holder appointed to review the activities of Australia's six intelligence agencies¹ and the intelligence functions of the Australian Criminal Intelligence Commission (ACIC) and the Australian Federal Police (AFP).² Broadly, under the *Inspector-General of Intelligence and Security Act 1986* (IGIS Act), the functions of the IGIS in respect of an agency within jurisdiction are to undertake inspections and conduct inquiries and preliminary inquiries. The IGIS has a specific function to inquire into complaints made about the activities of ASIS, ASIO, ASD, AGO and the use of network activity warrants by the ACIC and the AFP.³ The IGIS also has an employment jurisdiction to inquire into complaints made by employees of ASIO, ASIS and ASD in respect of promotion, termination of appointment, discipline, remuneration or other matters relating to their employment, such as security clearance decisions.

The Bill seeks primarily to amend the *Australian Security Intelligence Organisation Act 1979* (ASIO Act) to enable the implementation of a consistent approach to issuing, maintaining and revoking Australia's highest-level security clearances by ASIO. The amendments will enable ASIO to become the agency centrally responsible for the issuing and maintaining of Australia's highest-level security clearances, a function currently performed by the Australian Government Security Vetting Agency (AGSVA), and other authorised entities including ASIO, ASIS, AFP and ONI. The Bill will also amend

¹ The Australian Secret Intelligence Service (ASIS), the Australian Security Intelligence Organisation (ASIO), the Office of National Intelligence (ONI), the Australian Signals Directorate (ASD), the Australian Geospatial Intelligence Organisation (AGO) and the Defence Intelligence Organisation (DIO).

² These relate specifically to the use of network activity warrants by the ACIC and the AFP under the *Surveillance Devices Act 2004*.

³ Section 8 IGIS Act.

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the *Office of National Intelligence Act 2018* (ONI Act) to give ONI an additional function in independently assuring the quality, consistency and transferability of high-level security clearances.

I note that many employees of the intelligence agencies within IGIS's jurisdiction are required to obtain and maintain Australia's highest level of security clearance (TSPV), as a condition of employment.

ASIO Act amendments - Internal and external merits review framework

If enacted, the Bill would provide for ASIO to make "security clearance decisions" and to furnish "security clearance suitability assessments".⁴ Each of those terms would be the subject of a new definition in section 4 of the ASIO Act (but the term "security clearance" itself is not defined, either in the existing Act or in the Bill). The main distinction between these outcomes would seem to be that a security clearance is an end result in its own right, whereas a suitability assessment is only a statement about a person's suitability to hold a security clearance that has been, or may be, granted by another agency that makes its own security clearance decisions.

The processes proposed for merits review differ depending on whether the challenged action of ASIO was a security clearance decision or a security clearance suitability assessment. In the case of the former, there would be an internal review under the proposed Subdiv A of Div 3 of Pt IVA, followed by (in the case of someone who already holds a security clearance or is a Commonwealth employee) the availability of a review in the Security Division of the Administrative Appeals Tribunal (AAT) under Subdiv B, or (in the case of someone who does not already hold a security clearance and is not a Commonwealth employee) by the availability of a review by an independent reviewer under Subdiv C.⁵ In the case of the latter, if the assessment were "prejudicial", there would be no internal review, but a review by the AAT under Subdiv B would be directly available.⁶

Where there has been an independent review, a copy of the independent reviewer's decision must be provided to the IGIS and the Director-General of Security. The Director-General is also required to provide the IGIS with written notice of their decision made in light of the independent reviewer's opinion.⁷ As such, the IGIS will be kept abreast of any decisions made by ASIO concerning the independent reviewer's opinion.

The IGIS will continue to be able to receive complaints about the activities of ASIO in relation to ASIO's new functions proposed under the Bill. However, paragraph 9AA(c) of the IGIS Act prohibits the IGIS from inquiring into a matter that is, or could be, subject of a review by the Security Division of the AAT, unless the matter is referred to the IGIS under subsection 65(1A) of the ASIO Act. In other words, matters that could be, or are being, heard by the AAT concerning an ASIO security clearance decision or security suitability assessment will be outside the IGIS's remit. Where the person concerned does not already hold a security clearance and is not a Commonwealth employee, because there would then be no availability of a review in the AAT this exclusion would not apply to the internal review mechanism proposed in the Bill, and, as such, the IGIS would be able to inquire into complaints about

⁴ Schedule 1, item 12, proposed paragraphs (b) and (d), respectively, of subsection 82C(1).

⁵ The outcome of which (the reviewer's "opinion") would feed into the Director-General's consideration of whether to cause ASIO to make a new security clearance decision: Schedule 1, item 12, proposed section 83EE.

⁶ Schedule 1, item 12, proposed subsection 83(2): a prejudicial security clearance suitability assessment would be an "externally reviewable decision".

⁷ Schedule 1, item 12, proposed subsections 83ED(5) and 83EE(2).

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ASIO's activities. For completeness, I note that the IGIS is not a merits review body, nor does it make binding decisions.

Further, I note that persons affected by a security clearance decision or security suitability assessment made by ASIO who are engaged or proposed to be engaged for employment or duties outside Australia and who are not Australian citizens or normally reside in Australia, are excluded entirely from seeking review under the proposed review framework.⁸ These persons will, however, still be able to approach the IGIS to make a complaint concerning ASIO activities.⁹

Additionally, the IGIS, in accordance with his functions under sections 8 and 9A of the IGIS Act, will be responsible for overseeing ASIO's activities undertaken in accordance with the proposed amendments through inspecting or otherwise inquiring into the legality and propriety, and compliance with human rights, and relevant Ministerial directions or guidelines.

ONI Act amendments

Schedule 1, item 46 of the Bill, seeks to enable the operations of the Quality Assurance Office (QAO) in ONI by inserting a new function into the ONI Act under proposed paragraph 7(1)(ba). This function will enable the QAO to assure the quality, consistency and transferability of high-level security clearances and assist Commonwealth authorities that sponsor these clearances to establish and maintain capabilities to prevent and detect insider threats.¹⁰ As part of this, the Bill also proposes to amend section 10 of the ONI Act to insert subsection 10(2A), which states existing paragraphs 10(2)(b) and (d) of the ONI Act do not prevent ONI from performing its function under proposed paragraph 7(1)(ba). Paragraphs 10(2)(b) and (d) of the ONI Act provide that ONI's functions do not include conducting inquiries into individual complaints about the activities of an intelligence agency or an agency with an intelligence role or function (the NIC agencies); and do not include inquiring into the legality, propriety or integrity of activities undertaken by the NIC agencies. Inquiring into the legality, propriety and compliance with human rights of intelligence agencies' activities, as well as inquiring into individual complaints, are, of course, functions of the IGIS, the processes for which are set out under the IGIS Act.

According to the Explanatory Memorandum to the Office of National Intelligence Bill 2018, section 10 was included in the ONI Act in order to place an obligation on the Director-General of National Intelligence to ensure that ONI performs its functions in ways that do not inappropriately impact on, or encroach on, the functions, powers and responsibilities of the other NIC agencies, a department in relation to the NIC agencies within their portfolio, or statutory office holders whose office relates to a NIC agency, or the NIC more generally, such as the IGIS.¹¹ As a matter of law, this would continue irrespective of the proposed amendments to the ONI Act in this Bill.

The IGIS will oversee the activities of the QAO in accordance with his usual practices, including undertaking inspections or inquiries into ONI's activities. Under the proposed Modernisation Bill 2022, which is currently before the Parliament, the IGIS will also be able to inquire into complaints about ONI's actions, including the activities of the QAO.

⁸ Schedule 1, item 12, proposed subsections 82H(3), 83(3), and 83EA(2).

⁹ See section 8(1) IGIS Act, the IGIS can inquire into a complaint made by a person in respect of action taken by ASIO, irrespective of their nationality or residency status in Australia.

¹⁰ Schedule 1, item 46.

¹¹ Explanatory Memorandum, Office of National Intelligence Bill 2018, para 50.

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I trust this information is of assistance to the Committee.

Yours sincerely



The Hon Christopher Jessup KC
Inspector-General

21 April 2023

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