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Australian Government

Australian Secret Intelligence Service

**ASIS Submission to the Parliamentary Joint Committee
on Intelligence and Security**

**Review of the National Security Legislation Amendment (Comprehensive
Review and Other Measures No. 3) Bill 2023**

2 February 2024

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Introduction

The Australian Secret Intelligence Service (ASIS) welcomes the opportunity to provide a submission to the Parliamentary Joint Committee on Intelligence and Security's Review of the National Security Legislation Amendment (Comprehensive Review and Other Measures No. 3) Bill 2023 (the Bill).

The Bill contains measures to address 12 outstanding recommendations from the *Comprehensive Review of the Legal Framework of the National Intelligence Community* (Comprehensive Review). The Bill also includes additional measures to clarify the operation of some existing provisions in intelligence legislation, including the *Intelligence Services Act 2001* (IS Act).

This submission will comment on the measures in the Bill that affect ASIS. Where possible ASIS has provided an unclassified submission.

The key focus of this submission is the measure contained in Part 1 of Schedule 2 of the Bill, which will amend the IS Act, to improve and enable cover employment arrangements and associated protections for current and former ASIS and ASD staff members. The Bill will also make similar amendments to the *Australian Security Intelligence Organisation Act 1979* for current and former ASIO employees and affiliates.

The submission will also address the other measures impacting ASIS and provide the Committee with further detail on the background to supplement the Committee's understanding. The measures are:

- Part 2 of Schedule 2 of the Bill, which will consolidate the existing secrecy offences relating to ASIS, the Australian Signals Directorate (ASD), the Australian Geospatial-Intelligence Organisation (AGO) and the Defence Intelligence Organisation (DIO).
- Part 3 of Schedule 2 of the Bill which will make exempt under the Archives Act records that identify current and future ASIO employees, ASIO affiliates, staff members of ASIS or agents of ASIS.
- Part 1 of Schedule 3 of the Bill which will:
 - enable the Minister for Foreign Affairs and the Minister for Defence to authorise ASIS, ASD and AGO to undertake activities relating to an Australian person who is likely to be involved in activities that are likely to be a threat to security, before the Attorney-General gives their agreement to the authorisation.
 - clarify that the Minister for Foreign Affairs and the Minister for Defence can authorise ASIS, ASD and AGO to undertake activities relating to an Australian person who is likely to be involved in activities that present a risk to their own safety, or are themselves involved in activities relating to a contravention of a UN sanction enforcement law.

ASIS was consulted by the Department of Home Affairs during the development of the Bill.

Part 1 of Schedule 2 – Amendment to support cover arrangements in the IS Act

The Bill will insert new sections 41AA – 41AC into the IS Act, and will enable current and former staff members of ASIS or ASD to employ cover arrangements, in accordance with a determination given by the Director-General of ASIS or ASD under section 41AB(1), and protect persons employing cover, or facilitating cover in accordance with the arrangements from criminal liability. These amendments implement Recommendation 70 of the Comprehensive Review.

Section 41AA(1) would provide that a person who is a current or former staff member of ASIS or ASD, may identify as their employer or place of work, a Commonwealth authority determined by the Director-General of ASIS or ASD.

Section 41AB(1) would provide that the Director-General of ASIS or ASD may, in writing, determine one or more Commonwealth authorities that may be identified as the employer or place of work for a current or former staff member of ASIS or ASD. The Director-General of ASIS or ASD must obtain in writing the agreement of the head of the Commonwealth authority before making such an instrument.

ASIS strongly supports these amendments in the Bill. These important amendments will provide a clear statutory basis for the cover employment arrangements ASIS staff members use. They will allow ASIS staff members to use cover to obfuscate their employment with confidence, by providing legal certainty to ASIS staff members and persons facilitating cover for ASIS staff members under these arrangements, that they will be protected from criminal liability from Commonwealth, state and territory laws.

Cover employment arrangements for ASIS staff members

‘Cover’ employment is where an ASIS staff member states they work for another Commonwealth authority rather than explicitly identifying ASIS as their place of employment. ASIS staff members routinely use cover employment in a wide range of situations in their operational, corporate and personal capacities.

Limits of the cover employment arrangements

Section 41AB(2) would provide that a determination under section 41AB(1) may determine a specified Commonwealth authority in relation to a specified class of current or former staff members of ASIS or ASD, or specify limitations or restrictions. The period for which the current or former staff member may identify a Commonwealth authority as their employer or place of work, is limited to those periods in which that person is or was a staff member.

Third party protections

Section 41AC provides that third parties will also not be subject to criminal liability for assisting ASIS in the course of their official duties. It is important that immunity is afforded both to ASIS staff members, and those persons who facilitate, assist and support the cover arrangements, whether they are staff members of any Commonwealth authority or other persons acting in a professional capacity.

Given the significance of cover arrangements for ASIS staff members, it is equally important that professionals who assist ASIS staff members in maintaining this cover are also not subject to criminal liability for this assistance. The statutory cover employment arrangements will provide confidence and legal certainty to these third parties.

IGIS oversight

The Inspector-General for Intelligence and Security (IGIS) oversees ASIS’s activities for legality, propriety and compliance with human rights. The cover employment arrangements under these new provisions would be overseen by the IGIS.

Part 2 of Schedule 2 – Consolidation of offences in the IS Act

This amendment will consolidate the secrecy offences in sections 39-40M of the IS Act, in accordance with Recommendation 143 from the Comprehensive Review. The scope of the existing offences will not change.

ASIS supports the consolidation of the secrecy offences. By consolidating the offences, there is a reduced ability to identify an individual charged with an offence as belonging to, or associated with, a particular agency.

Part 3 of Schedule 2 – Protection of identities under the Archives Act

The Bill will also protect the identities of ASIO and ASIS staff members and agents from disclosure under the *Archives Act 1983* (Archives Act), in accordance with Recommendation 190 from the Comprehensive Review.

Both the *Administrative Appeals Tribunal Act 1975* (AAT Act) and Archives Act are proposed to be amended to ensure the identity of current and former ASIO employees, ASIO affiliates, staff members of ASIS and agents of ASIS that are included in Commonwealth records that are in the open access period are protected from public access.

This measure will expand the grounds of an ‘exempt record’ from the open access period to include a record that contains information, or a matter, that identifies ASIO and ASIS staff members and agents.

ASIS supports these amendments to the AAT Act and Archives Act.

Part 1 of Schedule 3 – Clarifications to authorisation processes in the IS Act

This Part contains a number of measures to enhance the efficacy and efficiency of the authorisation processes for certain intelligence activities. This includes implementation of Recommendation 2 of the Comprehensive Review, which also gives effect to comments made by the 2017 Independent Intelligence Review (IIR), in relation to sequencing of ministerial authorisations given to ASIS, AGO or ASD in circumstances where Australian persons are, or are likely to be, involved in activities that are, or are likely to be, a threat to security or, involved with a listed terrorist organisation. Currently the Attorney-General’s agreement to the authorisation needs to be obtained before the relevant Minister can give an authorisation (see sections 9(1A) or (1AAA) of the IS Act).

This proposed amendment seeks to streamline the ministerial authorisation process to enable the Attorney-General’s agreement to enable an agency to produce intelligence on, or undertake activities that will or are likely to have a direct effect on, an Australian person, to be obtained before or after the authorisation of the responsible Minister to authorise an agency. This measure will allow the Attorney-General and relevant Minister to provide agreement or authorisation in any order, providing practical flexibility. Regardless of the order in which the authorisation is sought, the authorisation will not take effect until the Attorney-General has given their agreement.

The 2017 IIR and the Comprehensive Review considered the existing process could lead to some delays and difficulties, as it required ASIO to prepare a submission to the Attorney-General as a first step in the process. While these reviews concluded that it remained appropriate for the Attorney-General and ASIO to be involved in the ministerial authorisation process, amending the order may reduce the time required to process these authorisations.

ASIS supports this measure to improve and streamline ministerial processes for threat to security ministerial authorisations and provide flexibility and potential efficiencies in the approval process for ministerial authorisations on these grounds.

The amendments also include additional measures that are not 2017 IIR or Comprehensive Review Recommendations, to clarify the references to 'a person' in Division 1 of Part 2 of the IS Act; and an amendment to update the 'serious risk' to safety threshold in section 9B of the IS Act to 'significant risk' to safety. The policy rationale is to make the language of this provision consistent with other provisions of the Act.

ASIS supports these additional measures, which provide clarity around the application of the relevant provisions.

To ensure consistency, these amendments would also extend to circumstances where an Australian person may be involved in a contravention, or alleged contravention, by a person of a UN sanction enforcement law. That is, the person contravening the UN sanction enforcement law is the person who ASIS is seeking the authorisation on, as they are of intelligence interest to ASIS.

IGIS oversight

As noted above, the IGIS oversees ASIS's activities for legality, propriety and compliance with human rights. This includes the activities ASIS undertakes under ministerial authorisations. To that end, sections 9(5), 9A(5)(b), 9B(5) of the IS Act, the Director-General must ensure that copies of ministerial authorisations are available for inspection on request by the IGIS. Any record or copy of an agreement given by the Attorney-General under sections 9(1A) and (1AAA) must also be kept for inspection by the IGIS.