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OFFICE OF THE
INSPECTOR-GENERAL
OF INTELLIGENCE
AND SECURITY

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

Submission to the Parliamentary Joint Committee on
Intelligence and Security

01 February 2024

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2. Introduction

1. The Inspector-General of Intelligence and Security welcomes the opportunity to make this submission to the review by the Parliamentary Joint Committee on Intelligence and Security (the Committee) of the National Security Legislation Amendment (Comprehensive Review and Other Measures No. 3) Bill 2023 (the Bill).
2. Consistent with established practices, the Inspector-General does not make any comment on the policy underlying the Bill. Rather, this submission discusses the key features of the Bill that relate to the Inspector-General's role providing oversight of Australia's intelligence agencies and agencies with intelligence functions.
3. The Inspector-General was consulted by the Attorney-General's Department and the Department of Home Affairs during the development of the Bill, which chiefly implements a number of recommendations from the Comprehensive Review of the Legal Framework of the National Intelligence Community (the Comprehensive Review).

3. Background

3.1 About the Inspector-General

4. The Inspector-General is an independent statutory officer appointed under the *Inspector-General of Intelligence and Security Act 1986* (Cth) (IGIS Act).¹
5. Under his existing jurisdiction, the Inspector-General reviews the activities of the following six intelligence agencies:
 - Office of National Intelligence (ONI)
 - Australian Security Intelligence Organisation (ASIO)
 - Australian Secret Intelligence Service (ASIS)
 - Australian Signals Directorate (ASD)
 - Australian Geospatial-Intelligence Organisation (AGO)
 - Defence Intelligence Organisation (DIO)and the intelligence functions of the Australian Criminal Intelligence Commission (ACIC) and the Australian Federal Police (AFP), as defined in the IGIS Act.²
6. The overarching purpose of the Inspector-General's functions is to assist Ministers in the oversight and review of the activities of each intelligence agency to ensure that they are legal and proper, comply with ministerial guidelines and directions, and respect human rights.³

¹ The purposes of the Inspector-General are those referred to in sections 8, 9 and 9A of the IGIS Act (subsection 6AA(e) IGIS Act).

² The intelligence functions of the ACIC and AFP, as defined in section 3 of the IGIS Act, are the collection, correlation, analysis, production and dissemination of intelligence obtained by the ACIC or AFP from the execution of a network activity warrant; or the performance of a function, or the exercise of a power, conferred on a law enforcement officer of ACIC or AFP by the network activity warrant provisions of the *Surveillance Devices Act 2004*.

³ See section 4 IGIS Act.

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4. Main Amendments

7. This Bill will implement the Government's response to some of the recommendations of the Comprehensive Review. The Comprehensive Review examined the effectiveness of the legislative framework governing the national intelligence community (NIC) and prepared findings and recommendations for reforms.
8. The Bill would primarily amend the *Australian Security Intelligence Organisation Act 1979* (ASIO Act), the *Intelligence Services Act 2001* (IS Act), the *Telecommunications (Interception and Access) Act 1979* (TIA Act) and the *Archives Act 1983* (Archives Act) to address 12 recommendations of the Comprehensive Review.

4.1 Delayed Security Assessments, Security Clearance Decisions, and Security Clearance Suitability Assessments

9. Schedules 1 and 4 of the Bill would amend the ASIO Act to require ASIO to notify the Inspector-General where there are delays in the furnishing of security assessments, security clearance decisions (SCDs), and security clearance suitability assessments (SCSAs). These amendments would respond to Recommendation 199 of the Comprehensive Review.
10. The amendments proposed in Part 3 of Schedule 1 of the Bill to Part IV of the ASIO Act would require the Director-General of Security to notify the Inspector-General if a security assessment is not furnished within 12 months after ASIO starts to prepare the assessment. This notification requirement would not apply if ASIO was notified that the security assessment was no longer required or if ASIO had initiated the preparation of the security assessment itself, without a request being made by another Commonwealth agency, State, or authority of a State. The proposed provisions would only apply to security assessments for which preparation started on or after the relevant provisions commence.⁴
11. Part 2 of Schedule 4 replicates these provisions with respect to SCDs and SCSAs made under Part IVA of the ASIO Act. Similarly, these provisions would apply to SCDs that ASIO has started to consider making and SCSAs that ASIO has started to prepare on or after the commencement of the provisions.⁵
12. Proposed subsection 42(1) requires the Director-General of Security to make a written protocol for dealing with delayed security assessments. Proposed subsection 82GB(1) creates an analogous protocol for dealing with delayed SCDs and delayed SCSAs. ASIO would be required to comply with the protocol in accordance with proposed subsections 42(6) and 82GB(6).
13. The protocol must specify certain matters, including when ASIO is taken to have started to prepare a security assessment, or SCSA, or started to consider making a SCD; the period in which notification must be made and the information which must be included; the steps which ASIO is required to take following notification; and other relevant matters which the Director-General considers appropriate.⁶
14. The Inspector-General understands that these requirements are designed to ensure that the protocol includes steps which ASIO must take beyond mere notification, such as providing an

⁴ Schedule 1, Part 3 of the Bill would commence on a single day to be fixed by Proclamation, or if the provisions did not commence within 6 months of the Act receiving Royal Assent, on the day after that period.

⁵ Schedule 4, Part 2 of the Bill would commence on a single day to be fixed by Proclamation, or if the provisions did not commence within 6 months of the Act receiving Royal Assent, on the day after that period.

⁶ Schedule 1, Part 3, proposed subsection 42(3) and Schedule 4, Part 2, proposed subsection 82GB(3).

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explanation to the Inspector-General of the reasons for the delay, directions to take steps as set out in relevant ASIO policies or procedures, or requiring relevant senior executive officers to be briefed.⁷

15. The Director-General would be required to consult with the Inspector-General before making the protocol and likewise if the protocol was repealed, rescinded, revoked, amended or varied.⁸
16. The Inspector-General recognises that the protocol will need to be classified in order to operate as intended, noting the types of information that are likely to be included in the protocol, such as how ASIO manages different classes of security assessments, SCDs and SCSAs. Nonetheless, this lack of transparency is balanced by the requirement that the Inspector-General is consulted on the protocol's development and his ability to oversee the implementation of the protocol in accordance with his usual practices.

4.2 Protecting Identities and Information

17. Schedule 2 of the Bill would amend the ASIO Act, the IS Act and the Archives Act to improve and enable cover employment arrangements and associated protections for current and former ASIO employees, ASIO affiliates, ASIS and ASD staff; consolidate secrecy offences relating to ASIS, ASD, AGO and DIO; make records that identify ASIO or ASIS employees, affiliates and agents exempt under the Archives Act; and modernise publication offences in the ASIO Act to take into account developments in technology and modern communications.

Cover employment

18. Schedule 2, item 2 of the Bill would amend the ASIO Act to enable current and former ASIO employees and ASIO affiliates to identify a Commonwealth authority as their employer or place of work, in accordance with a determination made by the Director-General of Security.⁹ The determination must be made with the written agreement of the head of that Commonwealth authority.¹⁰ The proposed provisions would ensure that persons using or facilitating cover employment under these arrangements would be protected from criminal liability.¹¹
19. Equivalent provisions would be added to the IS Act under Schedule 2, item 5 of the Bill, to enable current and former staff members of ASIS and ASD to identify a Commonwealth authority as their employer or place of work,¹² subject to a determination by the agency head made with the agreement of the head of the authority,¹³ and provide similar protections to those using or facilitating cover employment under these arrangements from criminal liability.¹⁴
20. These amendments would give effect to recommendations 70 and 71 of the Comprehensive Review.
21. The Inspector-General may oversee agencies' compliance with the proposed provisions, in accordance with his usual practices.

⁷ Explanatory Memorandum, [84], [320].

⁸ Subsection 33(3) *Acts Interpretation Act 1901*.

⁹ Schedule 2, item 2 proposed subsection 92B(1).

¹⁰ Schedule 2, item 2 proposed subsection 92C(5).

¹¹ Schedule 2, item 2 proposed subsection 92D.

¹² Schedule 2, item 5 proposed section 41AA.

¹³ Schedule 2, item 5 proposed section 41AB.

¹⁴ Schedule 2, item 5 proposed subsection 41AC.

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Secrecy offences

22. Part 2 of Schedule 2 would amend the IS Act to consolidate the secrecy offences contained in Part 6 of that Act.¹⁵ The purpose of these amendments is to increase the protection of identities of intelligence agency staff that are regulated by the IS Act and reduce the number of secrecy offences in Commonwealth laws.¹⁶ This amendment gives effect to recommendation 143 of the Comprehensive Review. The Inspector-General understands that the amendments are not otherwise intended to alter, or affect the scope of, the existing offences.
23. The consolidation of these offences will not affect the existing provisions which allow information, records and other matters to be communicated to the Inspector-General for the purpose of exercising a power or performing a function or duty under the IGIS Act. The exceptions in subsections 39(3), 40C(2A) and 40D(2A) of the IS Act for communications to IGIS officials, dealing with records or making a recording of information or matter for the purpose of the Inspector-General exercising a power or performing a function or duty under the IGIS Act, will be retained.

4.3 Authorisations for Intelligence Activities

24. Schedule 3 of the Bill would amend the sequencing of ministerial authorisations under the IS Act where the Attorney-General's agreement is required and clarify certain references to persons in relation to these authorisations.

Clarifying authorisations for activities relating to Australian persons

25. Part 1 of Schedule 3 amends the IS Act, by repealing and substituting subsections 9(1A) and (1AAA). Proposed paragraph 9(1A)(a) provides that an authorisation may be given where the Minister is satisfied that the Australian person or class of persons is or are, or likely to be, involved in 'activities that present a significant risk to the safety of *any* person'.¹⁷ This amendment makes clear that an authorisation may be given where the Minister is satisfied that the Australian person (or a member of a class of Australian persons) is involved in activities that present a significant risk to his or her own safety.¹⁸
26. Proposed paragraph 9(1A)(f) makes the same clarification for circumstances in which an Australian person is, or is likely to be, involved in activities related to a contravention, or alleged contravention, of a UN sanction enforcement law, such that an authorisation can be made where the Australian person is himself or herself involved in activities related to the contravention or alleged contravention of a UN sanction enforcement law.

Seeking agreement of the Attorney-General

27. Schedule 3, item 2 of the Bill amends the IS Act by inserting proposed subsection 9(1AAC) which provides that an authorisation under subsection 9(1A) for an activity or series of activities, in relation to Australian persons, who are, or are likely to be involved in activities that are, or are likely to be, a threat to security, cannot take effect unless and until the Minister has obtained the agreement of the Attorney-General. This would replace the requirement to obtain the agreement of the Attorney-General currently set out in paragraph 9(1A)(b) of the IS Act.

¹⁵ Schedule 2, items 7 to 14.

¹⁶ Explanatory Memorandum, [144].

¹⁷ Compare current paragraph 9(1A)(a)(i), which provides for an authorisation where an Australian person is likely to be involved in activities that present a significant risk to *a* person's safety.

¹⁸ Explanatory Memorandum, [247]. See also Schedule 3 item 3, which amends section 9B(2)(c)(ii) of the IS Act to mirror the wording in proposed paragraph 9(1A)(a).

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28. Proposed subsection 9(1AAC) would ensure that the agreement of the Attorney-General may be sought *before or after* the Minister has given their authorisation. However, the authorisation would not take effect until the Attorney-General has provided their agreement.
29. Proposed subsection 9(1AAD) would similarly provide that a Minister can provide an authorisation under subsection 9(1AAA) for an activity or series of activities, in relation to a class of Australian persons involved, or likely to be involved, with a listed terrorist organisation, either before or after the Attorney-General has provided their agreement. Likewise, the authorisation would not take effect until the Attorney-General has provided their agreement.
30. The Inspector-General understands that these amendments are intended to provide flexibility for agencies in seeking ministerial authorisations where the Attorney-General's agreement is required. It is anticipated that the relevant Minister would give an authorisation before the Attorney-General gives their agreement only where it is operationally necessary.¹⁹
31. These amendments give effect to recommendation 2 of the Comprehensive Review.
32. The Inspector-General would continue to oversee agencies' compliance with the IS Act, including in obtaining ministerial authorisations as required, in accordance with his usual practices.²⁰

4.4 Other Amendments

33. Part 3 of Schedule 3 of the Bill would make further amendments to the ASIO Act to provide that only the Director-General of Security may apply to the Attorney-General for an authority to conduct a special intelligence operation under Part 3, Division 4 of the ASIO Act. This amendment gives effect to recommendation 68 of the Comprehensive Review.
34. The Inspector-General would oversee compliance with the proposed amendments, in accordance with his usual practices.²¹

¹⁹ Explanatory Memorandum, [257].

²⁰ See subparagraph 8(2)(a)(i) IGIS Act.

²¹ See section 9AA IGIS Act.