Australian Government
Department of Home Affairs

Submission to the Inquiry Ministers of State (Checks for Security Purposes) Bill 2019

Senate Standing Committees on Finance and Public Administration

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1. Introduction

The Department of Home Affairs (the Department) thanks the Senate Standing Committees on Finance and Public Administration (the Committee) for the opportunity to comment on the Ministers of State (Checks for Security Purposes) Bill 2019 (the Bill). The Department's response is made on behalf of the Home Affairs portfolio (the Portfolio).

There are key issues outlined in the Bill that impact on the fundamental tenets of representative government in Australia, the responsibilities set out in the Statement of Ministerial Standards and the extant functions of the Director General of Security.

More detailed comments on the purpose and drafting of the Bill are set out in **Attachment A.**

1.1. Material Reviewed by the Portfolio

In preparing its submission, the Portfolio has reviewed the Bill, along with the associated Explanatory Memorandum and Second Reading Speech by Senator Patrick.

2. Principles

2.1. Responsible and Representative government

Under Australia's system of representative and responsible government, Ministers are accountable to the Parliament, the members of which are in turn accountable to the people of Australia by way of elections. In *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129, the High Court stressed the importance of this system, noting that the Constitution was 'permeated' with 'the institution of responsible government'. This can be distinguished from the system in the United States of America which involves a more strict separation of the Legislature and the Executive, as members of the Executive are appointed from outside the Legislature.

Under the principle of responsible government, while the Executive is appointed by the Governor General on advice from the Prime Minister, they are accountable to, and may be removed by, the Parliament. Because Ministers must be drawn from the members of Parliament, the system of responsible government ensures that Ministers must hold the confidence of the people in order to continue to hold office.

Section 64 of the Constitution contains an important element of this principle, requiring that no Minister of State shall hold office for a longer period than three months unless they are or become a senator or a member of the House of Representatives. This ensures Ministers of State are subject to public, political and media scrutiny through the election process.

The requirements of ministerial responsibility are also enshrined in constitutional convention. Most notably, ministerial responsibility requires that the government must resign or call an election if a vote of no confidence is passed against the government. If a motion of no confidence was passed against a particular Minister (as opposed to the government itself) and its grounds were directly related to government policy, the question of the Minister or the Government continuing to hold office would be one for the Prime Minister to consider and advise the Governor-General about. A motion of no-confidence is an important democratic tool, which allows members of the Parliament to make a statement or vote about whether a member of Parliament is no longer deemed fit to hold that position, perhaps because they are inadequate in some respect, are failing to carry out obligations, or are making decisions that other members feel detrimental.

Further, the ability for the Senate and the House of Representatives to pass censure motions provides an important mechanism for Parliament to express disapproval of ministers and their actions. While ministers are neither appointed nor removed by the Senate, they are accountable to it. If there is dissatisfaction with

the performance of a particular minister, a censure motion may be moved. Although a resolution of the Senate censuring the government or a minister can have no direct constitutional or legal consequences, it does act as an expression of the Senate's disapproval.

Australia's system of responsible and representative government provides important mechanisms to ensure Ministers of State are appropriate to hold that position and to ensure that Ministers enjoy the confidence of the Australian people. Introducing an additional mandatory legislative requirement as proposed in the Bill would achieve no more than what is already provided for through Australia's system of government and laws.

2.2. Statement of Ministerial Standards

Another accountability mechanism for Ministers of State includes the Statement of Ministerial Standards. Established by the Prime Minister, the Statement provides a code of conduct with which Ministers are expected to comply. This Statement details the ethical standards required of Ministers to ensure they act with integrity and in the best interests of the people of Australia. The Statement provides that Ministers may be required by the Prime Minister to resign if the Prime Minister is satisfied that they have failed to comply with the standards in a substantive and material way. Further, the Statement provides that, where an allegation of significant improper conduct (including a breach of the standards) is made against a Minister, the Prime Minister may refer the matter to an appropriate independent authority for investigation and advice.

These are important accountability measures to ensure the ethical standards required of Ministers are upheld. Concerns in relation to the implications of a Minister's personal background and circumstances is a matter that may be more appropriately dealt with in this Statement than in legislation of the kind proposed, however this is a matter for the Prime Minister.

2.3. Existing functions of the Director-General of Security

The Bill would make it mandatory for a Prime Minister to seek and be provided with a report from the Director-General of Security about security matters in relation to Ministers of State appointed by the Governor-General. The Bill does not mandate the Prime Minister to act on the report. The Prime Minister is already able to seek advice on such matters and the Australian Security Intelligence Organisation's existing legislative framework would permit it to prepare and provide such a report.

Section 17 of the *Australian Security Intelligence Organisation Act 1979* provides that the Australian Security Intelligence Organisation's functions are, among other things:

a. to obtain, correlate and evaluate intelligence relevant to security;
b. for purposes relevant to security, to communicate any such intelligence to such persons, and in such manner, as are appropriate to those purposes;
c. to advise Ministers and authorities of the Commonwealth in respect of matters relating to security, in so far as those matters are relevant to their functions and responsibilities;

It is currently within the legislative functions and powers of the Australian Security Intelligence Organisation to provide to a Prime Minister advice in respect of matters relating to security, of the kind envisaged by the Bill, in so far as it is relevant to the Prime Minister's functions and responsibilities. Such advice might be at the request of a Prime Minister, or the Australian Security Intelligence Organisation might proactively provide advice to a Prime Minister.

3. Conclusion

The Portfolio thanks the Committee for the opportunity to comment and is available to expand on any matter raised above as the Committee requires.

Attachment A

Concerns with drafting of the Bill

Purpose and intent of reports prepared under the Bill

The provisions of the Bill concerning the purpose and intent of the report are internally contradictory and the purpose of reports under the Bill is consequently unclear.

Subsections 5(1) and 5(2) of the Bill provide that the Director-General must prepare reports in relation to '*security arising from examination of the personal background and circumstances of the Minister of State*'. Subsection 5(9) provides that a report to the Prime Minister must only contain '*information and advice that is strictly relevant to matters relating to security*'. 'Security' is defined within section 4 of the Bill to have the same meaning as in the *Australian Security Intelligence Organisation Act 1979*.[1] The Explanatory Memorandum similarly provides that the purpose of the Bill '*is to ensure that the Prime Minister is fully informed of any security issues that may arise from the personal background and circumstances of persons who have been appointed as Ministers of State'*.

These sections suggest that the report to be prepared by the Director-General is restricted to consideration of the implications of a Minister's personal background and circumstances in relation to the limited heads of security contained in the *Australian Security Intelligence Organisation Act 1979*, akin to a security assessment issued under Part IV of the *Australian Security Intelligence Organisation Act 1979*.

However, subsection 5(4) of the Bill requires the Director-General to '*obtain information and undertake inquiries that are equivalent to the information and inquiries required for the clearance for security purposes of ASIO employees*'. The Explanatory Memorandum notes that '*[i]n practice, this will involve inquiries and information gathering equivalent to that required for Positive Vetting*', which the Explanatory Memorandum says is appropriate given Ministers will have access to '*the most sensitive and highest levels of classified information.*' This suggests that the report will be the equivalent of a Positive Vetting security clearance (subject to further comments below concerning the clearance process that applies in relation to Australian Security Intelligence Organisation employees).

There is an inherent conflict between the requirement in subsection 5(4) and the provisions in subsections 5(1), 5(2) and 5(9).

In preparing a security assessment, Australian Security Intelligence Organisation takes into account a broad range of factors which are relevant to an assessment of the requirements of 'security' (as defined in the

[1] Security is defined in the *Australian Security Intelligence Organisation Act 1979* to mean:
(a) the protection of, and of the people of, the Commonwealth and the several States and Territories from:
(i) espionage;
(ii) sabotage;
(iii) politically motivated violence;
(iv) promotion of communal violence;
(v) attacks on Australia's defence system; or
(vi) acts of foreign interference;
whether directed from, or committed within, Australia or not; and
(aa) the protection of Australia's territorial and border integrity from serious threats; and
(b) the carrying out of Australia's responsibilities to any foreign country in relation to a matter mentioned in any of the subparagraphs of paragraph (a) or the matter mentioned in paragraph (aa).

Australian Security Intelligence Organisation Act 1979) in the particular circumstances at that time. These risk factors may be similar to those considered by a vetting agency in deciding whether a person is suitable to hold a security clearance, but are not necessarily so.

Ultimately, the information and inquiries stipulated by subsection 5(4) do not align with the apparent intended purpose of the report evidenced by subsections 5(1) and 5(9). In light of this internal contradiction, the nature of the report required by the Bill is unclear.

Scope of application of the Bill

The application of the Bill is limited to Ministers of State within the meaning of the *Ministers of State Act 1952*. The Department notes that the Protective Security Policy Framework provides that all members and senators of the Commonwealth, state parliaments and territory legislative assemblies do not need a security clearance in order to access security classified information.

As is noted in the Explanatory Memorandum for the Bill, various Members of Parliament other than Ministers of State will also have access to sensitive classified information. This includes the Leader of the Opposition, certain Shadow Ministers and members of the Parliamentary Joint Committee on Intelligence and Security. The Explanatory Memorandum justifies applying this regime only to Ministers by noting that access by other Members of Parliament to such information is intermittent and allowed only in controlled circumstances.

The members of the Parliamentary Joint Committee on Intelligence and Security have regular access to highly classified material. Further, that Committee has the power to require the production of documents (subject to certain restrictions in the *Intelligence Services Act 2001*). In contrast, the regularity of a Minister's exposure to classified material, and the level of classification of the material that a Minister will access, may vary depending on the nature of the portfolio administered by the Minister. In light of this, there may not be a clear principled basis for distinguishing Ministers of State from other Members of Parliament required to access security classified information in the course of their duties.

Defining information collection and inquiry requirements by reference to Australian Security Intelligence Organisation employees

The Department notes that, while the Australian Government Security Vetting Agency undertakes assessments of a person's suitability to hold a security clearance (security vetting) on behalf of most Commonwealth agencies, the Australian Security Intelligence Organisation is permitted to conduct its own vetting for its employees. Those assessments are conducted in accordance with the Protective Security Policy Framework.

In practice Australian Security Intelligence Organisation employees must be assessed as suitable to obtain and maintain a Positive Vetting clearance. However, the Department notes that the actual clearance level of Australian Security Intelligence Organisation employees is not set out on the face of legislation. The level of security clearance required by Australian Security Intelligence Organisation employees is a matter of discretion for the Director-General and could be set at different levels at the behest of the Director-General.

In addition to the above concerns about subsection 5(4), there is a question whether it is appropriate to define the standard of information to be collected and inquiries to be undertaken by reference to a vetting process which is not otherwise referred to in legislation.

The Director-General's discretion

Subsection 5(4) of the Bill dictates the information that should be collected, and the inquiries that should be undertaken by the Director-General in preparing a report. The determination of what information should be

collected and what inquiries should be undertaken to inform such a report is a matter that is more appropriately left to the discretion of the Director-General.

Given the incongruence between the purpose of the report outlined in subsection 5(1) and the information required to be obtained under subsection 5(4) (detailed above), the Bill would potentially be inconsistent with the obligation of the Director-General (under section 20 of the *Australian Security Intelligence Organisation Act 1979*) to ensure the work of the Australian Security Intelligence Organisation is limited to what is necessary to discharge its statutory functions and to ensure that the Australian Security Intelligence Organisation acts impartially. The Bill may improperly fetter the discretion of the Director-General in deciding how the Australian Security Intelligence Organisation should carry out its statutory function.

Subsection 7(2) provides that information obtained must only be used for the purpose of preparing the report to the Prime Minister. In accordance with the Australian Security Intelligence Organisation Act and the Attorney-General's Guidelines, the Australian Security Intelligence Organisation must be able to use all information collected for purposes relevant to security. The Australian Security Intelligence Organisation is subject to rigorous oversight—including by the Inspector-General of Intelligence and Security—to ensure that information is collected and used in a proper manner.

Consideration of adverse information and consequences of a report not being a security assessment

The Bill does not appear to contain any provision regarding how adverse or potentially adverse material may be used by the Prime Minister or outlining whether the subject of the report is to be notified of that adverse material. The Department further notes that section 6 of the Bill expressly provides that a report produced by the Director-General is not a security assessment made under Part IV of the Australian Security Intelligence Organisation Act.

A 'security assessment' is defined in the *Australian Security Intelligence Organisation Act 1979* to mean a statement in writing furnished to a Commonwealth agency (which is defined under section 35 of the Australian Security Intelligence Organisation Act to mean a Minister or an authority of the Commonwealth) expressing any recommendation, opinion or advice on, or otherwise referring to, the question whether it would be consistent with the requirements of security for prescribed administrative action to be taken in respect of a person. Prescribed administrative action is further defined in section 35 of the *Australian Security Intelligence Organisation Act 1979* to mean, among other things, action that affects access by a person to an information or place access to which is controlled or limited on security grounds, including action affecting the occupancy of any office or position under the Commonwealth.

Given the purpose of the Bill is to assess the suitability of Ministers of State, such a report may refer to the question whether it would be consistent with the requirements of security for the person to access classified information or for the person to continue to occupy the office of Minister of State. As such, except for the operation of section 6 of the Bill, a report by the Director-General made under section 5 may otherwise constitute a security assessment for the purposes of the *Australian Security Intelligence Organisation Act 1979*.

Further, section 39 of the Australian Security Intelligence Organisation Act, which provides that a Commonwealth agency (including a Minister of the Commonwealth) cannot take prescribed administrative action on the basis of any communication from the Australian Security Intelligence Organisation not amounting to a security assessment. Because reports provided under this Bill are deemed not to be security assessments, the effect of section 39 may be that the Prime Minister is prohibited from taking prescribed administrative action on the basis of such a report. As such, if a report recommended that it would be inconsistent with the requirements of security for a person to be made a Minister of State, the Prime Minister may be prevented by section 6 from relying on the report to take action in relation to the role of the Minister, for example by changing the way classified information was provided to the Minister, restricting the flow of classified information to the Minister, changing the portfolio responsibilities of the Minister, or advising the Governor-General to remove the person from that office.

If the intention of section 6 of the Bill is to exclude the notification and review requirements that apply to security assessments, this would be better achieved by acknowledging that a report is a security assessment and providing that Part IV of the Australian Security Intelligence Organisation Act does not apply to security assessments made under the Bill. This would align with the approach taken in section 36 of the Australian Security Intelligence Organisation Act, which outlines certain types of security assessments to which Part IV of the Act does not apply.

Timeframes for completing assessments

Paragraph 5(8)(b) of the Bill requires the Director-General to provide a report or additional report within 120 days of the day the Prime Minister directed that report to be prepared.

The Department notes that the Bill refers to 'days' and does not specify 'business days' which is defined in the *Acts Interpretation Act 1901.* On this basis 'days' would be interpreted to be calendar days and as a result, the Bill provides less than 120 business days for the proposed security checks and reporting.

In considering whether this timeframe is achievable in practice, the Portfolio notes that the Australian Security Intelligence Organisation does not publish statistics regarding its median security clearance or security assessment processing timeframes. For comparison purposes, the Department does however draw the Committee's attention to the Australian Government Security Vetting Agency's Service Level Charter, which contains Key Performance Indicators for the end-to-end processing of security clearances undertaken by the Australian Government Security Vetting Agency. The Australian Government Security Vetting Agency's median processing time for routine Positive Vetting cases is 180 business days or less (or 90 business days or less for routine, non-complex priority Positive Vetting cases).

In order to make this timeframe more workable for the Australian Security Intelligence Organisation, the Department considers the any prescribed timeframe should commence from the time at which the Director-General has collected the requisite information.

The complexity and content of reports, and the inquiries required to inform those reports, may vary significantly between individual Ministers of State. As such, any prescribed timeframe should commence from the time at which the Director-General has collected the requisite information and the Bill should permit the Director-General to seek an extension of the timeframe as necessary to ensure that the report received by the Prime Minister is as thorough as possible.

Ongoing management of the security checking process

The Bill does not appear to contain any provisions regarding the ongoing maintenance of the 'security checking process' or impose any obligations on individuals who are subject to the process to report changes in their personal circumstances. The Committee may wish to consider whether a one-off 'point in time' assessment of security will provide a level of ongoing assurance that is equivalent to a Positive Vetting security clearance and the associated ongoing suitability and assurance measures contained within the Protective Security Policy Framework.

A decision to grant a security clearance is based on the facts and evidence available to the delegate at the time. The Protective Security Policy Framework therefore contains a range of obligations on individuals and their sponsoring agencies to ensure the ongoing suitability of that individual to hold a security clearance. For example, clearance holders are required, as a condition of their security clearance, to promptly report all changes in their personal circumstances that may impact on their continued suitability to hold a security clearance.

The Bill also does not appear to contain any provisions regarding the interaction (if any) between the proposed security checking process and the current statement of registerable interests process for members and senators. For example, it is not clear whether the Bill intends that declarations made by senators and members

as part of the statement of registerable interests process will be scrutinised or investigated through the proposed security checking process.

Costs and resourcing implications

There are likely to be significant cost and resourcing implications arising out of this Bill due to the complexities and sensitivities involved in this type of work. Introducing a mandatory scheme of this kind would require the Australian Security Intelligence Organisation to reprioritise and reallocate resources.

While Australian Security Intelligence Organisation does not publish its costs for processing security clearances, the current fee for a Positive Vetting security clearance undertaken via the Australian Government Security Vetting Agency is $10,380 (including GST) per initial clearance and revalidation process (which must be undertaken every five to seven years).

Procedural fairness and judicial review

Although the Bill excludes the review provisions in Part IV of the *Australian Security Intelligence Organisation Act 1979*, subject to the requirements of security, the Australian Security Intelligence Organisation would be required to afford procedural fairness to a subject minister and the reports may be subject to judicial review.