Australian Government
Department of Home Affairs

Department of Home Affairs submission to the review of the Australian Security Intelligence Organisation Amendment Bill 2023

Parliamentary Joint Committee on Intelligence and Security

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List of Abbreviations

Term	Meaning
AAT	Administrative Appeals Tribunal
AGSVA	Australian Government Security Vetting Agency
ASIO	Australian Security Intelligence Organisation
ASIO Act	Australian Security Intelligence Organisation Act 1979
The Bill	Australian Security Intelligence Organisation Amendment Bill 2023
The Committee	Parliamentary Joint Committee on Intelligence and Security
The Department	Department of Home Affairs
EL1	Executive Level 1
IGIS	Inspector-General of Intelligence and Security
ONI	Office of National Intelligence
PAA	Prescribed Administrative Action
PSCSA	Prejudicial Security Clearance Suitability Assessment
PSPF	Protective Security Policy Framework
PV	Positive Vetting
QAO	Quality Assurance Office
SCSAs	Security Clearance Suitability Assessments
TS-PA	TOP SECRET-Privileged Access

1. Introduction

1. The Department of Home Affairs (the **Department**) welcomes the opportunity to make this submission to the Parliamentary Joint Committee on Intelligence and Security's (the **Committee**) review of the Australian Security Intelligence Organisation Amendment Bill 2023 (**the Bill)**.

2. This submission seeks to provide the Committee with an overview of the key features of the Bill, which includes amendments to uplift and harden Australia's highest-level of security clearance in response to the unprecedented threat from espionage and foreign interference and the need for enhanced mobility in the cleared workforce. The reforms will modernise the approach to security vetting for the highest level of security clearance, noting that in themselves they are not designed to accelerate the clearance process.

3. The Bill would enable the Australian Security Intelligence Organisation (**ASIO**) to implement a consistent approach to issuing, maintaining and revoking Australia's highest-level security clearances and ensure Australia's most sensitive information, capabilities and secrets remain protected. The measures in the Bill would reduce the risk of compromise of trusted insiders, maximise the utility derived from shared services in a fiscally constrained environment, improve the mobility and agility of Australia's highest-cleared workforce and ensure the ongoing confidence of our most trusted allies.

4. The reforms proposed are underpinned by a new, classified TOP SECRET-Privileged Access (**TS-PA**) Standard for Australia's highest level of security clearance, the TS-PA security clearance. The TS-PA security clearance provides the same level of access as Australia's existing Positive Vetting (**PV**) security clearance. The TS-PA Standard establishes stronger mandatory minimum security clearance requirements reflecting contemporary psychological and insider threat research. The TS-PA Standard forms part of a new National TS-PA Capability, comprising the National TS-PA Authority in ASIO and the Quality Assurance Office (**QAO**) in the Office of National Intelligence (**ONI**).

5. The TS-PA Authority in ASIO would be centrally responsible for issuing and maintaining TS-PA security clearances. Over time, those security clearances will replace PV security clearances, and the PV operations of those vetting agencies currently authorised under the Protective Security Policy Framework (**PSPF**) would be transitioned to ASIO. Responsibility for the issue and management of lower-level security clearances, from Baseline to Negative Vetting Level 2, would remain unchanged.

6. The Bill embeds strict safeguards, independent oversight, and accountability mechanisms including:

    i. the QAO in ONI that would be responsible for independently assessing the quality, consistency and transferability of TS-PA security clearances, and driving the uplift of the insider threat management for TS-PA security clearance sponsors across the Australian Government; and

    ii. new internal, independent and external merits review frameworks that would provide affected persons with avenues to seek review of security clearance decisions and security clearance suitability assessments (**SCSA**) made by ASIO, subject to limited exceptions.

7. ASIO's new vetting function would be subject to oversight by the Inspector-General of Intelligence and Security (**IGIS**) and the National Anti-Corruption Commission when established. The IGIS has significant powers akin to a Royal Commission and is able to inquire into the legality and propriety of intelligence agency activities, as well as agency compliance with ministerial guidelines, directives and internal policies.

2. The Bill

2.1. Schedule Summary

8. The Bill contains the following key measures:

- new functions and a new Part IVA setting out ASIO's new security vetting and security clearance related functions, including:
    - a new function for ASIO to make security clearance decisions for ASIO and non-ASIO personnel alike, and conduct security vetting and assessment on an ongoing basis;
    - a new function enabling ASIO as the vetting authority to communicate with sponsoring agencies in respect of a person who has applied for, or holds, a security clearance, to enable a stronger and more effective partnership between ASIO and the sponsoring agencies to enhance their insider threat capability; and
    - a new function for ASIO to furnish SCSAs, which may be used by other authorised vetting agencies under the PSPF to inform their security clearance decisions. This replaces, but is largely similar to, the existing framework in Part IV of the *Australian Security Intelligence Organisation Act 1979* (**ASIO Act)** whereby ASIO may provide security assessments to security vetting agencies to inform security clearance decisions by those agencies;
- a new safeguard to ensure that other Commonwealth security vetting agencies can only make a security clearance decision on the basis of ASIO advice that is a SCSA which, subject to the exceptions set out below, is an externally reviewable decision if it would or could be prejudicial to a security clearance decision in respect of a person;
- a new statutory framework to provide internal merits review of prejudicial security clearance decisions (i.e. a decision to deny or revoke a security clearance, or to impose or vary a condition on a security clearance) by ASIO involving a different decision-maker to the original decision-maker, except for persons who are not Australian citizens or who do not normally reside in Australia and who are being engaged (or proposed to be engaged) for duties outside Australia;
- consistent rights for external merits review in the Administrative Appeals Tribunal (**AAT**) for persons subject to a prejudicial security clearance decision or prejudicial SCSA (**PSCSA**) furnished to a security vetting agency, except for:
    - persons who are not Australian citizens or who do not normally reside in Australia who are being engaged (or proposed to be engaged) for duties outside Australia;
    - ASIO security clearance decisions in respect of persons who are not existing security clearance holders or Commonwealth employees; and
    - persons subject to a conclusive certificate issued by the Minister for Home Affairs that would prevent external merits review in exceptional circumstances, if it would be prejudicial to security to change a security clearance decision or SCSA, or for the decision or assessment to be reviewed;
- a new statutory framework to provide independent review of a decision made on internal review by an independent reviewer appointed by the Attorney-General, if the person is not eligible for external merits review in the AAT because they are not an existing security clearance holder or Commonwealth employee; and
- a new function in the ONI Act to enable a QAO in ONI to independently assess the quality, consistency, and transferability of the highest-level of security clearances, and drive the uplift of the insider threat capability of agencies that sponsor these clearances.

2.2. New security vetting and clearance functions for ASIO

9. The Bill would amend the ASIO Act, introducing a new Part IVA to provide ASIO with new security vetting and security clearance functions, including to:

   - make security clearance decisions for ASIO and non-ASIO personnel alike;
   - undertake security vetting to assess a person's suitability to hold a security clearance, and vetting and assessing suitability on an ongoing basis;
   - communicate with a sponsoring agency for a security clearance in relation to the ongoing suitability of a person to hold the security clearance;
   - furnish SCSAs; and
   - assume responsibility for a security clearance that has been granted to a person by another security vetting agency.

10. These amendments are required to enable the National TS-PA Authority within ASIO as ASIO's current function in subsection 17(1)(c) of the ASIO Act is limited to providing advice, and does not extend to making security clearance decisions for persons not employed by ASIO.

11. It is envisaged that ASIO will predominantly make security clearance decisions for TS-PA clearances. However, the Bill will also provide ASIO with the flexibility to make lower-level clearance decisions for other security vetting agencies from time to time, upon request, in accordance with the PSPF maintained by the Attorney-General's Department (**AGD**).

12. While as a matter of policy the existing PV vetting operations of other authorised vetting agencies would be transferred to ASIO, the reforms themselves do not in any way limit the capacity of other security vetting agencies from to perform security vetting or make security clearance decisions in accordance with their existing practices and functions under the PSPF.

13. As such, the Australian Government Security Vetting Agency (**AGSVA**) would remain responsible for issuing the majority lower-level security clearances from Baseline to Negative Vetting Level 2. ASIO would work closely with AGSVA and other authorised vetting agencies to ensure a consistent approach to security vetting across all security clearance levels.

14. Centralising Australia's highest-level clearance within ASIO leverages ASIO's security intelligence functions, holdings and capabilities to allow for a holistic assessment of a person's suitability to hold a TS-PA security clearance, having regard to the most current and accurate information about the security threats confronting Australia.

2.3. Information Sharing and Managing Insider Threats

15. The Bill would introduce a new Part IVA to the ASIO Act establishing a framework that would enable ASIO to share information more freely than is currently possible under the existing Part IV, without the need to furnish a security assessment under Part IV.

16. This is essential to allow ASIO to cooperate more effectively with sponsors' insider threat management teams enabling an integrated, single repository of information about security clearance holders, and supporting sponsors to proactively manage their clearance holders and risk.

17. An ongoing, rather than point-in-time, validation of an individual's suitability for a security clearance through improved cooperation with sponsors' insider threat management teams is critical in assisting sponsors enhance their insider threat capability.

2.3.1. Current Framework – Part IV

18. Currently under Part IV of the ASIO Act, Commonwealth agencies are prohibited from taking prescribed administrative action (**PAA**) on the basis of ASIO advice, unless that advice is provided in the form of a security assessment (section 39 of the ASIO Act). In the security vetting and clearance context, PAA relevantly includes taking action that relates to or affects access to information or places or the performance of activities, controlled on security grounds. However, Commonwealth agencies are able to take temporary actions to prevent access to places that, or performing activities that, are controlled or limited on security grounds if the requirements of security make it necessary to take that action as a matter of urgency pending the furnishing of a security assessment by ASIO. Subject to limited exceptions, prejudicial security assessments are reviewable in the AAT.

19. The current framework in Part IV restricts ASIO from proactively sharing information with security clearance sponsors, and restricts sponsors' ability to rely on advice from ASIO to proactively manage insider threats in the absence of complex and time-consuming security assessments. While sponsors are able to take the temporary actions described above where the requirements of security make it necessary and there is a matter of urgency, the requirement for ASIO to subsequently furnish a security assessment restricts sponsors ability to take more definitive action where insider threats are identified on the basis of a range of information (including advice from ASIO).

20. It is critical that ASIO is able to more freely and proactively share information with sponsors to empower them to proactively manage insider threats in an environment where foreign inference and espionage are becoming increasingly complex and challenging. Allowing sponsors, including their insider threat management teams, to act on information provided by ASIO alongside other information or advice they have access to, would support them to make informed decisions to manage these risks.

2.3.2. Proposed Framework – New Part IVA

21. Proposed Part IVA would enable greater information sharing between ASIO and security clearance sponsors by disapplying the operation of Part IV with regard to ASIO's new Part IVA security vetting and security clearance functions. This extends to communications made by ASIO under the new Part IVA, which would no longer be subject to the security assessment regime in Part IV of the ASIO Act, and in respect of which Commonwealth agencies would not be subject to the prescribed administrative action prohibition in section 39 of the ASIO Act, nor would ASIO be subject to the restriction on communication with States in section 40.

22. New subsection 36A(2) in Part IVA further clarifies that any decisions made or not made, and any actions taken or not taken, on the basis of a communication from ASIO made in relation to its new functions established in section 17(1)(cb) and proposed Part IVA are not PAA within the meaning under section 35(1) of the ASIO Act. The effect of these amendments is that sponsors and/or employers would be able to, on the basis of a communication from ASIO made in connection with a power or function under Part IVA, take steps to restrict or manage a security clearance holder's or applicant's access to information, places, or ability to perform certain activities.

23. This is essential to enable security clearance sponsors to proactively manage insider threats and other security risks in a responsive and timely manner, on the basis of a range of information including information provided by ASIO under Part IVA, without requiring ASIO to furnish a security assessment under Part IV or an SCSA under Part IVA. Those assessments are complex, time consuming and resource intensive to produce, and therefore can result in significant delays to ASIO's external communication of potential security risks. Security clearance sponsors would be responsible for any actions they take to manage insider threats or other security risks on the basis of advice provided under Part IVA. This is consistent with sponsors' and employers' general administrative powers with regard to employees and visitors attending their premises.

24. Such sponsors would still be required to comply with the *Fair Work Act 2009* and other relevant employment law when taking action based on ASIO's advice. The Bill does not seek to limit or affect a person's right to seek legal remedies for breaches of contractual arrangements or employment law.

2.3.3. Information sharing with State and Territories

25. Part IV of the ASIO Act currently prevents ASIO from providing advice other than in the form of a security assessment to state and territory authorities where ASIO is aware the advice or information may be used in taking PAA. Such arrangements hinder the timely provision of advice and information to state and territory authorities and restricts their ability to proactively manage insider threats and other security risks on the basis of advice from ASIO.

26. The *Comprehensive Review of the legal framework governing the National Intelligence Community* (the **Comprehensive Review**) recognised that "plac[ing] ASIO in this position would frustrate ASIO in its ability to perform its functions of furnishing assessments to an authority of a state, and through that the protection of the people of the states and territories from threats to security". Furthermore, recommendation 198 of the Comprehensive Review recommended that the ASIO Act should be amended to allow ASIO to make a communication directly to a state or territory agency other than through a security assessment where the requirements of security make it necessary, as a matter of urgency, to take action of a temporary nature pending the furnishing of a security assessment.

27. Subsection 82F(4) would enable ASIO to communicate preliminary advice under Part IVA directly to a state or territory security vetting agency in urgent circumstances and would assist states and territories in proactively responding to threats to security. While the proposed subsection is not intended to implement recommendation 198 in full, these amendments implement recommendation 198 to the extent that it relates to ASIO's new security vetting and security clearance functions under Part IVA.

2.3.4. Safeguards

28. While the prohibition on taking PAA under Part IV would be disapplied in relation to communications made under Part IVA, this is appropriately balanced with robust safeguards. Commonwealth security vetting agencies would be prevented from making, refusing to make or refraining from making a security clearance decision on the basis of advice from ASIO that does not amount to a SCSA (proposed section 82E). This ensures that such advice from ASIO is subject to external merits review or independent review, subject to limited exceptions.

29. However, the Bill would allow Commonwealth security vetting agencies to make a temporary security clearance decision to suspend a security clearance or, impose or vary a condition on a security clearance, if the requirements of security make it necessary as a matter of urgency (proposed subsection 82E(3)).

30. Proposed section 82E is an effective safeguard as it ensures communication of prejudicial information (that is short of a SCSA), that is information which is not fully assessed by ASIO and as such could be subject to error and change, does not result in a permanent security clearance decision that could have significant impacts on an individual's livelihood, employability and reputation. In this way, it encourages ASIO to communicate this advice in the form of an SCSA, which is subject to external merits review or independent review (subject to limited exceptions).

31. Proposed section 82F would have a similar effect to proposed section 82E, but in respect of state and territory security vetting agencies. Particularly, new subsection 82F(3) would prohibit ASIO from communicating to a state or territory security vetting agency where ASIO knows the information is intended or likely to be used in the making of a security clearance decision, unless that communication is in the form of a SCSA. However, an exception applies where the Director-General is satisfied that the requirements of security make it necessary as a matter of urgency for the State security vetting agency to make a temporary security clearance decision (proposed subsection 82F(4)).

32. These safeguards ensure that communications from ASIO that may be used by a state or territory security vetting agency to make a permanent security clearance decision are subject to a rigorous analytical process and, unless an exception applies, subject to external merits review in the AAT.

33. A security clearance subject impacted by a decision made by a sponsor or employer, that is not a security clearance decision (i.e. a decision to grant, revoke or deny a security clearance, or impose or revoke conditions on a security clearance), on the basis of a communication from ASIO short of a SCSA, would not have access internal review, external merits review or independent review under Part IVA. However, security clearance subjects would retain rights to seek judicial review and access to any applicable protections and remedies under employment or other laws, including the *Fair Work Act 2009*.

2.4. Merits review Framework

2.4.1. Overview

34. Subject to limited exceptions, Part IVA of the Bill would introduce new internal review, independent review and external merits review framework for security clearance subjects the subject of:

    - a prejudicial security clearance decision (i.e. a decision to deny, revoke or impose/vary conditions on a security clearance), or
    - a PSCSA (i.e. an assessment that contains information or advice about a person that would or could be prejudicial to a security clearance decision).

35. The robust merits review framework introduced by the Bill would ensure fair treatment of all persons affected by decisions, improved quality and consistency of decisions and enhanced openness and accountability of decisions made by government.

36. With regard to ASIO's new function making security clearance decisions for both ASIO and non-ASIO personnel alike, the Bill will introduce both internal and external merits review frameworks as follows:

    - **Internal review:** all affected persons would have access to a new statutory framework for internal merits review within ASIO of security clearance decisions to deny, revoke, or impose or vary certain conditions upon, a security clearance, except for persons who are not Australian citizens or who do not normally reside in Australia and who are engaged (or proposed to be engaged) for duties outside Australia.
    - **Independent review**: a person may seek review of a decision made on internal review by an independent person appointed by the Attorney-General, if the person is not eligible for external merits review in the AAT because they are not an existing security clearance holder or Commonwealth employee.
    - **External review:** all existing security clearance holders and Commonwealth employees as defined in the Bill, including existing Australian Intelligence Community (**AIC**)[1] staff members, would have access to external merits review in the AAT except for:
        - persons who are not Australian citizens or who do not normally reside in Australia and who are engaged (or proposed to be engaged) for duties outside Australia; and
        - persons subject to a certificate issued by the Minister for Home Affairs that would preventing external merits review.

37. With regard to ASIO's new function to furnish SCSA to other security vetting agencies, including state or territory security vetting agencies, PSCSAs furnished by ASIO would be externally merits reviewable in the AAT.

38. However, SCSAs would not be internally or independently reviewable as they are for the purposes of informing a decision that is not made directly by ASIO, and those other agencies are responsible for the review pathways available for their decisions.

2.4.2. Internal Review

39. There is currently no statutory requirement for internal review with regard to security clearance decisions informed by a security assessment furnished under Part IV of the ASIO Act. Access to internal or independent review with regards to a security clearance decision made by a security vetting agency other than ASIO would be determined via policy or internal procedures, with this varying between security vetting agencies.

[1] ASIO, Australian Secret Intelligence Service, Australian Signals Directorate, Office of National Intelligence, Australian Geospatial-Intelligence Organisation and Defence Intelligence Organisation

40. The Bill would establish a statutory right to internal review for prejudicial security clearance decisions (i.e. decisions to deny or revoke a security clearance, or to impose or vary certain conditions upon a security clearance) made by ASIO with only limited exceptions. These types of decisions are referred to in the Bill as internally reviewable decisions. The Bill does not affect review pathways that may be available for security clearance decisions made by other security clearance decisions.

41. After an internally reviewable decision or an internal reviewer's decision is made, ASIO is required to provide an affected person and the relevant sponsoring agency within 14 days, a written notice of the decision and reasons for the decision. This is to ensure the affected person has appropriate information to understand the basis of the security clearance decision and to consider whether to pursue internal review (in the former case) or external review (in the latter case). The notice must also contain prescribed information concerning the person's rights to apply to ASIO for internal review, to an independent reviewer for independent review or to the AAT for external merits review of a security clearance decision.

42. The internal review framework established by the Bill enables a comprehensive processes through which affected persons would be invited to provide information or evidence in support of their claims. This would be undertaken in alignment with Administrative Review Council's best practice. An internal reviewer would then review the security clearance information afresh and either affirm, vary or set aside an internally reviewable decision and make a new decision.

43. An internal reviewer cannot be the person who made the original security clearance decision that is subject to internal review. Where possible, the internal review would be a more senior officer that was not consulted or involved in the making of the original security clearance decision.

44. If the decision is still to deny, revoke, or impose or vary conditions on the security clearance, then the affected person will either have rights to request a review by the Independent Reviewer, or external review in the AAT, subject to limited exceptions.

45. Where internal merits review is available, it must be sought by an affected person before seeking external merits review or independent review. Internal review is also generally easier for applicants to access and enables a quicker and more inexpensive means of re-examining decisions where applicants believe a mistake has been made. Requiring affected persons to first seek and undergo internal review will not pose a barrier to external merits review or independent review, but rather support them to seek review in a less formal setting to support high quality outcomes at both the internal review and external/independent review stages.

46. Internal review will not be available to persons who are not Australian citizens or do not normally reside in Australia who are engaged, or proposed to be engaged, for employment outside Australia for duties outside Australia. Persons engaged offshore that are not Australian citizens or residents may pose higher risks in relation to espionage. As such, this measure will ensure these persons not able to access sensitive information about Australia's security clearance processes by engaging in merits review to exploit potential vulnerabilities.

2.4.3. External Merits Review in the Administrative Appeals Tribunal

47. The Bill would introduce a new statutory framework for merits review of ASIO security clearance decisions, and SCSAs in place of the Part IV framework.

48. Clearance applicants the subject of a PSCSA will have access to external merits review of that PSCSA in the AAT, with limited exceptions. Applicants the subject of a prejudicial security clearance decision made by ASIO (i.e. a decision to deny, revoke, impose or vary a condition on a security clearance) will have access to either external review in the AAT or independent review by an independent reviewer appointed by the Attorney-General. Existing security clearance holders or Commonwealth employees will have access to external merits review of a security clearance decision in the AAT. However, those that are not existing security clearance holders or Commonwealth employees will not have access to external review, but rather will have access to independent review.

49. This is a narrow carve out of a small class of individuals that will have access to independent review rather than external merits review in the AAT, and will primarily relate to TS-PA security clearances given ASIO's role as the National TS-PA Authority. The rationale for providing independent review of security clearance decisions in respect of persons who are not existing clearance holders nor Commonwealth employees is to balance the importance of providing an appropriate mechanism for review of security clearance decisions with the need to protect Australia's security vetting standards, capability and techniques from those that would seek to use external merits review to gain insights into security clearance vetting and decisions.

50. The threat to Australians from espionage and foreign interference is higher than at any time in Australia's history. New applicants who have never held a security clearance or been a Commonwealth employee bring a lower level of assurance, in that they do not have an existing track record or have not been previously screened or vetted as a Commonwealth employee.

51. If adversaries were to gain insights into how ASIO undertakes security clearance vetting and makes security clearance decisions this would undermine both trust and fairness in the system for those that do not have access to these same insights and the integrity of those security clearance decisions.

52. Under proposed subsection 36 (1)(c) of the ASIO Act, staff members engaged or proposed to be engaged by the AIC agencies do not currently have access to external merits review through the AAT for security assessments made by ASIO under Part IV of the ASIO Act, including where these assessments are intended to inform a security clearance decision.

53. The Bill will grant all existing staff members of these agencies access to internal merits review within ASIO and external merits review in the AAT of any PSCSA or prejudicial security clearance decision made by ASIO. New applicants to these agencies will also gain access to internal review by ASIO and independent review by an independent reviewer appointed by the Attorney-General, if they are not an existing clearance holder or Commonwealth employee, noting those persons who are existing clearance holders (of any level) or Commonwealth employees will have access to external merits review in the AAT. This is consistent with the intent of recommendation 195.a. of the Comprehensive Review of the legal framework of the National Intelligence Community, which recommended that the loss of a clearance for an ASIS staff member should be reviewable.

54. Under section 36(1)(a), a person who is not an Australian citizen or not normally resident in Australia that is engaged or proposed to be engaged for employment or duties outside of Australia, does not currently have access to external merits review in the AAT in relation to a security assessment made by ASIO. Part IVA will retain this existing exception in relation to SCSAs and security clearance decisions made by ASIO.

55. The Bill will introduce a new safeguard whereby the Attorney-General can, if they are satisfied that it is desirable to do so by reason of special circumstances, require the AAT to inquire into and report to the Attorney-General and the Minister for Home Affairs on any question concerning the furnishing of such a SCSA or the making of a security clearance decision by ASIO, or to review such an assessment or such a decision along with any information or matter on which it is based. This mechanism allows the Attorney-General to seek independent advice regarding the appropriateness of an ASIO security clearance decision or SCSA that would not otherwise be subject to external merits review in the AAT where special circumstances are considered to exist.

56. Where an affected person applies to the AAT for external merits review of a prejudicial security clearance decision made by ASIO, the Director-General must provide the affected person with a copy of a statement of grounds as soon as practicable. The statement of grounds will assist the affected person to make an informed decision as to whether to pursue external merits review and will assist them in their application in the AAT, or to seek judicial review.

57. In contrast, if ASIO furnishes a PSCSA to another security vetting agency, the security vetting agency is required to provide notice of the assessment and a copy of the assessment (including the statement of grounds) to the affected person within 14 days. The reason why the subject of a prejudicial security clearance decision will only receive a statement of grounds after they make an application to the AAT for external review as opposed to when the reviewable security clearance decision is because, unlike PSCSAs, an affected person of a prejudicial security clearance decision will get access to internal merits review and a statement of reasons to assist them understand the decision that was made and enable them to determine whether to pursue external merits review. Contrary, individuals the subject of a PSCSA do not have access to internal merits review so it is appropriate they are provided the statement of grounds earlier to assist them in making an informed decision as to whether to pursue external review.

58. To assist the AAT review the PSCSA or prejudicial security clearance decision, the Director-General must present the AAT with all information available (whether favourable or unfavourable to the affected person) that is relevant to the findings made in a statement of grounds for a PSCSA or prejudicial security clearance decision.

59. In relation to security clearance decisions made by ASIO, the Director-General may also present the AAT with a copy of any standard (or part thereof) relating to the Commonwealth's highest-level of security clearance, including both the current standard and the standard that was used to make a security clearance decision. If the Director-General presents the AAT with a copy of a standard (or part thereof) the AAT is required to apply the standard in its review of a security clearance decision. This will ensure that the AAT applies the same vetting standard as the original decision-maker, or the most current vetting standard, in reviewing a security clearance decision made by ASIO, thus ensuring all applicants are consistently assessed equally on the same grounds, or the most current grounds, throughout the security vetting and merits review. It would be inappropriate for the AAT to apply a different standard in relation to a security clearance decision than that applied to security clearance decisions made by ASIO.

60. The AAT can make findings that are binding if, in the AAT's opinion, the information relied upon in making the original decision was incorrect, was incorrectly represented or could not reasonably be relevant to the requirements of security. Commonwealth agencies, States or authorities of a State must treat the findings of the AAT with regard to an SCSA or security clearance decision, to the extent that they do not confirm a security clearance decision or SCSA, as superseding the original decision or assessment. ASIO cannot make any further decisions or assessments in respect of an affected person that are not in accordance with the AAT's findings, except on the basis of matters occurring after the review or where evidence was not available at the time of the review.

61. Overall, these reforms would increase the number of avenues for review available to security clearance subjects. Even new applicants who have not previously held a clearance and who are not Commonwealth employees will now have access to internal review and independent review of security clearance decisions. Currently, the framework in Part IV does not provide for external merits review of a security clearance decision, only a security assessment furnished by ASIO that may be relied upon in making a security clearance decision.

2.4.4. Independent Review

62. There is no current equivalent framework in Part IV of the ASIO Act. The Bill will introduce for the first time, an independent review mechanism for security clearance decisions in the ASIO Act.

63. Part IVA will establish a framework for independent review of security clearance decisions relating to non-Commonwealth employees who do not hold security clearances, and who therefore will not have access to external merits review in the AAT. This ensures that the right to seek independent review of a prejudicial security clearance decision made by ASIO is available to clearance applicants. However, consistent with section 36 (1)(a) of the ASIO Act, independent review will not be available to a person who is not an Australian citizen or does not normally reside in Australia and who is engaged (or proposed to be engaged) for duties outside Australia.

64. The Attorney-General will be empowered to engage one or more independent reviewers who would have the discretion to review or decline to review a prejudicial security clearance decision made by an internal reviewer. The Bill does not stipulate criteria that the independent reviewer must consider when deciding whether to conduct a review or not in order to provide them with complete discretion in determining the merit in undertaking a review on a case-by-case basis. This discretion will allow an independent reviewer to consider a wide range of factors when determining whether to undertake a review.

65. Similar to external merits review, the Director-General must provide an independent reviewer with all information that was relied upon by the internal reviewer in making the independently reviewable decision and a copy of a standard relating to the Commonwealth's highest security clearance that was used in the independently reviewable decision. An independent reviewer may also request that the Director-General seek further information from an affected person for the purposes of conducting the independent review.

66. Following independent review of a security clearance decision, the independent reviewer must provide the Director-General, in writing, their opinion as to whether the decision was reasonably open to have been made by an internal reviewer. The independent reviewer must also provide a copy of this opinion to the IGIS. Within 14-days of giving the Director-General an opinion, the independent reviewer must also notify the affected person and the sponsoring agency for the security clearance in relation to which the decision was made that the opinion has been given.

67. However, the Director-General must, as soon as practicable, consider the opinion and decide whether to take any action. If the Director-General decides to cause ASIO to make a new security clearance decision in respect of the affected person, the Director-General must ensure that the new decision is not made by either the internal reviewer who reviewed the same decision or the decision maker who made the original security clearance decision.

2.4.5. Certificates to withhold notice and conclusive certificates

68. The Bill would provide a power allowing the Minister for Home Affairs to issue a conclusive certificate preventing external merits review of a security clearance decision or SCSA in respect of a person in exceptional circumstances, if it would be prejudicial to security to change a security clearance decision or SCSA, or for the decision or SCSA to be reviewed.

69. The high threshold of "exceptional circumstance" is appropriate and provides a mechanism for the Minister, subject to their discretion and advice from ASIO, to address prejudice to security in scenarios where the foreign intelligence threat is extreme, or where the circumstances involved are so serious that it would not be in Australia's national interests to undertake external merits review. For example, this could include scenarios where ASIO discovers through its sophisticated capabilities that a person or organisation is seeking to probe into or collect information on ASIOs security clearance framework, or its capabilities more generally. If the Minister issues a conclusive certificate, the AAT must not review, or continue to review, the security clearance or SCSA in question.

70. The Bill will also enable the Minister of Home Affairs to issue a certificate to withhold notice of a PSCSA in respect of an affected person where the Minister is satisfied it is essential to the security of the nation that notice not be given. Withholding notice of the assessment would mean that an affected person would not be made aware that advice from ASIO was involved in making the decision by another security vetting agency (other than ASIO). However, the Bill will also provide a safeguard in that the Minister must consider whether to revoke a certificate 12 months after the certificate to withhold notice is given and 12 months after the Minister last considered whether to revoke it.

71. Withholding notice would impact an affected person's ability to pursue external merits or judicial review, to which they may otherwise be entitled, as they would not be aware an SCSA had been furnished by ASIO. Withholding of notice of the PSCSA would not preclude the relevant security vetting agency (other than ASIO) that used a PSCSA to inform their security clearance decision from giving an affected person notice of their decision – for example, of a decision by that agency to deny a clearance.

72. In certain circumstances where there are pressing and substantial national security concerns, it is reasonable and necessary to withhold notice of a PSCSA to ensure that sensitive information is not disclosed that could otherwise undermine the integrity of Australia's security clearance framework.

2.4.6. Judicial Review

73. The Bill does not seek to limit a person's right to access judicial review. All security clearance applicants would continue to have a right to seek judicial review in the Federal Court of Australia or High Court of Australia under the section 39B of the *Judiciary Act 1903* or section 75(v) of the Constitution.

2.5. Protection of Information prejudicial to security

74. The Bill provides a number of mechanisms that would limit the information provided or accessible to an affected person in relation to certain PSCSAs or prejudicial security decisions including the:

- ability for the Director-General of Security or a person authorised by the Director-General to withhold certain information (e.g. the standard relating to the Commonwealth's highest level of security clearance, information on public interest grounds or information that could disclose the methodology behind psychological assessments) from reasons of the decision or a statement of grounds provided to the applicant;

- ability for the Minister for Home Affairs or their delegate to withhold certain information (e.g. the standard relating to the Commonwealth's highest level of security clearance) from reasons of the decision or a statement of grounds provided to the applicant; and

- the requirement for certain information to be withheld from the applicant and their legal representative in AAT proceedings if that information would be prejudicial to security.

75. These limitations are essential to ensure that persons in these circumstances are not able to access sensitive information about Australia's security clearance processes by bringing frivolous or vexatious claims forward in the AAT in order to identify and exploit potential vulnerabilities. Disclosure of this sensitive information would adversely impact Australia's national security by undermining the quality and effectiveness of ASIO's vetting functions, and risk directly harming Australia's national security through the disclosure of highly sensitive information.

2.5.1. Withholding certain information from the reasons for the decision

76. The Director-General of Security or an authorised ASIO employee or affiliate at the Senior Executive Service (SES) level, may withhold information from the reasons of the decision that is contrary to public interest, could reveal the methodology underlying a psychological assessment of the affected or information relating to the standard relating to the Commonwealth's highest level of security clearance that would be prejudicial to security.

77. Removing information prejudicial to security or contrary to the public interest from the reasons of the decision or the statement of grounds could affect a person's capacity to effectively respond to prejudicial findings and make meaningful submissions to the AAT. However, this is necessary, reasonable and proportionate to ensure that where there are pressing and substantial national security concerns about an affected person, sensitive information is not disclosed or available to those that are seeking to exploit sensitive information on Australia's security clearance processes.

2.5.2. Withholding of certain information from a statement of grounds

78. The Bill would enable the Director-General to authorise an ASIO employee, or an ASIO affiliate, who holds, or is acting in, a position in the Organisation that is equivalent to or higher than a position occupied by an SES employee to:

- Withhold information from a statement of grounds for a PSCSA if the inclusion of that information would be prejudicial to security;

- Withhold from notice of an internally reviewable decision information relating to the Standard for the highest level of security clearance if the inclusion of that information would be prejudicial to security

- Withhold from notice of an internal reviewer's information relating to the Standard for the highest level of security clearance if the inclusion of that information would be prejudicial to security

- Withhold from the statement of grounds for a security clearance decision information:
    - relating to the Standard for the highest level of security clearance if the inclusion of that information would be prejudicial to security; or
    - that would be contrary to the public interest; or
    - that could reveal the methodology underlying a psychological assessment of the affected person

- Require the AAT to protect information which would be contrary to the public interest or could reveal the methodology underlying a psychological assessment of the affected person.

79. The Director-General's authorisation powers are necessary to ensure ASIO's ability to furnish SCSAs and security clearance decisions in a timely manner. Additionally, it is necessary to ensure ASIO's ability to participate in AAT proceedings without causing unnecessary delays.

80. The Bill will also empower the Minister for Home Affairs to delegate their ability to withhold certain information from a statement of grounds to be provided to an affected person, including powers to:

- withhold notice of a PSCSA, if they are satisfied that doing so is essential to the security of the nation; or

- withhold part, or all, of a statement of grounds from an affected person, if they are satisfied that doing so would be prejudicial to the interests of security; or

- protect information during AAT proceedings if the evidence is of such a nature that the disclosure of the evidence or submissions would be contrary to the public interest because it would prejudice security or the defence of Australia.

- issue a public interest certificate under section 39B of the *Administrative Appeals Tribunal Act 1975* (**AAT Act**) that the disclosure of information would be contrary to the public interest.

81. The Minister can only delegate this power to an ASIO employee, or an ASIO affiliate, who holds, or is acting in, a position in the Organisation that is equivalent to or higher than a position occupied by an SES employee. The authorisation powers of the Minister are necessary to ensure the Minister's ability to balance the protection of information with the potential volume of cases which may be received by ASIO and the AAT.

82. The Minister's delegates must comply with any written directions of the Minister. This provision will act as a safeguard to ensure consistency and best practices are upheld throughout the decision-making cycle.

2.5.3. Disclosure of information in the Tribunal

Security of Defence Certificates

83. The Bill would provide the Minister with the power to certify that disclosure of evidence proposed to be adduced or submissions proposed to be made on behalf of the Director-General in the AAT would be contrary to the public interest because it would prejudicial security or the defence of Australia. If such a certificate were to be given by the Minister for Home Affairs, an applicant must not be present when the evidence is adduced or the submissions are made by the Director-General. An affected person's representative must also not be present when the evidence is adduced or the submissions are made unless the Minister for Home Affairs consents.

84. Disclosure of information regarding vetting standards, methodologies, techniques or activities, or other national security information, would severely undermine the effectiveness of the Commonwealth's security clearance regime with the potential to render it meaningless. Unless the Minister consents to this disclosure, such information must be protected from disclosure within public hearings and to an applicant or a person representing the applicant, to prevent the risk of the representative deliberately or inadvertently disclosing such information to their client.

Standard relating to the Commonwealth's Highest Level of Security Clearance

85. Proposed section 39C in the AAT Act would require the AAT to do all things necessary to ensure that:

- a copy of a standard certified by the Director-General or any information contained within a standard certified by the Director-General, and
- sensitive information certified by the Director-General as being information that would be contrary to the public interest.

is not disclosed to an applicant, their representative or any person other than an AAT member for the purposes of the proceeding, or the Director-General or a representative of the Director-General. The exception to this is if the disclosure of these types of information has already been lawfully disclosed to the applicant or is disclosed to the applicant with the consent of the Director-General.

86. This is reasonable, necessary and proportionate to prevent the disclosure of highly-sensitive information about security clearance vetting techniques and methodologies, or other national security information, which if disclosed would have a grave impact on Australia's national security by enabling the exploitation of the security clearance process.

2.6. Delegations

87. The Director-General of Security and Minister for Home Affairs may delegate some of their powers in the below circumstances.

2.6.1. Security clearance decisions and furnishing of SCSAs

88. The Bill would enable the Director-General to delegate their powers or functions on behalf of ASIO to an ASIO employee or an ASIO affiliate. However, the Director-General can only delegate this power to ASIO employees or ASIO affiliates who are in a position within ASIO that is equivalent to or higher than an Executive Level position (EL1).

89. This reflects ASIO's usual operational practice, where non-prejudicial assessments and decisions of lower-complexity and risk may be made at the EL1 equivalent level. Requiring a higher delegation floor than EL1 level would not be appropriate given the volume of security clearance decisions to be made and the relatively lower-complexity and risk involved in these relevant decisions,. It is anticipated that a majority of security clearance decisions made by ASIO and SCSAs furnished by ASIO will be non-prejudicial. Given the non-controversial and non-prejudicial nature of these decisions and SCSA, it would not be appropriate or necessary for them to be made by delegates at more senior levels.

90. All delegates would be appropriately qualified and trained in accordance with policies and procedures that the Director-General of Security must put in place to provide guidance on the making of security clearance decisions and SCSAs.

91. More complex cases, or cases that involve PSCSAs or security clearance decisions to deny, revoke or impose or vary conditions upon a security clearance, would generally be escalated to more senior or experienced delegates, with the seniority of the escalation depending on their complexity and sensitivity. Decisions to be made where an application has been made for review of an internally reviewable decision, which must be considered by an alternative delegate, could fall into this category.

2.6.2. Provision of information to an independent reviewer

92. The Bill would provide that, if the Director-General receives notice that the independent reviewer has decided to review a security clearance decision made by ASIO, the Director-General must, as soon as practicable, provide the independent reviewer all of the information relied on by the internal reviewer in making the independently reviewable decision. However, the Director-General can delegate this requirement to provide information to an independent reviewer with regard to:

- a copy of any standard (or part thereof) certified in writing by the Director-General as a standard relating to the Commonwealth's highest level of security clearance that was used to make the independently reviewable decision. The Director-General may only delegate this power to an ASIO employee or affiliate; and

- directions in relation to the protection or handling of information to the independent reviewer. The Director-General may only delegate their powers to an ASIO employee, or an ASIO affiliate, who holds, or is acting in, a position in the Organisation that is equivalent to or higher than a position occupied by an SES employee.

93. The Director-General's delegates must comply with any written directions of the Director-General. This provision will act as a safeguard to ensure consistency and best practices are upheld throughout the decision-making cycle.

2.7. New QAO function in ONI

94. The Bill would enable the operations of the Quality Assurance Office (QAO) in the Office of National Intelligence (ONI) to independently assure the quality, consistency and transferability of TS-PA clearances, and drive the uplift of the insider threat capability for the sponsors of such security clearances across the Commonwealth.

95. ONI's new quality assurance function would include audit and review activities, against policy and procedures relevant to the highest level of security clearance. Whilst the QAO's findings or recommendations from its audit and review activities would be non-binding, the QAO can report on these activities to appropriate parts of government and the executive, and provide advice on concerns and process improvements as appropriate.

96. In assisting Commonwealth authorities that sponsor those security clearances, the QAO would be able to engage agencies and articulate appropriate measures and programs to prevent and detect insider threats. The QAO would also be able to work with agencies to ensure the robustness of those measures, including through the provision of training, education and advice.

97. The QAO and ONI more broadly would not have a specific complaints handling function. Additionally, the inquiries the QAO would make under its quality assurance function are not the type of activities undertaken by IGIS pursuant to the *Inspector-General of Intelligence and Security Act 1986* (IGIS Act). However, the QAO would not be precluded from conducting reviews and collecting information relating to the processes for making decisions relating to the highest level of security clearance, and managing such clearances. This includes where complaints have been made in respect of those processes.

98. For example, the QAO would be able to conduct a process review of ASIO's new TS-PA vetting and security clearance functions. A process review may involve the QAO reviewing ASIO's application of the relevant standards in the security vetting or security clearance process, or review of whether ASIO has applied the correct procedure when making a decision or furnishing an assessment. This acts as an additional safeguard in relation to the limitation on rights by these measures, by ensuring independent oversight of the quality and appropriateness of security clearance decisions made by and SCSAs furnished by ASIO.

99. Furthermore, ONI's functions do not include inquiring into the legality, propriety or integrity of activities undertaken by an intelligence agency, or an agency with an intelligence role or function as this is appropriately the remit of the IGIS. While legality, propriety and integrity are not the QAO's focus, these reforms would make clear that QAO may incidentally identify, consider and, where appropriate, report or refer such concerns where they arise. For the avoidance of doubt, the inquiries the QAO would make are not the type the IGIS can undertake pursuant to the IGIS Act, including as part of its inspection role.