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Submission to Parliamentary Joint Committee on Intelligence and Security review of the National Security Legislation Amendment (Comprehensive Review and Other Measures No. 2) Bill 2023

Introduction

The Office of National Intelligence (ONI) welcomes the opportunity to provide a submission to the Parliamentary Joint Committee on Intelligence and Security's review of the National Security Legislation Amendment (Comprehensive Review and Other Measures No. 2) Bill 2023 (the Bill).

This submission is limited to Schedule 1, Part 8 of the Bill which concerns amendments to the *Administrative Appeals Tribunal Act 1975* and the *Archives Act 1983* (Archives Act), which would implement Recommendation 191 of the Comprehensive Review of the Legal Framework of the National Intelligence Community.

Schedule 1, Part 8

ONI supports these proposed amendments, which would have the effect of enabling the Security Division of the AAT to hear *all* exempt security record matters arising under sections 33(1)(a) and 33(1)(b) of the Archives Act.

ONI notes section 33(1)(a) and 33(1)(b) of the Archives Act concern:

- Information or a matter the disclosure of which under the Archives Act could reasonably be expected to cause damage to the security, defence or international relations of the Commonwealth; or
- Information or a matter that was communicated in confidence by, or on behalf of, a foreign government, an authority of a foreign government or an international organisation to a Commonwealth entity, which the foreign entity advises the Commonwealth entity is still confidential and the confidentiality of which it would be reasonable to maintain.

Currently, the Security Division is expressly empowered to exercise review in respect of access to ASIO records under the Archives Act.

The proposal to hear all matters relating to section 33(1)(a) and s33(1)(b) information in the Security Division removes an artificial assumption that proceedings concerning documents from other Commonwealth agencies are inherently and uniformly less sensitive than proceedings involving ASIO's

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records. Hearing of those matters arising in the Security Division would provide consistency to applicants and the Commonwealth when the AAT is reviewing decisions involving national security information, regardless of the document owner. The nature of exempt security records is that they are not limited to documents held by ASIO. The benefits of a safeguard to require the hearing of disputes about these documents in the Security Division are not uniquely applicable to ASIO documents. Other Commonwealth agencies, including in some instances agencies outside the National Intelligence Community, may have custody of exempt security records equally or more sensitive than certain documents in ASIO's possession.

The intent of sections 33(1)(a) and 33(1)(b) – that information of this type is not to be disclosed pursuant to the Archives Act – will be more comprehensively achieved where there is a stronger capacity to maximise the protection of the information during the review process in a manner which is agnostic to the particular agency which has custody of it at a point in time.

As articulated in the Explanatory Memorandum to the Bill, requiring reviews of decisions of the Director-General of the Archives with respect to exempt security records to be heard in the Security Division would ensure that highly sensitive information is considered by at least one presidential member, is not automatically publicly released and is subject to tailored processes and procedures within the Tribunal. This leverages the existing wealth of experience and specialisation of the Security Division, which is best equipped to provide appropriate protection to the highly sensitive information and evidence required to be submitted to the AAT in support of the protection of documents or information in issue in proceedings. This includes Tribunal staff with appropriate security clearances and experience in providing storage and facilities compliant with the Protective Security Policy Framework (PSPF), commensurate with its classification.

NIC agencies routinely provide sensitive evidence to the AAT to explain why information needs to remain protected, including current information regarding ongoing sensitivities and complexities particular to the national security environment. In some cases, the harm that would be caused by the improper handling of documents containing information explaining the sensitivity of national security information may be greater than from the improper handling of the document in question. This renders the protections provided by the Security Division even more critical, noting the hearing of matters in this forum does not diminish the ability of parties to have their matter independently reviewed on its merits.

The hearing of such matters in the Security Division would provide additional reassurance for partners and foreign entities whose information may form part of the material in question. This is particularly the case where the Commonwealth has a memorandum of understanding or ongoing arrangement with that foreign partner, where there is a mutual expectation of the protection of each other's sensitive information from unauthorised disclosure. Confirmation that the Security Division is the automatic forum to hear disputes regarding these matters would provide further certainty to foreign partners about the seriousness with which Australia protects their sensitive information, with a concomitant benefit to the quality of these relationships and strengthened trust between partners. The information sharing between Australia and its international partners is a key plank in Australia's national security arrangements.

ONI thanks the Committee for the opportunity to provide this submission.