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Australian Government
**Australian Security
Intelligence Organisation**

ASIO supplementary submission to the Parliamentary Joint Committee on Intelligence and Security

Review of the Australian Security Intelligence Organisation
Amendment Bill 2023

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1. Thank you for the opportunity to provide a further submission to the Parliamentary Joint Committee on Intelligence and Security's review of the Australian Security Intelligence Organisation Amendment Bill 2023 (the Bill).
2. This submission addresses questions raised during the public hearing and provides supplementary information.

Part 1 – Statistics on highest-level security clearances

What is the total number of applications for the highest-level of security clearance and the percentage of those applications which have been declined?

3. Under the Protective Security Policy Framework (PSPF) maintained by the Attorney-General's Department, there are presently five separate vetting agencies (the Australian Government Security Vetting Agency (AGSVA), ASIO, the Australian Secret Intelligence Service (ASIS), the Australian Federal Police (AFP) and the Office of National Intelligence (ONI)) authorised to grant Positive Vetting (PV) security clearances. Each agency manages its own security clearance demand, with AGSVA servicing all remaining Commonwealth entities.
4. The majority of PV clearances are issued by AGSVA, and so the Department of Defence holds the most accurate information on the majority of applications in progress. Questions of the other authorised agencies (i.e. ASIS, AFP and ONI) are best directed to relevant portfolios.
5. With regards to ASIO, ASIO's classified submission to the Committee's *Review of Administration and Expenditure No. 21 (2021-22) – Australian Intelligence Agencies* provides statistics on the number of applications for the highest-level of security clearance and the percentage of those applications which have been declined.

Part 2 – Conclusive certificates

What is an example of the exceptional circumstances that would enable the Minister for Home Affairs to issue a conclusive certificate preventing access to external merits review?

6. Section 83E of the Bill enables the Minister, in exceptional circumstances, to issue a conclusive certificate in relation to a security clearance decision or security clearance suitability assessment, preventing review of the decision or assessment in the Administrative Appeals Tribunal (AAT) where it would be prejudicial to security to change or review the decision or assessment.
7. The 'exceptional circumstances' threshold ensures that this power will be used sparingly in respect of decisions or matters raising grave concerns about the decision or assessment prejudicing security. An example of such exceptional circumstances would be if ASIO had identified that foreign powers or their proxies were seeking to use a merits review process to identify sensitive information, methods or capabilities, including potentially the identities of ASIO officers involved in any proceedings, for example, by putting an agent of a foreign intelligence service through the clearance process.

Part 3 – Case study

Could you please prepare a case study addressing the practical operation of subparagraphs 82C(1)(e) and (f)?

8. Paragraphs 82C(1)(e) and (f) are not directly linked. Paragraph 82C(1)(e) enables the uplift of insider threat capabilities across the Commonwealth by enabling ASIO and sponsors to share information and collaborate to identify and mitigate potential insider and other threats. Paragraph 82C(1)(f) is a separate provision that provides clarity, from an administrative perspective, of how ASIO becomes responsible for a security clearance initially issued by another authorised vetting agency – e.g. AGSVA.

9. Critical to enabling the new Part IVA contained in the Bill is proposed section 36A, that would disapply the operation of Part IV to the extent it relates to the exercise or performance of a power or function under Part IVA. Part IV of the ASIO Act prohibits Commonwealth agencies from taking permanent prescribed administrative action (e.g. taking action involving restricting access to information or places) on the basis of ASIO advice, unless that advice is a security assessment (section 39 of the ASIO Act). Subject to limited exceptions, prejudicial security assessments are reviewable in the AAT.
10. The restrictions in Part IV affect clearance sponsors' ability to rely on advice from ASIO to proactively manage insider threats and other risks. This makes it more difficult for ASIO and clearance sponsors to deal with security threats as and when they arise. As changes in an individual's suitability go unreported risks accumulate. Periodic revalidation not supported by a continuous exchange of clearance suitability information makes the aggregate of individual unreported changes more difficult to manage, and may in extreme cases result in a clearance subject being found no longer suitable only after a significant risk has materialised. It is this disapplication of Part IV that enables ASIO, under paragraph 82C(1)(e), and sponsors who receive advice from ASIO pursuant to that paragraph, to better respond to potential insider threats.
11. Set out below is a case study regarding the practical application of paragraph 82C(1)(e), noting the disapplication of Part IV:

Hypothetical Case Study

Person 1 has an ASIO-issued security clearance. Person 1 moves from Department A to Department B to take up a promotion. ASIO provides Department B access to a summary of Person 1's security clearance suitability risks to enable Department B's insider threat functions. This includes information about Person 1's security clearance suitability and concerns about past security practices that result in Department B deciding, on the basis of ASIO's communication of the information, to impose ongoing restrictions on Person 1's access to certain types of sensitive information, consistent with restrictions that were in place in Department A.

Under the current provisions of the ASIO Act, ASIO would be required to prepare either a qualified or adverse security assessment and assuming no exceptions applied, give Person 1 notification of this security assessment, including notification that Person 1 had review rights in the AAT, before Department B can impose such restrictions. This is the case irrespective of whether Person 1 provided consent for Department B gaining access to their personal information. As a result, the current provisions have the potential to cause delay to Person 1's move from Department A to Department B, because Department B would not be able to impose the ongoing restrictions they desire on Person 1 without first receiving information from ASIO in the form of a security assessment.

Under the amended provisions, ASIO would be able to provide Department B access to a summary of Person 1's security clearance suitability risks, and Department B could rely on that information to impose ongoing restrictions without the need for a formal security assessment, noting that Person 1 previously consented to the use and disclosure of their personal information as part of the security clearance process. The reforms would enable ASIO to establish and maintain a single source of information about Person 1's security clearance suitability. This would enable ASIO to provide a consistent and holistic assessment that enables the current and any potential future sponsoring agencies (through their insider threat units) to fulfil their responsibility to manage Person 1's access to security classified information and resources.

Part 4 – Information protection

If a Certificate is issued by the Minister of Home Affairs under s.83A(4) of the Bill, assumedly there is an obligation on the sponsoring agency not to disclose the prejudicial security clearance suitability assessment to the applicant, but the Bill appears to be silent in that regard, why is this?

12. The Bill does not include an obligation on sponsors to withhold a prejudicial security clearance suitability assessment from an application in circumstances where a Minister has issued a certificate. While there is no obligation on the sponsoring agency, ASIO notes that disclosure would be inconsistent with the purpose and intent of such a certificate.
13. In addition, sponsors are subject to the operation of the PSPF, which sets out requirements relating to the treatment of security classified information, including the circumstances in which it may be accessed and disclosed. Where the Minister has issued a certificate to withhold a prejudicial security clearance suitability assessment, or part thereof, that information would be classified, and therefore could not be provided to the applicant.

Part 5 – Other questions about accountability and new rights of review

A disaffected person may make an application to the AAT in respect to the security clearance decision pursuant to s.83B(2) of the Bill "at any time". Why is this the case?

14. Subsection 83B(2) applies only after the AAT has completed a review of a security clearance decision or security clearance suitability assessment. It enables an applicant to apply to the AAT where, following that review, 'fresh evidence of material significance that was not available at the time of the previous review' has arisen. It is a safeguard that enables the AAT to examine fresh evidence that may have affected the outcome of the AAT's original review. ASIO considers that the 'fresh evidence of material significance' threshold is appropriate in this context.

What other certificates or clearances are envisaged by section 83F(1)(a) and (b)?

15. The effect of subsection 83F(1) is that, under subsection 83F(2), the Attorney-General may, if satisfied that it is desirable to do so by reason of special circumstances, require the AAT to perform an inquiry or a review of:
 - Prejudicial security clearance suitability assessments which have not been provided to the affected person; or
 - security clearance decisions that are not internally or externally reviewable (i.e. subject to the exception to review rights for persons who are engaged, or proposed to be engaged, for employment outside Australia for duties outside Australia, and who are either not Australian citizens or not normally resident in Australia).
16. At the request of the Committee, ASIO would be pleased to provide a briefing on any of the issues addressed in this submission.