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1 February 2024

Secretary

Parliamentary Joint Standing Committee on Intelligence and Security

Parliament of Australia

Parliament House, Canberra ACT

via pjcis@aph.gov.au

Dear Secretary,

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

Please consider my submission to the Parliamentary Joint Standing Committee on Intelligence and Security's inquiry into the National Security Legislation Amendment (Comprehensive Review & Other Measures no.3) Bill 2023 (hereafter 'the Committee' and 'the Bill', respectively).

In line with ASPI's Charter, this submission does not reflect a single ASPI perspective and is the opinion of the author alone. Nor does this submission represent the views of the Australian government or any government agency.[1]

This submission argues that the measures in the Bill are prudent refinements to already sound fundamentals of national security oversight in Australia, will enhance important protections for intelligence personnel and operations, and will improve the effectiveness of processes related to security assessments and clearances.

Background to the Bill

A common but regrettable trope in Australian public life is the simplistic assertion that since 2001 an ever-increasing volume of national security legislation has been passed by the Australian Parliament, the effect of which has been to proportionately diminish the liberties of Australians. This presentation of a directly proportionate trade-off between 'security' and 'liberty' has a venerable heritage in liberal discourse, in the same fashion as, for example, 'guns versus butter'. But, as in that instance, the truth is more complicated. As US writer Benjamin Wittes has observed:

> '[...] in the vast majority of circumstances, liberty and security are better understood as necessary preconditions for one another than in some sort of standoff. The absence of

[1] Noting I am on secondment to ASPI from the Australian Government, see https://www.aspi.org.au/bio/chris-taylor.

> liberty will tend to guarantee an absence of security, and conversely, one cannot talk meaningfully about an individual's having liberty in the absence of certain basic conditions of security. While either in excess can threaten the other, neither can meaningfully exist without the other either.'[2]

And,

> '[T]he essence of the relationship between liberty and security [is] one of profound mutual dependence yet, simultaneously, mutual danger and hostility. An adjustment to one partner in the symbiosis may aid both, may harm both, may advantage one with respect to the other. It may cause the relationship to adjust, to reformulate, or to dissolve.'[3]

Thus, in my view, national security-related legislative measures should be considered on their own merits and their possible effect on this symbiosis. Not simply assigned to one end of a balance beam.

While the trope has its origins in legislation specifically addressing terrorism, it is commonly deployed against national security bills more generally, including those dealing with the intelligence services. It would not be a surprise for the Committee to encounter it during this inquiry itself.

The reasonably steady flow of national security legislation through the Australian Parliament is much better understood as a constant tending and improvement of what is a fundamental responsibility of a sovereign, liberal government (and Parliament). It also reflects the relatively recent adoption of a legislative framework for the conduct of foreign intelligence activities by Australia, beginning with the introduction of the original Intelligence Services Bill in June 2001 and its passage in late September of that year.

Successive governments of differing political stripes have made such legislation a priority. This prioritisation has stemmed from their recognition of the importance of these national capabilities and the seriousness with which perceived impingements (typically much more minor than suggested) on liberties are approached – as well as the dynamic nature of the strategic environment and the threats facing Australian interests.

This Bill is a prime example of that constant tending and improvement. In significant part it puts into practice a further set of twelve recommendations arising from the Comprehensive Review of National Security Legislation (the 'Richardson Review') completed in late 2019. The Richardson Review was itself an outcome of a recommendation by the 2017 Independent Intelligence Review (the 'L'Estrange-Merchant Review').

A note of caution: my observations above should not be interpreted as Panglossian. More needs to be done, by ministers and the bureaucracy, to inform the public of the 'why' behind national security legislation. Declining levels of public trust in government and other institutions, weaponisation of disinformation and misinformation, and a relative lull in the terrorist threat level inside Australia, all bear on public understanding. Simply relying on the

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[2] Benjamin Wittes, *Against a Crude Balance: Platform Security and the Hostile Symbiosis Between Liberty and Security*, Harvard Law School & Brookings Institution's Project on Law and Security, 21 September 2011, p.4, as at https://www.brookings.edu/articles/against-a-crude-balance-platform-security-and-the-hostile-symbiosis-between-liberty-and-security/

[3] Benjamin Wittes, 'Liberty and Security: Hostile Allies', Hoover Institution, 10 November 2011 (adapted from *Against a Crude Balance*), as at https://www.hoover.org/research/liberty-and-security-hostile-allies

inherent logic behind 'constant tending and improvement' is not enough. I note that in this instance, the 'case for' the Bill has, to date, consisted only of the relevant sections in the (1317 page, four volume) Richardson Report released publicly three years ago, and the Minister's second reading speech.

There is a role here too for the Committee in its careful consideration of, and reports upon, proposals and more broadly for parliamentarians with an interest in the effectiveness of our national security capabilities.

In this vein, it is welcome that the Home Affairs Minister, in her second reading speech, acknowledges that while counter-terrorism had been an important, driving factor in the development of Australian national security law since 2001, there are additional national security factors also of significant and growing importance. She specifically cites counter-espionage. Noting of course that her portfolio responsibilities mean an exclusive focus on security and law enforcement, as distinct from foreign intelligence-related factors.

This statement is particularly welcome because the ready use of counter-terrorism as universal example and explanation for intelligence matters (legislative and otherwise) over the past twenty years has served a purpose, and resonated readily with the public, but has had an unfortunate effect of sometimes narrowly skewing public understanding of the full breadth of national security and intelligence matters (although this is slowly changing). This has in turn led to often mischievous mischaracterisation of laws fully intended to address wide-ranging national security challenges – for example the *National Security Information Act* - as somehow being exclusively for counter-terrorism purposes.

Observations on the Bill's measures

Fundamentally, the measures fall into the following four categories.

Reforms to improve processes around ASIO 'Security Assessments'

I agree that it is sensible to exclude analysis provided by ASIO to the Foreign Investment Review Board (FIRB) from the characterisation of 'security assessment', given the particular implications of that term. That is, by confirming that the FIRB's decisions are not 'prescribed administrative actions' as understood in this context.

Furthermore, the extension of the term's application to prescribed administrative actions in relation to (more non-traditional) uses such as probation, and gun and private security licences, etc seems a reasonable adaptation to the proliferation of such security-based decision-making outside of the Commonwealth.

While also granting suitable flexibility to ASIO to communicate timely, preliminary security information to state government authorities in emergency situations (without being trapped in bureaucratic processes associated with Part IV of the ASIO Act.)

Enhanced protection of (ASIS, ASD and ASIO) officer identities, and refinement of secrecy and publication offences

The identities of persons associated with ASIS, ASIO and ASD require special protections under the law. These protections are matched by the special legal obligations placed on those persons not to disclose the true nature of their present and past employment (for example by way of section 41 of the *Intelligence Services Act*, as it relates to ASIS staff).

Not only are these provisions intended to protect individuals from physical harm (eg from those seeking to undertake politically motivated violence) but to shield them from counter-intelligence threats (ie from adversarial foreign intelligence services who might wish to coerce, compromise or disrupt them). The ultimate adversarial intention is to compromise Australian intelligence operations, given the identification of intelligence staff is often key to identifying sources and operational methods.

As Richardson explained (in specific relation to ASIS):

> 'Strict secrecy with respect to ASIS identities is required as this information may be used by hostile foreign intelligence services to target, infiltrate or disrupt ASIS' intelligence operations.'[4]

And,

> 'The disclosure or publication of information about a former ASIS or ASIO officer may enable conclusions to be drawn about the identity of other officers, including officers who have undertaken the same role at an earlier or later time, as well as the identity of current or former agents or sources. The disclosure of such information may significantly prejudice current and future intelligence operations and the continuing viability of particular methods or sources.'[5]

The recommendation of the Comprehensive Review was therefore to provide a legislative basis for the existing use of cover arrangements by ASIS and the bolstering of the existing arrangements used by ASIO. The Bill extends this to include ASD staff also.

The possibility that the disclosure of such identities might threaten those persons' safety is not a theoretical one. Past counter-terrorism investigations have identified the intended terrorist targeting of ASIO officers, for example. Likewise, the second volume of the history of ASIO includes a frank account of the outrageous and violent harassment of individual ASIO staff by extremists during the 1970s, most notably the 'Committee for the Abolition of Political Police'. [6]

As such, the proposed changes both reflect the growing importance of 'intelligence as contest'[7]and a punctiliousness on the part of the government (in line with the spirit observed at the beginning of this submission) to cross every possible 'T' and dot every 'I' on these matters.

The Bill is clear that any cover arrangements enabled and utilised must be mutually agreed between the intelligence agency in question and the Commonwealth authority providing the cover. This cannot be a unilateral action by ASIS, ASIO or ASD.

In pursuit of the protection of intelligence identities, the Bill also includes amendments to the *Archives Act* to exempt from release archival material that would identify ASIS and ASIO officers, affiliates and agents. This is a positive move that will help clarify much decision-making around archival releases, although I anticipate it might possibly exacerbate some

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[4] *Comprehensive Review of the Legal Framework of the National Intelligence Community - Volume 2: Authorisations, Immunities and Electronic Surveillance*, Commonwealth of Australia, December 2019, p.219, as at https://www.ag.gov.au/system/files/2020-12/volume-2-authorisations-immunities-and-electronic-surveillance.PDF

[5] *Comprehensive Review of the Legal Framework of the National Intelligence Community - Volume 3: Information, Technology, Powers and Oversight*, Commonwealth of Australia, December 2019, p.107, as at https://www.ag.gov.au/system/files/2020-12/volume-3-information-technology-powers-and-oversight.PDF

[6] John Blaxland, *The Protest Years: The Official History of ASIO volume 2 1963-1975*, Allen & Unwin, Sydney, 2015, pp.429-435

[7] About which I have written previously, see 'Winning the 21st century intelligence contest', *The Strategist*, 11 July 2023, as at https://www.aspistrategist.org.au/winning-the-21st-century-intelligence-contest/

consternation experienced around non-release of cabinet materials where there are incidental references to such persons in those documents.

Similarly, the Bill consolidates secrecy offences, thereby ensuring that the charging of a person with a particular secrecy offence under the *Intelligence Services Act* does not inadvertently imply their employment by a particular intelligence agency. The Bill also suitably updates the existing publication offence in the *ASIO Act* to reflect the evolved media landscape.

Reforms to improve ASIO's security clearance work

These measures in the Bill reflect ASIO's growing centrality to the conduct of security clearance work within the Australian Government. This includes not only the long-standing contribution of security advice to the conduct of clearances by other agencies (including the Australian Government Security Vetting Agency) but also the ongoing transition of ASIO to being responsible for positive vetting (henceforth 'Top Secret - Privileged Access') clearances across government.

In turn, this will aid in achieving efficiencies to address what is a lingering national security vulnerability - namely a mess of clearance lapses and delays. For example, by enabling the Director-General of ASIO to delegate non-prejudicial security clearance suitability assessments to ASIO staff. Notably, prejudicial assessments will continue to need to be actioned by the Director-General alone.

The Bill will also impose new disciplines on ASIO. Such as by requiring the organisation to report to the Inspector-General of Intelligence and Security when ASIO fails to complete related assessments – security clearance decisions or suitability assessments - within twelve months.

Refinement of processes for certain Ministerial Authorisations and Warrants

This includes a minor but otherwise sensible refinement to the process for Ministerial Authorisations (MAs) under the *Intelligence Services Act* sought on security grounds, such that in the future a MA can be signed by the Attorney General or the Defence/Foreign Minister in either order. Regardless, both the Attorney General and the relevant Minister will both still need to sign before an authorisation becomes effective or commences.

Conclusion

Passage of the National Security Legislation Amendment (Comprehensive Review and Other Measures No.3) Bill will further improve the functioning of Australia's national security laws.

I support the Bill and the measures therein.

This judgment is consistent with my long-standing view that Australia's oversight arrangements are fundamentally sound but can be further honed, in terms of efficiency and effectiveness, including when tested against practicalities of everyday implementation by agencies.

Relatedly, we endorse the Minister for Home Affairs' observation in her second reading speech that:

> 'These changes will support our intelligence agencies in the vital work they do for the Australian people, while also enhancing oversight in some specific areas.'[8]

I would be happy to discuss this submission with the Committee, including at any forthcoming hearing.

Chris Taylor, Head Statecraft & Intelligence Centre[9]

[8] Hon Clare O'Neil MP, second reading speech for the National Security Legislation Amendment (Comprehensive Review and Other Measures No.3) Bill 2023, 30 November 2023
[9] For information on the Centre see https://www.aspi.org.au/program/statecraft-and-intelligence-program