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**THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA**

**HOUSE OF REPRESENTATIVES**

**Australian Security Intelligence Organisation Amendment (Restoring  
Merits Review) Bill 2014**

**EXPLANATORY MEMORANDUM**

Circulated by authority of  
Andrew Wilkie MP

## STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

*Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011*

### **Australian Security Intelligence Organisation Amendment (Restoring Merits Review) Bill 2014**

This bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

#### **Overview of the Bill**

This is a Bill primarily to amend the *Australian Security Intelligence Organisation Act 1979* ('the ASIO Act') to restore the right of all asylum seekers to access merits review through the Administrative Appeals Tribunal ('AAT') if they are the subject of an adverse security assessment. The Bill makes a consequential amendment to the *Administrative Appeals Tribunal Act 1975* to help facilitate and remove doubt as to these rights. This Bill complements the Migration Amendment (Ending the Nation's Shame) Bill 2014 also introduced by the Member for Denison granting, *inter alia*, the right to access the AAT to asylum seekers who have their claim rejected. Due to the specific operation of the ASIO Act in relation to rejections on security grounds, this Bill is necessary to afford all asylum seekers equal access to the right of appeal regardless of how they arrive in Australia and what are their cited grounds for rejection.

#### **Human rights implications**

This Bill engages with Australia's responsibility under the Convention and Protocol Relating to the Status of Refugees ('the Refugee Convention'), as does the Migration Amendment (Ending the Nation's Shame) Bill 2014. Under Article 31 of the Refugee Convention, no person seeking asylum shall be penalised for arriving in the country of refuge illegally if they present themselves for processing on arrival. Certain asylum seekers are currently penalised due to the grounds on which they are rejected, even if they present in the same way as all the other asylum seekers and in accordance with international law. The Bill also engages Article 16, which relates to accessing a fair judicial system. Currently, there are some administrative rejections that allow judicial review and some which do not, and this is not equal or fair access to the judicial system.

#### **Conclusion**

This Bill is not only compatible with human rights but necessary to bring Australia in line with international humanitarian law. Without this Bill, Australia will be operating contrary to and incompatibly with its human rights obligations.

**Mr Andrew Wilkie MP, Member for Denison**

# **Australian Security Intelligence Organisation Amendment (Restoring Merits Review) Bill 2014**

## **Clause 1: Short Title**

1. This clause is a formal provision and specifies the short title of the Bill, once enacted, as the *Australian Security Intelligence Organisation Amendment (Restoring Merits Review) Bill 2014*.

## **Clause 2: Commencement**

2. This clause provides for the commencement of all Sections of the Act the day after the Act receives the Royal Assent.

## **Clause 3: Schedule(s)**

3. This clause establishes that, as the intent of the Bill is to be realised through amendments to other Acts, the Schedules of this Bill will amend those Acts accordingly.

## **Schedule 1 – Amendments**

### *Australian Security Intelligence Organisation Act 1979*

#### **Item 1: Subsection 35(1) (paragraph (b) of the definition of *prescribed administrative action*)**

1. Item 1 removes action taken under the *Migration Act 1958* from the definition of prescribed administrative action, thereby limiting the ability of powers exercised as a prescribed administrative action from treating those covered by the Migration Act as a special class.

#### **Item 2: Paragraph 36(b)**

2. Item 2 repeals one of the exclusions to the persons who are affected by Part IV of the Act. Part IV outlines the process for receiving and dealing with security assessments. Within Part IV it is outlined how review of adverse or qualified security assessments are managed and who may access a review in accordance with Part IV. Section 36 of the Act details groups of persons to whom the normal procedure for security assessments does not apply. One of these groups is persons who are the subject of prescribed administrative action (which is defined in the Act) relating to migration, which means that currently many irregular maritime arrivals with adverse or qualified

security assessments do not have access to the same review mechanisms available to others. Repealing paragraph 36(2) will open these review mechanisms, such as the AAT, to asylum seekers currently precluded.

**Item 3: Subsection 37(3)**

3. Item 3 qualifies the existing subsection relating to the ability of the regulations to prescribe matters that may be considered by the AAT and limits the existing subsection 37(3) subject to the insertion of the new subsection 37(3A).

**Item 4: After subsection 37(3)**

4. Item 4 specifies that a person's status as an asylum seeker, or a person's characterisation as belonging to a class of persons defined as asylum seekers, cannot be used as a reference for any matters prescribed to be taken into account by the AAT, thus not limiting the AAT's ability to examine all the evidence and information relating to that person in an equitable way to all other applications.

**Item 5: Subsection 54(2)**

5. Item 5 omits the words relating to migration security assessments from section 54, which currently prevents certain migration security assessments from being reviewed if new information is available, resulting in equal rights to appeal an AAT decision when new information is available for all persons covered by Part IV of the Act.