

EXPLANATORY STATEMENT

Select Legislative Instrument 2016 No.

Issued by the authority of the Attorney-General

Australian Security Intelligence Organisation Act 1979

Australian Security Intelligence Organisation Regulation 2016

Introduction

Authority

Section 95 of the *Australian Security Intelligence Organisation Act 1979* (the Act) provides that the Governor-General may make such regulations, not inconsistent with the Act, prescribing all matters required or permitted by this Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to this Act.

Background

The *Australian Security Intelligence Organisation Regulations 1980* (the 1980 Regulations) were last updated in 2003. The purpose of the *Australian Security Intelligence Organisation Regulation 2016* (the Regulation) is to repeal the 1980 Regulations and remake them to ensure they are up-to-date and accurately reflect the current provisions in the Act and the *Administrative Appeals Tribunal Act 1975* (AAT Act). The Regulation also includes a new regulation to enhance the Australian Security Intelligence Organisation's (ASIO) ability to cooperate with the Defence Department (Defence).

The Regulation repeals the 1980 Regulations to remove references to obsolete sections in the Act. Regulations 3, 5 and 6, Schedule 1 Form 2 and Schedule 2 of the 1980 Regulations are obsolete as a result of the repeal of corresponding sections in the Act. The Regulation ensures that each section corresponds with its related provision in the Act and that, where possible, headings use similar language to the comparative section in the Act.

The Regulation also updates the information provided to persons to whom section 38(1) of the Act applies about their right to apply to the Administrative Appeals Tribunal (AAT) for a review of a qualified or adverse security assessment, including ensuring that the information in Schedule 1 Form 1 is consistent with section 29 of the AAT Act. Schedule 1 Form 1 prescribes the manner of making an application to the AAT and the information to be included in that application.

More information on the Regulation is set out in the Attachment.

The Act specifies no other conditions that need to be satisfied before the power to make the Regulation may be exercised. ASIO and Defence were consulted on the Regulation.

The Regulation is a legislative instrument for the purposes of the *Legislative Instruments Act 2003*. The Regulation will commence on the day after it is registered on the Federal Register of Legislative Instruments.

Financial Impact Statement

The Regulation does not have a financial impact.

Statement of Compatibility with Human Rights

This statement is prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Australian Security Intelligence Organisation Regulation 2016

This Regulation 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*.

Objective

There are two objectives of the Regulation:

1. First, to remake the regulations under section 95 of the Act to reflect current provisions in relevant legislation. The Act has had a number of amendments since 2003, resulting in some inconsistencies with corresponding provisions in the regulations previously made under section 95 of the Act, the 1980 Regulations.

The Regulation is also amended to ensure that it reflects the current arrangements at the AAT. For example, the former Security Appeals Tribunal has been replaced by the Security Division as part of the AAT. References to the Security Appeals Tribunal are removed, and Schedule 1 updated to reflect AAT procedure.

2. Second, to enhance ASIO's ability to assist Defence in the performance of its functions. In order to do this, the Regulation prescribes Defence as an organisation with which ASIO may cooperate and which ASIO may assist in the performance of its functions under subsection 19A(1) of the Act.

Human rights implications

This instrument engages the following human rights:

- Freedom of expression: Article 19 of the International Covenant on Civil and Political Rights (ICCPR).
- Right to a fair trial: Article 14 of the ICCPR
- Right to an effective remedy: Article 2(3) of the ICCPR

Freedom of expression

Article 19(2) contains the right of freedom of expression, and includes the right to receive and impart information. This right can only be subject to restrictions that are provided by law and are necessary for, among other things, the protection of national security.

Section 7 of the Regulation limits the right to communicate information that relates to the sources or holdings of intelligence and ASIO's methods of operations. This provision does not itself prohibit disclosure; rather, it prevents a prescribed authority from removing a

prohibition on disclosure imposed by section 34ZS of the Act. Section 34ZS makes it an offence if a person communicates certain information in connection with a questioning or a questioning and detention warrant, except where a prescribed authority has given written permission for that disclosure. The restriction relates only to disclosure by a legal adviser of a specific category of information obtained during the questioning or detention of the subject, and it is tailored specifically to prevent disclosure of highly sensitive information regarding Australia's intelligence capabilities.

The purpose of the restriction of the right to impart information relates to the 'protection of national security', which is permitted by Article 19 of the ICCPR. The limitation is necessary to protect information being disclosed that could have detrimental effects on Australia's national security. The limitation is reasonable and proportionate to the protection of national security because it goes no further than is necessary to maintain secrecy of national security material and continues to allow for legal representation of a subject during questioning. This measure is therefore consistent with the right to freedom of expression.

This limitation is consistent with the permitted limitation on the right to freedom of expression, including the right to receive and impart information in Article 19(3)(b), in the interests of protecting national security.

Right to an effective remedy

Article 2(3) protects the right to an effective remedy for any violation of rights or freedoms recognised by the ICCPR.

Section 8 also engages the right to an effective remedy in Article 2(3) of the ICCPR, as the limitation applies in proceedings for a remedy. However, the section relates only to security information and does not prohibit access by a lawyer with an appropriate security clearance. It is unlikely to have any material impact on a person's ability to seek an effective remedy and is therefore consistent with the right.

Right to a fair and public hearing

Article 14 provides for the right to a fair and public hearing.

The Regulation engages the right to a fair and public hearing in its amendment of Schedule 1 Form 1, titled 'Information concerning right to apply to Administrative Appeals Tribunal'. The amendments ensure Form 1 provides clear, instructive information about the form and manner of making an application to the Security Division of the AAT for a review of a security assessment. Providing clear and instructive information to an applicant seeking a review of a security assessment is consistent with a person's right to a fair and public hearing under Article 14 of the ICCPR.

The AAT usually sets a 28 day time limit for applying for review of decisions. The form provides that an application must be made within 28 days after receipt of the notification of the assessment or within such further time as the AAT, either before or after the expiration of the 28 days, allows. Importantly, a person may make an application for an extension of time

in writing. Information on how to apply for a time extension may be found on the AAT's website or by calling 1800 228 333.

New section 8 limits the right of access to security information by a lawyer acting for a person in connection with proceedings for a remedy relating to either a warrant under Division 3 of Part III of the Act or the treatment of the person in connection with such a warrant. Security information is defined in section 5 as "information to which access is controlled or limited on security grounds". Access to security information may be given to the lawyer only if the lawyer has been given an appropriate security clearance in relation to the information, or if the Secretary of the Attorney-General's Department is satisfied that giving the lawyer access would not be prejudicial to the interests of security.

Limiting access to sensitive security information is necessary to protect Australia's law enforcement and intelligence capabilities. The purpose of the restriction of the right to impart information relates to the 'protection of national security', which is permitted by Article 19 of the ICCPR. Section 8 does not prevent a person from obtaining legal representation.

Conclusion

The Regulation is compatible with human rights because it promotes the right to an effective remedy and because to the extent it limits the right to freedom of expression and the right to a fair and public trial, these limitations are necessary, reasonable and proportionate to a legitimate objective.

Attachment

Details of the *Australian Security Intelligence Organisation Regulation 2016*

Section 1 – Name

This section provides that the title of the Regulation is the *Australian Security Intelligence Organisation Regulation 2016* (the Regulation).

Section 2 – Commencement

This section provides that the Regulation commences on the day after it is registered.

Section 3 – Authority

This section provides that the Regulation is made under the *Australian Security Intelligence Organisation Act 1979* (the Act).

Section 4 – Schedules

This section clarifies the effect of the Schedules. The effect of this is that the *Australian Security Intelligence Organisation Regulations 1980* (the 1980 Regulations), specified in Schedule 2, are repealed.

Section 5 – Definitions

This section:

- retains the definition of ‘Act’ in the 1980 Regulations, meaning the *Australian Security Intelligence Organisation Act 1979*, but updates the spelling of the word ‘Organization’ to ‘Organisation’;
- adopts the definition of security information contained in regulation 3B of the 1980 to make Regulations as meaning information to which access is controlled or limited on security grounds, otherwise than by new section 8 (previously regulation 3B); and
- clarifies that a ‘subject’ in new section 7 means a person specified in a warrant issued under Division 3 of Part III of the Act.

Section 6 – Co-operation with intelligence and law enforcement agencies etc.

Subsection 19A(1) of the Act allows the Australian Security Intelligence Organisation (ASIO) to cooperate with and assist a number of bodies in the performance of their functions. The bodies include other Commonwealth intelligence collection agencies, law enforcement agencies, and State or Commonwealth authorities prescribed by regulations.

ASIO has capabilities and expertise that can provide valuable assistance to the Defence Department (Defence) in the performance of its functions. Assistance may include, but is not limited to, capability sharing such as the provision of linguistic, analytical, technical or logistical support. Currently, ASIO is only able to assist or cooperate with

Defence where it is for the proper performance of ASIO's functions. This limits ASIO's ability to cooperate with Defence on matters that are not relevant to security.

Section 6 prescribes Defence for the purpose of subsection 19A(1)(e) to allow ASIO to assist Defence in the performance of its functions. By prescribing Defence, ASIO will, for example, be able to provide Defence APS employees, contractors to Defence and Australian Defence Force (ADF) personnel training on technical equipment, provide support to its recovery and humanitarian operations, and assist in developing new capabilities. The prescription of Defence will also provide greater legal certainty for ASIO employees and ASIO affiliates working with Defence on security and non-security related matters.

For the purposes of the prescription under 19A(1)(e), "Defence Department" includes the ADF.

In accordance with paragraph 19A(2)(b), ASIO may only provide such assistance on request by either the Chief of the Defence Force or the Secretary of the Defence Department. This prescription provides ASIO with the same legislative ability to cooperate and assist Defence as it currently has with all other Australian intelligence collection and law enforcement agencies. The prescription of Defence in the Regulation for the purposes of 19A(1)(e) of the Act does not alter or limit ASIO's current ability to cooperate with any other agencies already listed in subsection 19A(1).

Section 7 – Secrecy relating to warrants and questioning

Section 7 is similar to regulation 3A of the 1980 Regulations. It has been amended in the Regulation to reflect that it corresponds with what is now section 34ZS of the Act, which provides for secrecy relating to warrants and questioning.

Section 34ZS of the Act provides for the secrecy of information about matters relating to a warrant issued under Division 3 of Part III of the Act. Under section 34ZS of the Act, a person commits an offence if they communicate certain information in connection with a questioning or a questioning and detention warrant. However, subsection 34ZS(6) provides an exception to the offence where a prescribed authority has given written permission for that disclosure.

Subsection 34ZS(6) provides that a prescribed authority may give written permission for certain persons (a legal adviser, parent, guardian or representative) to disclose specific information to a specified person. Subsection 34ZS(6) provides that any such permission given under that subsection must not be inconsistent with the regulations.

Like regulation 3A of the 1980 Regulations, section 7 provides that, for subsection 34ZS(6) of the Act, a prescribed authority must not give written permission to a legal adviser of a subject to communicate to anyone else information that is obtained during the questioning or detention of the person, and that relates to:

- (a) sources of holdings of intelligence; or
- (b) the Organisation's method of operations.

The type of information referred to in subparagraphs (b)(i) and (b)(ii) of new section 7 remains unchanged from regulation 3A of the 1980 Regulations. This reflects that disclosure of information relating to the sources or holdings of intelligence or ASIO's method of operations would likely prejudice national security, including undermining the effectiveness of ASIO's operations, and such information would require protection from disclosure.

The Note in section 7 amends the Note in regulation 3A of the 1980 Regulations to clarify that a disclosure of information in contravention of written permission given by a prescribed authority under subsection 34ZS(6) of the Act may not be a permitted disclosure for the purposes of section 34ZS of the Act.

While regulation 3A of the 1980 Regulations referred to the 'subject' of the warrant as a person specified in a questioning warrant under section 34D, new section 7 extends the provision to cover the questioning and question and detention warrants issued under Division 3 of Part III of the Act. This reflects the intention of the amendments made by the *ASIO Legislation Amendment Act 2006*, which divided the provisions relating to warrants in Division 3 Part III into two subdivisions. At that time, the 1980 Regulations were not updated to reflect the 2006 legislative amendments.

Section 8 – Lawyers' access to security information for proceedings relating to warrant

Section 8 is similar to regulation 3B of the 1980 Regulations. It controls lawyers' access to security information (as defined in section 5) for proceedings for a remedy related to a warrant or the treatment of a person in connection with a warrant. Section 8 provides that a lawyer can only be given access to security information if the lawyer holds a security clearance at a level considered appropriate by the Secretary of the Department, or if the Secretary of the Department is satisfied that granting access would not be prejudicial to the interests of security.

The Secretary of the Department may also make access to security information conditional upon requirements relating to the use, handling, storage or disclosure of the information. This regulation balances the right of a person to an effective remedy with the need to ensure sensitive information is adequately protected.

The heading of new section 8, 'Lawyers' access to security information for proceedings relating to warrant', omits the reference to section 34VA of the Act, which was repealed in 2006 and substituted with section 34ZT.

Subsection 8(1) clarifies that for section 34ZT of the Act, new section 8 regulates access to security information by a lawyer acting for a person in connection with proceedings for a remedy relating to:

- (a) a warrant issued under Division 3 of Part III of the Act in relation to the person; or
- (b) the treatment of the person in connection with such a warrant.

Subsection 8(2) also provides that access to security information may be given to the lawyer only if:

- (a) the lawyer has been given a security clearance in relation to the information at the level considered appropriate by the Secretary of the Department, or
- (b) the Secretary of the Department is satisfied that giving the lawyer access to the information would not be prejudicial to the interests of security.

A reference to the 'Department' in section 8 refers to the Attorney-General's Department, which is the department responsible for administering the Act.

A new Note is inserted after subsection 8(2) stating that security clearances are given in accordance with the Australian Government Protective Security Policy Framework (PSPF). This reflects changes to the process for obtaining a security clearance, including that the process is undertaken in accordance with the Australian Government PSPF.

Subsection 8(3) is consistent with subregulation 3B(2) of the 1980 Regulations and provides that access to security information may be given to the lawyer subject to any conditions that the Secretary of the Department considers appropriate, including conditions relating to the use, handling, storage or disclosure of the information.

Subsection 8(4) is similar to subregulation 3B(3) of the 1980 Regulations and provides that nothing in this section (section 8) entitles a lawyer who has been given a security clearance to be given access to security information.

Section 9 – Prescribed form of information

Subsection 38(1) of the Act sets out that, when ASIO furnishes an adverse or qualified security assessment in respect of a person, the Commonwealth (or State) agency upon which it is furnished must give the person information in the prescribed form within 14 days after the day on which the assessment is furnished. Subsection 36(1) of the Act excludes particular classes of persons from being given such information. Section 9 of the 2016 Regulation provides that that information must be in accordance with Form 1. Form 1 sets out the information that must be provided to a person in respect of whom an adverse or qualified security assessment has been furnished. It reflects the requirements in section 29 of the *Administrative Appeals Tribunal Act 1975* (AAT Act).

Schedule 1 – Forms

Form 1 – Information concerning right to apply to Administrative Appeals Tribunal

The heading of new Form 1 is 'Information concerning right to apply to Administrative Appeals Tribunal'. This heading is similar to the heading of Form 1 in the 1980 Regulations, with the addition of the words 'Administrative Appeals Tribunal' rather than 'Tribunal'.

New Form 1 updates information concerning a person's right to apply to the AAT for a review of an adverse or qualified security assessment.

Paragraph 1 of new Form 1 advises that a person may apply in writing to the Security Division of the AAT. The reference to 'Security Appeals Tribunal' in paragraph 1 of Form 1 of the 1980 Regulations is amended to refer to the 'Security Division of the Administrative

Appeals Tribunal' to ensure that a person is aware of the correct Division within the AAT to which to refer an application.

Paragraphs 2 and 3 of new Form 1 notes that a person making an application should include a copy of the assessment and a statement indicating any part of the assessment the person does not agree with and setting out the grounds on which the application is made.

The requirement for this information in Form 1 is consistent with section 29 of the AAT Act, which prescribes the manner of making an application to the AAT for a review of a security assessment and the information to be included in that application.

Paragraph 4 of new Form 1 amends the time period for making an application under the AAT Act from 30 days to 28 days, which is the usual time period for making an application under the AAT Act. This change to the application period ensures consistency with the AAT Act and avoids possible confusion as to the time for making an application for review of a security assessment.

Paragraph 5 of new Form 1 advises that, after completion of a review of the assessment, an applicant may apply for a review of the findings of the AAT, on the ground that the applicant has fresh evidence of material significance that was not available at the time of the previous review. This provision is consistent with the right of a review of the findings of the AAT, under subsection 54(2) of the Act and as referenced in the new Note inserted after paragraph 5. Paragraph 5 also clarifies that that a review of the findings of the AAT would not include a review of a security assessment made for the purposes of subsection 202(1) of the *Migration Act 1958*, which applies to a review of the Minister's decision to deport non-citizens on security grounds.

Paragraph 6 of new Form 1 states that in applying for a review of the findings of the AAT, the applicant must include a statement setting out the grounds on which the application is made.

Paragraph 7 of new Form 1 provides an updated address for sending applications for review to the AAT Registry.

Schedule 2 – Repeals

Australian Security Intelligence Organisation Regulations 1980

Item 1 – The whole of the Regulations

This schedule repeals the 1980 Regulations in their entirety. This is in order to substitute the Regulation as the relevant instrument made under section 95 of the Act.