

EXPLANATORY STATEMENT

Issued by the Minister for Home Affairs

Subject – *Australian Security Intelligence Organisation Act 1979*
Australian Security Intelligence Organisation Amendment (Permitted Disclosure) Regulations 2021

The instrument makes regulations to give effect to recent *Australian Security Intelligence Organisation Act 1979* (ASIO Act) amendments.

The ASIO Act provides the functions and powers of the Australian Security Intelligence Organisation (ASIO).

Section 95 of the ASIO Act provides that the Governor-General may make regulations, not inconsistent with the Act, prescribing all matters required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the Act.

The *Australian Security Intelligence Organisation Amendment Act 2020* (the Amendment Act) repealed the former Division 3 of Part III of the ASIO Act, which included the previous questioning and detention framework, and introduced a new Division 3 of Part III, which incorporates a new compulsory questioning framework with a limited apprehension power. The ASIO Act, as amended by the Amendment Act, now provides for questioning warrants to be issued in relation to espionage, foreign interference and politically motivated violence.

The purpose of the *Australian Security Intelligence Organisation Amendment (Permitted Disclosure) Regulations 2021* (the Amendment Regulations) is to make consequential and technical updates to the *Australian Security Intelligence Organisation Regulation 2016* (the Regulation) resulting from the introduction of new Division 3 of Part III into the ASIO Act.

These amendments:

- repeal the definition of *subject*. The term *subject* is no longer required to be defined in the Regulation, as the Amendment Act introduced a definition of *subject* for the purposes of Division 3 of Part III of the ASIO Act.
- update section references and terminology to align with Division 3 of Part III of the ASIO Act, as amended by the Amendment Act.
- provide minor technical updates to section 7 of the Regulation prohibiting a prescribed authority from giving directions to a lawyer for the subject of a questioning warrant to communicate to any other person information obtained during questioning or apprehension of the subject, that relates to sources or holdings of intelligence or ASIO's method of operations. The intent of new section 7 of the Regulations is the same as former section 7. The changes reflect changes to the underpinning, updated provisions in the ASIO Act.

Details of the Amendment Regulations are set out in [Attachment A](#).

The ASIO Act does not specify any conditions that need to be satisfied before the power to make the Amendment Regulations may be exercised.

A Statement of Compatibility with Human Rights has been completed in accordance with the *Human Rights (Parliamentary Scrutiny) Act 2011*. The overall assessment is that the Amendment Regulations are compatible with human rights. A copy of the Statement is at Attachment B.

The Office of Best Practice Regulation (the OBPR) has been consulted in relation to the amendments. No Regulation Impact Statement is required. The OBPR consultation reference number is 42831.

ASIO was consulted in relation to the Amendment Regulations.

The Amendment Regulations are a legislative instrument for the purposes of the *Legislation Act 2003*.

The Amendment Regulations commence on the day after they are registered on the Federal Register of Legislation.

Authority: Section 95 of the *Australian Security Intelligence Organisation Act 1979*

Details of the *Australian Security Intelligence Organisation Amendment (Permitted Disclosure) Regulations 2021*

Section 1 – Name

This section provides that the title of this instrument is the *Australian Security Intelligence Organisation Amendment (Permitted Disclosure) Regulations 2021* (the Amendment Regulations).

Section 2 – Commencement

This section provides that the whole of the instrument commences, or is taken to have commenced, on the day after the instrument is registered on the Federal Register of Legislation.

Section 3 – Authority

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

Section 4 – Schedules

This section provides that each instrument that is specified in a Schedule to the Amendment Regulations is amended or repealed as set out in the applicable items to the Schedule concerned, and any other item in a Schedule to the Amendment Regulations has effect according to its terms.

Schedule 1 – Amendments

This schedule makes amendments to the *Australian Security Intelligence Organisation Regulation 2016* (the Regulation).

Item 1 – Section 5 (definition of *subject*)

Item 1 repeals the definition of *subject* in section 5 of the Regulation. The term *subject* is no longer required to be defined in the Regulation, as the Amendment Act introduced a definition of *subject* specifically for the purposes of Division 3 of Part III of the ASIO Act, rather than for the Act more broadly. New section 34A of the ASIO Act now defines *subject*, in relation to a questioning warrant, to mean the person specified in the warrant. Paragraph 13(1)(b) of the *Legislation Act 2003*, provides that expressions used in any instrument will have the same meaning as in the enabling legislation. Therefore, in accordance with paragraph 13(1)(b) of the *Legislation Act 2003*, the definition of ‘subject’ can be repealed in section 5 of the Regulation.

Item 2 – Section 7

Item 2 repeals former section 7 of the Regulation and substitutes a new section 7. The purpose of the amendment is to reflect new subsection 34GF(6) of the ASIO Act, which was

inserted by the Amendment Act, to replace the repealed subsection 34ZS(6) to which section 7 of the Regulation previously referred. The intent and substantive effect of new section 7 of the Regulation is the same as former section 7, being to set out the circumstances in which a prescribed authority (the person appointed by the Attorney-General to oversee the executive of a questioning warrant) must **not** give a direction permitting the communication of specified information to a specified person.

New section 7 provides that for the purposes of new subsection 34GF(6) of the ASIO Act, a prescribed authority must not give a direction to a lawyer for the subject of a questioning warrant to communicate to anyone else information that:

- a) is obtained during:
 - (i) questioning of the subject under the warrant, or
 - (ii) apprehension of the subject in connection with the warrant, and
- b) relates to:
 - (i) sources or holdings of intelligence, or
 - (ii) the Organisation's method of operations.

The note at the end of section 7 of the Amendment Regulations replicates the previous note at the end of section 7 of the Regulation, although updated to reference new section 34GF and subsection 34GF(6) of the ASIO Act. The note clarifies that a disclosure of information in contravention of a direction given by a prescribed authority under new subsection 34GF(6) of the ASIO Act may not be a permitted disclosure for the purposes of new section 34GF of the ASIO Act.

New subsection 34GF(6) of the ASIO Act introduced new terminology that was not previously used in the Regulation. For example:

- the 'detention' framework has been replaced with an 'apprehension' framework;
- a prescribed authority may give a 'direction' in relation to the disclosure of information, rather than give written permission; and
- the representative lawyer is referred to as the 'lawyer for the subject of a questioning warrant'.

New subsection 34GF(6) of the ASIO Act, as introduced by the Amendment Act, is the equivalent of repealed subsection 34ZS(6) of the ASIO Act. Both provisions similarly provide for when a prescribed authority is able to make a direction permitting the subject, their lawyer or a minor's representative to disclose specified information to a specified person. Such a direction may be subject to certain conditions and must not be inconsistent with the regulations.

Item 3 – Subsection 8(1)

Item 3 amends subsection 8(1) of the Regulation by replacing the reference to repealed section 34ZT of the ASIO Act with a reference to section 34FH, consequential to changes made by the Amendment Act.

Section 8 of the Regulation was specifically made for the purposes of section 34ZT of the ASIO Act, and prescribed the criteria and conditions for access to security information by a lawyer. New section 34FH of the ASIO Act is the equivalent provision of the repealed section 34ZT, with the exception that the new section 34FH includes the defined term ‘questioning warrant’.

New section 34FH of the ASIO Act provides that the regulations may prohibit or regulate access to information, access to which is otherwise controlled or limited on security grounds, by lawyers acting for a person in connection with proceedings for a remedy relating to either a questioning warrant in relation to the person, or the treatment of the person in connection with such a warrant.

Item 4 – Paragraph 8(1)(a)

Item 4 repeals and substitutes paragraph 8(1)(a) of the Regulation and is consequential to changes made by the Amendment Act. In particular, new paragraph 8(1)(a) refers to ‘a questioning warrant in relation to the person’, rather than ‘a warrant issued under Division 3 of Part III of the Act in relation to the person’, to be consistent with the phrasing used in new paragraph 34FH(a) of the ASIO Act, as inserted by the Amendment Act. The term ‘questioning warrant’ is defined in section 34A of ASIO Act, as inserted by the Amendment Act.

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 (Permitted Disclosure) Regulations 2021

This Disallowable Legislative Instrument 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 Disallowable Legislative Instrument

1. The *Australian Security Intelligence Organisation Amendment (Permitted Disclosure) Regulations 2021* (the Amendment Regulations) are made under section 95 of the *Australian Security Intelligence Organisation Act 1979* (ASIO Act).
2. The Amendment Regulations amend the *Australian Security Intelligence Organisation Regulation 2016* (the Regulation) following the commencement of Schedule 1 to the *Australian Security Intelligence Organisation Amendment Act 2020* (the Amendment Act).
3. The Amendment Act repealed the previous questioning and detention framework in Division 3 of Part III of the ASIO Act, and introduced a new compulsory questioning framework with a limited apprehension power. It also allowed questioning warrants to be issued in relation to espionage, foreign interference and politically motivated violence.
4. The Amendment Act substantially retained the previous provisions in Division 3 of Part III of the ASIO Act relating to the Regulation. Specifically, in relation to:
 - section 7 of the Amendment Regulations – the Amendment Act inserted new subsection 34GF(6) of the ASIO Act and repealed subsection 34ZS(6) of the ASIO Act. It permits the prescribed authority to give a direction, not inconsistent with the regulations, for the lawyer of a subject to disclose specified information to a specified person, and
 - section 8 of the Amendment Regulations – the Amendment Act inserted new section 34FH of the ASIO Act and repealed section 34ZT of the ASIO Act. It provides that the regulations may prohibit or regulate the access to information by a lawyer or lawyers, acting on behalf of the subject of a questioning warrant in proceedings for a remedy relating to the warrant or the treatment of the person in connection with the warrant.
5. The Amendment Regulations make consequential and technical amendments to the Regulation, in particular, the amendments:
 - repeal the definition of subject
 - update section references and terminology to align with the new Division 3 of Part III of the amended ASIO Act, and

- provide minor technical updates to the regulation prohibiting prescribed authorities giving directions for a lawyer to communicate to any other person information obtained during the questioning or apprehension of a subject, which pertains to sources or holdings of intelligence or ASIO's operational methods.

Human rights implications

6. This Disallowable Legislative Instrument engages the following human rights:
 - Freedom of expression: Article 19 of the International Covenant on Civil and Political Rights (ICCPR) and Article 13 of the Convention on the Rights of the Child (CRC) in so far as it relates to children.
 - Right to an effective remedy: Article 2(3) of the ICCPR.
 - Right to a fair trial: Article 14 of the ICCPR and Article 40 of the CRC in so far as it relates to children.

Freedom of expression

7. Article 19(2) of the ICCPR and Article 13(1) of the CRC contain 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.
8. Section 7 of the Amendment Regulations provides that for the purposes of subsection 34GF(6) of the ASIO Act, as inserted by the Amendment Act, a prescribed authority must not give a direction to a lawyer for the subject of a questioning warrant to communicate to anyone else information that:
 - a) is obtained during:
 - (i) questioning of the subject under the warrant, or
 - (ii) apprehension of the subject in connection with the warrant, and
 - b) relates to:
 - (i) sources or holdings of intelligence, or
 - (ii) the Organisation's method of operations.
9. This provision does not itself prohibit disclosure; rather, it prevents a prescribed authority from removing a prohibition on disclosure imposed by new section 34GF of the ASIO Act, only in relation to a disclosure by a lawyer of a specific category of information.
10. Section 34GF makes it an offence if a person communicates certain information in connection with a questioning warrant, except where authorised by the prescribed authority, Director-General or the Attorney-General. A person may also disclose information to a lawyer for the purpose of seeking legal advice, to a court for the purpose of seeking a remedy in connection with a warrant or to the Inspector-General of Intelligence and Security (IGIS) or the Commonwealth Ombudsman for the purposes of making a complaint in relation to a questioning warrant. In relation to a minor, disclosures about the existence of the warrant or operational information may be made by the minor, or the minor's representative, to a range of people including to a parent, guardian, sibling, prescribed authority, the IGIS and the Commonwealth Ombudsman.

11. The restriction in section 7 of the Amendment Regulations relates only to disclosure by a lawyer for the subject of a questioning warrant 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.
12. The purpose of the restriction of the right to impart information in the specific circumstances of section 34GF relates to the 'protection of national security', which is a permitted limitation on the right to freedom of expression, under Article 19(3)(b) of the ICCPR and Article 13(2)(b) of the CRC. 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.

Right to an effective remedy

13. Article 2(3) protects the right to an effective remedy for any violation of rights or freedoms recognised by the ICCPR.
14. Section 8 of the Amendment Regulations engages the right to an effective remedy, as the limitation applies to access to security information by a lawyer acting for a person in connection with proceedings for a remedy relating to a warrant. However, the section relates only to security information and does not prohibit access by a lawyer with an appropriate security clearance. It does not prevent a person from obtaining legal representation, nor impede their ability to make a complaint or seek an effective remedy regarding their treatment during the questioning process and is therefore consistent with the Article 2(3) of the ICCPR.

Right to a fair and public hearing

15. Article 14 provides for the right to a fair and public hearing.
16. Section 8 of the Amendment Regulations engages the right to a fair trial by regulating access to security information by a lawyer acting for a person in connection with proceedings for a remedy relating to 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 Department of Home Affairs is satisfied that giving the lawyer access would not be prejudicial to the interests of security.
17. Section 8 would not prohibit a lawyer from receiving access to information or proceedings, rather it ensures that classified material is not handled inappropriately, or by a person whose access to information would be prejudicial to security.
18. Section 8 does not prevent a person from obtaining legal representation, nor impede their ability to make a complaint about their treatment during the questioning process. Limiting access to sensitive security information is necessary to protect Australia's law enforcement and intelligence capabilities and is therefore a permissible limitation to Article 14 of the ICCPR.

Conclusion

19. This disallowable legislative instrument is compatible with human rights because to the extent that it may limit human rights, those limitations are reasonable, necessary and proportionate.

**The Hon Peter Dutton MP
Minister for Home Affairs**