

## EXPLANATORY STATEMENT

Issued by authority of the Minister for Home Affairs

*Australian Security Intelligence Organisation Act 1979*

### ***Australian Security Intelligence Organisation Amendment (Notification of Review Rights) Regulations 2023***

- 1 The instrument makes regulations to give effect to recent *Australian Security Intelligence Organisation Act 1979* (the Act) amendments.
- 2 The *Australian Security Intelligence Organisation Act 1979* (the ASIO Act) establishes the functions, duties and powers of the Australian Security Intelligence Organisation (ASIO).
- 3 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. No other conditions are required to be satisfied before the power to make such regulations may be exercised.
- 4 The *Australian Security Intelligence Organisation Amendment (Notification of Review Rights) Regulations 2023* (the Regulations) commence on the day after they are registered on the Federal Register of Legislation, and are a legislative instrument for purposes of the *Legislation Act 2003* (the Legislation Act).

#### ***Purpose***

- 5 On 1 July 2023 the ASIO Act was amended by the *Australian Security Intelligence Organisation Amendment Act 2023* (ASIO Amendment Act) to introduce a new function and a new Part IVA, providing ASIO with new security vetting and security clearance functions, including to make security clearance decisions and furnish security clearance suitability assessments.
- 6 The ASIO Amendment Act also introduced a new framework providing for review of security clearance decisions or security clearance suitability assessments made or furnished by ASIO. The Act provides for internal, external and independent review as follows:
  - Internal review: all affected persons have access to a new statutory framework for review within ASIO of security clearance decision to deny, revoke or impose or vary certain conditions upon, a security clearance, except for persons engaged, or proposed to be engaged, for employment outside Australia for duties outside Australia, who are either not Australian citizens, or (regardless of whether they are Australian citizens) not normally resident in Australia.

- Independent review: a person may seek review of a decision made on internal review by an independent person appointed by the Attorney-General, if the person is not eligible for external merits review in the Administrative Appeals Tribunal (AAT) because they are not an existing security clearance holder or Commonwealth employee.
  - Independent Review is not available for persons engaged, or proposed to be engaged, for employment outside Australia for duties outside Australia, who are either not Australian citizens, or (regardless of whether they are Australian citizens) not normally resident in Australia.
- External review: all existing security clearance holders and Commonwealth employees as defined in the Act, including Australian Intelligence Community staff members, have access to external merits review in the AAT except for:
  - persons who are engaged, or proposed to be engaged, for employment outside Australia for duties outside Australia, who are either not Australian citizens, or (regardless of whether they are Australian citizens) not normally resident in Australia. This reflects the existing exception for merits review in the AAT of security assessments in s 36(1)(a) of the ASIO Act; and
  - persons in respect of whom a decision is made that is subject to a conclusive certificate issued by the Minister for Home Affairs, preventing external merits review.

- 7 ASIO or the security vetting agency is required to give the affected person notice in writing of the reviewable decision or assessment within 14 days. This notice must contain prescribed information concerning the affected person's right to apply for review.
- 8 The Regulations amend the *Australian Security Intelligence Organisation Regulation 2016* to prescribe information that must be included in the relevant notices, in accordance with subsections 82J(2), 82L(6), 82L(6A) and 83A(2) of the ASIO Amendment Act. The prescribed information is intended to be consistent with the intent of the Administrative Appeals Tribunal (Code of Practice) Determination 2017 for notifying persons of review rights.

### ***Consultation***

- 9 The Department of Home Affairs consulted on the Regulations with ASIO, the Attorney-General's Department, the Office of National Intelligence, the Department of Defence, the Australian Signals Directorate and the Department of Foreign Affairs and Trade, in accordance with section 17 of the Legislation Act.
- 10 The Office of Impact Analysis (OIA) was also consulted and considered that they are unlikely to have more than a minor impact, as the small burden imposed by the Regulations will fall on government entities. As such, no regulatory impact statement was required. The OIA reference number is OAI23-05012.

### ***Details of the Regulations***

- 11 Details of the Regulations are set out in **Attachment A**.

### ***Parliamentary scrutiny***

- 12 The Regulations are subject to disallowance under section 42 of the Legislation Act. A Statement of Compatibility with Human Rights has been prepared, and provides that the Regulations are compatible with human rights. The Statement is included at **Attachment B** to this explanatory statement.

**Details of the *Australian Security Intelligence Organisation Amendment (Notification of Review Rights) Regulations 2023***

**Section 1 - Name**

This section provides that the name of the instrument is the *Australian Security Intelligence Organisation Amendment (Notification of Review Rights) Regulations 2023* (the Regulations).

**Section 2 - Commencement**

This section provides that the Regulations commence on the day after registration of the instrument on the Federal Register of Legislation.

**Section 3 - Authority**

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

**Section 4 - Schedule**

This section provides that each instrument that is specified in a Schedule to the Regulations, namely the *Australian Security Intelligence Organisation Regulation 2016* (the ASIO Regulation) is amended or repealed as set out in the applicable items in a Schedule, and that any other item in a Schedule has effect according to its terms.

**Schedule 1 - Amendments**

***Australian Security Intelligence Organisation Regulation 2016***

Schedule 1 to the Regulations amends the ASIO Regulation to prescribe information that must be included in notices to be given to an affected person concerning their right to apply for review of certain security clearance decisions or security clearance suitability assessments.

**Item 1 – Section 5**

Item 1 inserts a number of definitions into the Regulation. The expressions ‘affected person’, ‘externally reviewable decision’, ‘independently reviewable decision’, ‘independent reviewer’, ‘internally reviewable decision’ and ‘internal reviewer’ in the Regulations have the same meaning as under Part IVA of the Act.

**Item 2 - Section 9 (heading)**

Item 2 repeals the current heading at section 9, which is ‘Prescribed Form of Information’ and substitutes the new heading ‘Prescribed form – review of security assessments under Part IV of the Act’. This amendment reflects that the prescribed form in Schedule 1 of the ASIO Regulation is for the purposes of Part IV of the Act, and does not apply to notices given under new Part IVA of the Act.

### Item 3 – After section 9

Item 3 inserts sections 10, 11 and 12 of the ASIO Regulations.

Section 10 prescribes information for the purposes of subsection 82J(2) of the Act concerning an affected person's right to apply to ASIO for internal review of an internally reviewable decision. Information prescribed in section 10 must be included in a notice given under subsection 82J(1) of the Act. The prescribed information is:

- a statement that the Organisation is an exempt agency under subsection 7(1) of the *Freedom of Information Act 1982* (the FOI Act) and the affected person is not able to obtain access to documents or information about the decision under that Act;
- information about the following matters:
  - how an affected person may seek review, by an internal reviewer, of the internally reviewable decision, including how the application for that review is to be made;
  - whether there are any time limits for seeking that review and, if so, what those time limits are;
  - whether or not a fee is payable for that review and if so, the amount of the fee and when it is payable;
  - whether the internal reviewer is required to conduct the review within a particular period and if so, what that period is;
  - any procedures of the internal reviewer that the Organisation considers that an affected person should be made aware of, including whether an affected person may be contacted by the internal reviewer.

The information prescribed in section 10 is intended to be consistent with the intent of the *Administrative Appeals Tribunal (Code of Practice) Determination 2017* (AAT Determination).

Section 11 prescribes information for the purposes of subsections 82L(6) and 83A(2) of the Act concerning an affected person's right to apply to Administrative Appeals Tribunal (AAT) for review of an externally reviewable decision. Information prescribed in section 11 must be included in a notice given under subsections 82L(5) or 83A(1) of the Act. The prescribed information is:

- a statement that the Organisation is an exempt agency under subsection 7(1) of the *Freedom of Information Act 1982* (the FOI Act) and the affected person is not able to obtain access to documents or information about the decision under that Act;
- information about the following matters:
  - how an affected person may seek review, by the AAT, of the externally reviewable decision, including how the application for that is to be made;
  - whether there are any time limits for seeking that review and, if so, what those limits are;
  - whether or not a fee is payable for that review and if so, the amount of the fee and when it is payable;
  - whether the AAT is required to conduct the review within a particular period and if so, what that period is;
  - any procedures of the AAT that the Organisation considers that an affected person should be made aware of, including whether an affected person may be contacted by the AAT.

The information prescribed in section 11 is intended to be consistent with the intent of the AAT Determination, and is based on the information that is included in the prescribed form in Schedule 1 of the ASIO Regulation for notices of adverse or qualified security assessments that are given under Part IV of the ASIO Act.

Section 12 prescribes information for the purposes of subsections 82L(6A) concerning an affected person's right to apply to an independent reviewer for review of an independently reviewable decision. Information prescribed in section 12 must be included in a notice given under subsection 82L(5) of the Act. The prescribed information is:

- a statement that the Organisation is an exempt agency under subsection 7(1) of the FOI Act and the affected person is not able to obtain access to documents or information about the decision under that Act;
- information about the following matters:
  - how an affected person may seek review, by an independent reviewer, of the independently reviewable decision, including how the application for that review is to be made;
  - whether there are any time limits for seeking that review and, if so, what those time limits are;
  - whether or not a fee is payable for that review and if so, the amount of the fee and when it is payable;
  - whether the independent reviewer is required to conduct the review within a particular period and if so, what that period is;
  - any procedures of the independent reviewer that the Organisation considers that an affected person should be made aware of, including whether an affected person may be contacted by the independent reviewer.

The prescribed information prescribed in section 12 is intended to be consistent with the intent of the AAT Determination.

#### **Item 4 –Schedule 1 (heading)**

Item 4 repeals the current heading of Schedule 1 (not including the note) which is 'Schedule 1' and insert the new heading 'Schedule 1 – Review of security assessments under Part IV of the Act'. This amendment reflects that the prescribed form in Schedule 1 of the ASIO Regulation does not apply to notices given under Part IVA of the Act.

#### **Item 5 –Schedule 1 (Form 1)**

Item 5 repeals the current heading of Form 1 of Schedule 1 which is 'Form 1 – Information concerning right to apply to Administrative Appeals Tribunal' and insert the new heading 'Form 1 – Information concerning review of a security assessment under Part IV of the Act'. This amendment reflects that the prescribed form in Schedule 1 of the ASIO Regulations does not apply to notices given under Part IVA of the 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 (Notification of Review Rights) Regulations 2023***

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 Regulation**

1. The *Australian Security Intelligence Organisation Amendment Act 2023* (ASIO Amendment Act) amended the *Australian Security Intelligence Organisation Act 1979* (ASIO Act) to introduce a new function and a new Part IVA, providing the Australian Security Intelligence Organisation (ASIO) with new security vetting and security clearance functions, including:
  - to make security clearance decisions for ASIO and non-ASIO personnel alike;
  - to undertake security vetting to assess a person's suitability to hold a security clearance, and vetting and assessing suitability on an ongoing basis;
  - to communicate with a sponsoring agency for a security clearance in relation to the ongoing suitability of a person to hold the security clearance;
  - to furnish security clearance suitability assessments (SCSA), and
  - to assume responsibility for a security clearance granted by another security vetting agency.
2. The ASIO Amendment Act provides for internal, independent and external merits review of ASIO's security clearance decisions and SCsAs.
3. These amendments will ensure the Regulations provide clear, instructive information about the form and manner of making an application for review of a security clearance decision made by ASIO or a prejudicial security clearance suitability assessment (PSCSA) furnished by ASIO.
  - Section 10 prescribes information for the purposes of subsection 82J(2) of the ASIO Act, concerning an affected person's right to apply to ASIO for internal review of an internally reviewable decision, to be included in a notice given under subsection 82J(1) of the ASIO Act.
  - Section 11 prescribes information for the purposes of subsections 82L(6) and 83A(2) of the ASIO Act, concerning an affected person's right to apply to Administrative Appeals Tribunal for review of an externally reviewable decision, to be included in a notice given under subsections 82L(5) or 83A(1) of the ASIO Act.

- Section 12 prescribes information for the purposes of subsections 82L(6A) of the ASIO Act, concerning an affected person's right to apply to an independent reviewer for review of an independently reviewable decision, to be included in a notice given under subsections 82L(5) of the ASIO Act.

**Human rights implications**

This Disallowable Legislative Instrument does not engage any of the applicable rights or freedoms.

**Conclusion**

This Disallowable Legislative Instrument is compatible with human rights as it does not raise any human rights issues.

**The Honourable Clare O'Neil MP, Minister for Home Affairs**