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Senator James Paterson
Chair
Parliamentary Joint Committee on Intelligence and Security
PO Box 6021
CANBERRA ACT 2600

By email to: pjcis@aph.gov.au

Dear Senator Paterson

Review of the Security Legislation Amendment (Critical Infrastructure Protection) Bill 2022

Thank you for the opportunity to make this submission to the Parliamentary Joint Committee on Intelligence and Security's review of the Security Legislation Amendment (Critical Infrastructure Protection) Bill 2022 (the Bill). The substance of my submission concerns IGIS oversight of proposed activities undertaken by intelligence agencies in the *Security of Critical Infrastructure Act 2018* (SOCI Act), including as amended by the Bill, and the capacity of persons affected by such activities to provide relevant information to my office.

As mentioned in my submission to the Committee's *Review of the Security Legislation Amendment (Critical Infrastructure) Bill 2020*, the Australian Signals Directorate (ASD) has a role under the amended SOCI Act. Among other things, this role involves being the default recipient of mandatory reports concerning cyber security incidents,¹ and being empowered to intervene, including by coercive means, in response to a cyber security incident.² This role will necessarily involve ASD interacting with, and exercising powers in relation to, 'entities'. An 'entity' is defined in section 5 of the SOCI Act to include, among other things, any natural person.

This Bill seeks to introduce a new section 43E to the SOCI Act to establish a framework for the authorised disclosure of protected information (within the meaning of the SOCI Act) by an entity.³ This section prescribes a list of circumstances in which an entity may disclose such information, and to whom.

The unauthorised disclosure of protected information by an entity is an offence under existing section 45 of the SOCI Act. Subsection 46(1) of the SOCI Act also provides an exception to the general offence in section 45 where the disclosure is 'required or authorised by or under... a law of the Commonwealth'. Proposed subsection 46(5) will insert a specific exception to this

¹ SOCI Act, Part 2B.

² SOCI Act, Part 3A.

³ Item 66 of Schedule 1.

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offence for disclosures of protected information to Commonwealth Ombudsman officials for the purposes of their functions and duties, or exercise of powers, as Ombudsman officials.⁴ The Bill does not provide a similar exception allowing entities to make disclosures to IGIS officials.

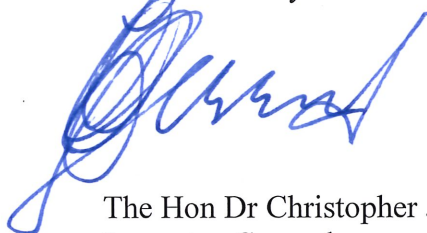
As an aside, I note that subsection 47(2) of the SOCI Act provides that the IGIS may *compel* entities to produce protected information where necessary to give effect to the IGIS Act, or any other Act conferring functions, power or duties on the IGIS. However, there is no comparable provision in the SOCI Act or the Bill for *voluntary* disclosures of protected information to my office.

To ensure that persons seeking to disclose protected information to the Commonwealth Ombudsman are afforded equal legal protections to those seeking to make such disclosures to the IGIS, the Committee may wish to consider whether a comparable exception to that proposed for Ombudsman officials in subsection 46(5) of the Bill should be included for IGIS officials. This would clarify the ability of entities to disclose protected information to my office where relevant to ASD's conduct under the SOCI Act. This would be consistent with the approach to secrecy offences in intelligence and national security legislation more broadly, including the ability for the Secretary of Home Affairs to disclose protected information to the IGIS under section 43A of the SOCI Act.

I note that subsection 34B(2) of the *Inspector-General of Intelligence and Security Act 1986* (IGIS Act) provides that a person is not liable to a penalty 'under any law of the Commonwealth' for providing or making available information or documents in accordance with subsection 34B(1) of the IGIS Act. This stands in contrast with proposed subsection 46(5) in relation to disclosures to Ombudsman officials which would provide a broad exemption from the offence in section 45 of the SOCI Act.

The Committee may wish to consider whether these protections for disclosures to the IGIS should be clarified on the face of the SOCI Act via the comparable exception outlined above.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'Chris Jessup', written over a horizontal line.

The Hon Dr Christopher Jessup QC
Inspector-General

| March 2022

⁴ Item 69 of Schedule 1.