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Intelligence Services Amendment (Enhanced Parliamentary Oversight of Intelligence Agencies) Bill 2018

**Submission to the
Senate Finance and Public Administration Committee**

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Introduction

The Inspector-General of Intelligence and Security (IGIS) is an independent statutory officer who reviews the activities of the six agencies that comprise the Australian Intelligence Community (AIC). **Attachment A** outlines the role and functions of the IGIS, and the Government's announcement to extend IGIS jurisdiction in line with recommendations of the *2017 Independent Intelligence Review*.

The Inspector-General welcomes the opportunity to make this submission to the Senate Finance and Public Administration Legislation Committee inquiry into the Intelligence Services Amendment (Enhanced Parliamentary Oversight of Intelligence Agencies) Bill 2018. This submission is provided to assist the Committee in its consideration of the practical impacts on IGIS of the proposed amendments.

Key measures in the Bill

The Bill proposes to amend Part 4 of the *Intelligence Services Act 2001 (ISA)* to remove an existing limitation on the functions of the Parliamentary Joint Committee on Intelligence and Security (PJCIS) that prohibits it from reviewing the operational activities of the six AIC agencies within its remit.¹

The new function of the PJCIS to conduct a review of an operational matter would be subject to the responsible Minister for the AIC agency whose operations were under review issuing a certificate to the PJCIS, which would effectively require the review to cease or be suspended. The Minister may issue a certificate on specified grounds, namely that the review relates to an 'ongoing operation' and would interfere with the proper performance by the relevant agency of its functions, or would 'otherwise prejudice Australia's national security or the conduct of Australia's foreign relations'.²

The Bill would empower the PJCIS to refer a Ministerial certificate to the IGIS for a review of the grounds on which it has been issued.³ The proposed amendments would also **require** the IGIS to conduct a review of such a certificate within 30 days of its referral by the PJCIS. The IGIS must provide a written report to the PJCIS setting out her opinion on whether the activity under review is an 'ongoing operation' and whether it is reasonable to conclude that a review by the PJCIS would cause the form (or forms) of interference or prejudice specified in the certificate.⁴ The PJCIS may only proceed with its review if the IGIS concludes that the activity **was not** an 'ongoing operation' or that there were no reasonable grounds for the Minister to issue the certificate.⁵

As the Explanatory Memorandum to the Bill notes, the proposed amendments are similar to provisions of the Canadian *National Security and Intelligence Committee of Parliamentarians Act 2017*.⁶ While the Canadian Act confers an operational oversight function on the relevant committee, and includes a similar Ministerial certification power, there is no review function akin to the mandatory role contemplated for IGIS in the present Bill.⁷

1 Schedule 1, items 1 and 2 (amendments to paragraph 29(1)(a) and subsection 29(3)).

2 Schedule 1, item 3 (new section 29A, especially new subsections 29A(1)-(5)).

3 Schedule 1, item 3 (new subsection 29A(6)).

4 Schedule 1, item 3 (new subsection 29A(7)).

5 Schedule 1, item 3 (new subsection 29A(8)).

6 [Explanatory Memorandum](#), p. 2. See also: Senator Patrick, [Second Reading Speech](#), Senate, *Debates*, 14 August 2018, pp. 44 and 45.

7 [National Security and Intelligence Committee of Parliamentarians Act 2017](#), S.C. 2017, c. 15, subsections 8(2) and 8(3).

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Mandatory nature of the proposed IGIS review function

The Bill would require the Inspector-General to conduct a review of a Ministerial certificate referred to her by the PJCS within 30 days of that referral.⁸ The Inspector-General has previously observed that the conferral of mandatory inquiry or review functions is a limitation on the independence of her office to determine if and when to conduct an inquiry into a matter, and to prioritise the allocation of oversight resources based on the Inspector-General's assessments of risk and need. (Such assessments are supported by information obtained through the standing inspection and complaints functions of IGIS, as well as any non-directory requests made by agency Ministers and the Attorney-General for the IGIS to inquire into matters.) This independence is crucial to the ability of the Inspector-General to assure the public and the Parliament that a decision to conduct an inquiry is free from political influence.⁹ There are presently very few statutory limitations on the ability of the IGIS to decide independently whether to conduct an inquiry into a matter, all of which are directed to exceptional or otherwise highly restricted circumstances.¹⁰ Given the importance of independence to the credibility of the office of the Inspector-General, IGIS opposes the imposition of further mandatory functions on this office.

The conferral of an arbitral function on the IGIS

The objects of IGIS oversight are set out in section 4 of the *Inspector-General of Intelligence and Security Act 1986* (IGIS Act). Broadly, they focus on the provision of assistance to Ministers through the advisory oversight and review of agencies' activities; and in doing so, assisting the Government in assuring the Parliament and the public that agencies' activities are open to scrutiny. The small number of functions that are conferred on the IGIS under other Acts are compatible with these objects, in that they involve the provision of findings or opinions of an advisory nature to the Government about, or in relation to, the activities of intelligence agencies.¹¹

The mandatory review function proposed in the Bill would be a material departure from the present role of the IGIS to conduct advisory oversight. The proposed amendments effectively confer an arbitral function on the IGIS to determine whether a Parliamentary committee may exercise its inquiry functions, in those instances in which the Government opposes the conduct of the inquiry through the issuing of a Ministerial certificate.¹²

8 Proposed subsections 29A(6) and (7).

9 See, for example: the Hon M Stone, IGIS, [Submission](#), PJCS inquiry into the Home Affairs and Integrity Agencies Legislation Amendment Bill 2017, 18 January 2018, pp. 2-3. See also: the Hon M Stone, IGIS, [Committee Hansard](#), PJCS, 7 February 2018, especially at pp. 1-2, 4 and 5.

10 *Inspector-General of Intelligence and Security Act 1986*, section 9 (inquiries on the direction of the Prime Minister); *Australian Security Intelligence Organisation Act 1979*, section 65 (inquiries into certain issues relating to non-merits reviewable security assessment decisions by ASIO, on the direction of the Attorney-General); and *Intelligence Services Act 2001*, paragraphs 9B(8A)(c) and 9C(6)(c) (compliance reviews of the exercise of certain emergency powers by agency heads).

11 See the provisions referred to in above n. 10, and the functions conferred on the IGIS under the *Public Interest Disclosure Act 2013*, and functions to provide expert evidence in the review of certain agency decisions by the Information Commissioner or Administrative Appeals Tribunals under the *Freedom of Information Act 1982*, Division 9 of Part VII and section 60A; and *Archives Act 1983*, section 50A.

12 See also: Senator R Patrick, [Second Reading Speech](#), Senate, *Debates*, 14 August 2018, p. 45, in which the proposed role of the IGIS is described as 'an umpire between the Minister responsible for intelligence agencies and the PJCS'.

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There is a risk that the proposed function could place the Inspector-General in a difficult position by requiring her to arbitrate disputes between the Parliament and the Executive, and may expose her office to the perception of political partisanship in the making of decisions under proposed subsection 29A(7). Even if such criticisms were unfounded, the perception of political partisanship has the potential to undermine public confidence in the independence of the office. More generally, proposals to confer any kind of conclusive (rather than advisory) decision-making function on the IGIS raise difficult questions about oversight or review of those decisions.

Potential compulsion to disclose operationally sensitive information

The *ISA* presently prohibits the PJCIS from compelling the provision of ‘operationally sensitive information’ whose disclosure would or might prejudice Australia’s national security or the conduct of its foreign relations. Broadly, this includes information about sources, operational assistance and methods, and particular operations of the six AIC agencies.¹³

The proposed amendments appear impliedly to override that limitation by requiring the Minister and the IGIS to disclose certain ‘operationally sensitive information’ in respectively issuing a certificate, and reviewing and providing an opinion on its grounds of issue if directed by the PJCIS. Information that confirms or denies the existence of an intelligence operation is normally classified because that information would enable the subject of the operation and others with interests adverse to Australia’s interests to ascertain if they were under investigation.¹⁴ Further, disclosing the reasons why an inquiry into an operational matter would interfere with an agency’s functions or would prejudice Australia’s security or international relations could require the disclosure of classified information about the objectives and conduct of that operation. Accordingly, IGIS would support further consideration of the security implications of the proposed certification and related review functions. A related practical risk for IGIS is that intelligence agencies could be less forthcoming about their operational activities, if there is the potential that the Inspector-General could be required to disclose that information in performing the mandatory review function in new section 29A.

Alternative approach

The *2017 Independent Intelligence Review* (IIR) recommended that the PJCIS be empowered to request IGIS to ‘conduct an inquiry into the legality and propriety of particular operational activities of the National Intelligence Community (NIC) agencies, and to provide a report to the PJCIS, Prime Minister and the responsible Minister’.¹⁵ IGIS notes that, from a practical perspective, the issues raised in relation to independence and security would not arise under this approach.

13 *ISA*, Schedule 1, clause 1A (definition of ‘operationally sensitive information’) and clause 1 (prohibition on the compulsion by the PJCIS of ‘operationally sensitive information’).

14 Proposed subparagraphs 29A(1)(b)(i) and 29A(7)(b)(i) appear to require the Minister and IGIS to confirm or deny the existence of a current operation by (respectively) certifying or providing advice on a certification that an inquiry relates to an ‘ongoing operation’ of an intelligence agency. Further, proposed subparagraphs 29A(1)(b)(ii) and 29A(7)(b)(ii) may require the Minister and IGIS to confirm or deny the existence of a completed or proposed operation by (respectively) certifying or providing advice on a certification that an inquiry into an operational matter would cause prejudice to security or foreign relations.

15 M L’Estrange and S Merchant, [2017 Independent Intelligence Review](#), Unclassified report, June 2017, recommendation 23 and pp. 122-125.

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Attachment A

Role of the Inspector-General of Intelligence and Security

The IGIS is an independent statutory officer who reviews the activities of the following agencies:

- Australian Security Intelligence Organisation (ASIO);
- Australian Secret Intelligence Service (ASIS);
- Australian Signals Directorate (ASD);
- Australian Geospatial-Intelligence Organisation (AGO);
- Defence Intelligence Organisation (DIO); and
- Office of National Assessments (ONA).

The Office of the IGIS is part of the Attorney-General's portfolio, and was previously located in the Prime Minister's portfolio from its commencement on 1 February 1987 until 10 May 2018. The IGIS is not subject to direction from any Minister on how responsibilities under the *Inspector-General of Intelligence and Security Act 1986* (*IGIS Act*) should be carried out. The Office currently has 28 staff.

The *IGIS Act* provides the legal basis for the IGIS to conduct inspections of the intelligence agencies and to conduct inquiries of the Inspector-General's own motion, at the request of a Minister, or in response to complaints. The overarching purpose of the IGIS's activities is to ensure that each intelligence agency acts legally and with propriety, complies with ministerial guidelines and directives, and respects human rights.¹⁶ A significant proportion of the resources of the Office are directed towards ongoing inspection and monitoring activities, so as to identify issues, including about the governance and control frameworks within agencies, before there is a need for major remedial action. IGIS staff have access to all documents of the intelligence agencies, and the IGIS is often proactively briefed about sensitive operations.

The inspection role of the IGIS is complemented by an inquiry function. In undertaking inquiries, the IGIS has strong investigative powers, including the power to require any person to answer questions and produce relevant documents, take sworn evidence, and enter agency premises. IGIS inquiries are conducted in private because they almost invariably involve classified or sensitive information, and the methods by which it is collected. Conducting an inquiry is resource intensive but provides a rigorous way of examining a complaint or systemic matter within an agency. The Inspector-General also receives and investigates complaints and public interest disclosures about the intelligence agencies. These come from members of the public and from current and former agency staff.

In response to the recommendations of the *2017 Independent Intelligence Review*, the Government announced that, subject to the introduction and passage of legislation, the jurisdiction of the IGIS will be extended to include the intelligence functions of the Department of Home Affairs, Australian Federal Police, Australian Criminal Intelligence Commission and Australian Transaction Reports and Analysis Centre. Resources for the IGIS are being increased to allow the office to sustain a full time equivalent staff of 55 and to allow the agency to move to new premises.¹⁷ The IGIS will also assume oversight functions in relation to the Office of National Intelligence (ONI) following passage of legislation presently before the Parliament to establish that agency as the successor to ONA.¹⁸

16 See *IGIS Act*, section 8 in relation to the general jurisdiction of the IGIS.

17 The Hon M Turnbull MP, Prime Minister and Cabinet Portfolio Budget Statements 2018-19, *Budget Related Paper No 114*, 8 May 2018, p. 278 (an additional \$52.1 m over five years from 2017-18).

18 Office of National Intelligence Bill 2018; and Office of National Intelligence (Consequential and Transitional Provisions) Bill 2018 (the latter Bill proposes to amend the *IGIS Act*, among other Acts).

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