

## Committee Secretary

Parliamentary Joint Committee on Intelligence and Security

PO Box 6021

Parliament House

Canberra ACT 2600

28 May 2021

### **Re: Questions on notice, Intelligence Oversight and Other Legislation Amendment (Integrity Measures) Bill 2020 (Cth)**

To the Committee,

In the public hearing on 6 May 2021, we took questions on notice regarding whether Home Affairs should be included in the remit of the Inspector-General of Intelligence and Security (IGIS), and whether the IGIS has equivalents in the other Five Eyes countries. Below, we provide our responses to these questions.

#### IGIS Oversight for Home Affairs

The 2017 Independent Intelligence Review (Intelligence Review) and the Comprehensive Review of the Legal Framework of the National Intelligence Community (Comprehensive Review) took different approaches to this question. The Intelligence Review recommended that IGIS oversight be extended ‘to all ten agencies within the NIC’, provided that the oversight extend only to the intelligence functions of those agencies.<sup>1</sup> It believed there was a ‘compelling case for a consistent oversight regime to apply to all the intelligence capabilities that support national security’.<sup>2</sup> This approach would mean that the Department of Home Affairs, which is a member of the National Intelligence Community (NIC) and performs intelligence functions,<sup>3</sup> would be included within the remit of IGIS. A private member’s Bill introduced to the Senate in December 2020 would have achieved this outcome.<sup>4</sup>

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<sup>1</sup> Commonwealth of Australia, Department of the Prime Minister and Cabinet, *2017 Independent Intelligence Review* (2017) 116 (*Intelligence Review*).

<sup>2</sup> *Ibid.*

<sup>3</sup> *Office of National Intelligence Act 2018* (Cth) s 4; Department of Home Affairs, *Incoming Government Brief* (28 May 2019) 132.

<sup>4</sup> Intelligence and Security Legislation Amendment (Implementing Independent Intelligence Review) Bill 2020 (Cth).

The current Bill adopts a narrower approach favoured by the Comprehensive Review. It recommended that IGIS oversight be extended to AUSTRAC and the Australian Criminal Intelligence Commission, but not Home Affairs or the AFP. It reasoned that a “one size fits all” approach is not needed for effective oversight.<sup>5</sup> It saw ‘no deficiency in the oversight of Home Affairs and question[ed] the value of adding another oversight body’.<sup>6</sup>

We support the broader approach of the Intelligence Review. As the Minister noted in the second reading speech, ‘[i]ntelligence functions require a specialised form of oversight’.<sup>7</sup> Compared to the gathering of evidence by law enforcement, intelligence activities are typically covert. There are fewer opportunities to independently assess the information collected and the legality of its collection (as is done with criminal evidence by judges, and through cross-examination, in a courtroom). There are also fewer procedural protections – such as the right to silence – to protect the rights of individuals dealing with these agencies.

IGIS is the only office with the requisite powers – akin to those of a royal commission – to ensure proper accountability of intelligence functions. The statutory functions of the IGIS are also unique in assessing both the legality and ‘propriety’ of an agency’s intelligence activities.<sup>8</sup> These statutory functions are not held by other review bodies such as the Australian National Audit Office, the Commonwealth Ombudsman, the Independent National Security Legislation Monitor, or the Australian Commission for Law Enforcement Integrity.

Due to the specialised nature of intelligence functions, they should be subject to the type and level of oversight that IGIS alone can provide. This is needed in whichever agency intelligence functions fall, even if they represent only a portion of the agency’s activities.

In any case, Home Affairs has substantial intelligence functions that should not be considered incidental. The extent of its intelligence activities was outlined in an internal brief for the Home Affairs Minister, which was released under FOI.<sup>9</sup> That document explains that Home Affairs has four ‘enduring principal tasks’, one of which is to ‘deliver intelligence outcomes’.<sup>10</sup> The Intelligence Division of Home Affairs has five divisions, encompassing:

- Strategic Assessment and Intelligence Management Branch – which provides a ‘strategic analysis capability across the border threat spectrum’;
- National Intelligence Branch – an ‘operational intelligence hub’ which provides threat assessments and advice;
- Border Intelligence Support to Operations Branch – which is delivers ‘operational and tactical intelligence support’ to Australian Border Force (ABF);
- The Border Intelligence Fusion Centre – which provides ‘tactical intelligence support directly to ABF operational functions’; and
- Intelligence Development Branch – which provides ‘technical and specialist capabilities’<sup>11</sup>

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<sup>5</sup> Dennis Richardson AC, *Comprehensive Review of the Legal Framework of the National Intelligence Community* (2019) 55 (*Comprehensive Review*).

<sup>6</sup> *Ibid* 56.

<sup>7</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 9 December 2020, 11022 (Porter).

<sup>8</sup> *Inspector-General of Intelligence and Security Act* 1986 (Cth) s 8.

<sup>9</sup> Department of Home Affairs, *Incoming Government Brief* (28 May 2019) 132.

<sup>10</sup> *Ibid* 9.

<sup>11</sup> *Ibid* 132.

Based on these extensive intelligence functions, the inclusion of Home Affairs in the statutory definition of the NIC,<sup>12</sup> and the fact that Home Affairs oversees other agencies in the NIC, we see no clear reason for excluding Home Affairs from the scope of IGIS oversight. The fact that Home Affairs employees do not conduct covert collection operations is not significant, as IGIS currently has oversight of assessment-only agencies (ONI and DIO).

Extending IGIS oversight to Home Affairs would not mean that IGIS would oversee all of the Department's functions. Rather, in line with the Intelligence Review, IGIS would gain oversight only of its intelligence functions. In this regard, it is notable that the Secretary for Home Affairs and the senior executive, in that released document, did not oppose extending IGIS oversight to their Intelligence Division. Rather, they noted that the government supported the recommendations of the Intelligence Review, and that IGIS oversight could be defined according to the 'classical intelligence functions' of its Intelligence Division:

We could define the bounds of the Inspector-General's oversight to the organisational entity within the Department of Home Affairs known as the Intelligence Division. This is the simplest and most elegant solution ... that will ensure that this oversight is limited to the performance of classical intelligence functions.<sup>13</sup>

We support this suggestion, and recommend that the current Bill include Home Affairs within the scope of IGIS oversight. To be consistent, IGIS oversight should also be extended to the intelligence activities of the AFP, as the remaining member of the NIC.

### IGIS Comparisons

The Comprehensive Review noted that IGIS was 'unique' and the 'gold standard' of accountability for intelligence agencies.<sup>14</sup> The office is not strictly unique among the Five Eyes, as NZ has an equivalent IGIS, which was created in 1996 and expanded in 2017.<sup>15</sup> The US has an Inspector-General of the Intelligence Community (IGIC), which conducts audits, investigations, inspections and reviews of programs and activities within the responsibility of the Director of National Intelligence.<sup>16</sup> It examines violations of laws and regulations, fraud, other abuses and deficiencies, and recommends 'corrective action'.<sup>17</sup>

Oversight models in Canada and the UK differ to a greater extent. Canada has recently created a National Security and Intelligence Review Agency (NSIRA) and an Intelligence Commissioner. The NSIRA is a review body of appointed experts with full security clearance that reports to Parliament. Its reviews assess 'whether national security or intelligence activities comply with the relevant laws and ministerial directives and whether the activities are reasonable and necessary'.<sup>18</sup> The Intelligence Commissioner conducts quasi-judicial review of the reasons given for authorising covert intelligence powers.<sup>19</sup>

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<sup>12</sup> *Office of National Intelligence Act 2018* (Cth) s 4

<sup>13</sup> Department of Home Affairs, *Incoming Government Brief* (28 May 2019) 38.

<sup>14</sup> *Comprehensive Review*, above n 5, 53.

<sup>15</sup> *Intelligence and Security Act 2017* (NZ).

<sup>16</sup> See 50 USCA § 3033.

<sup>17</sup> *Ibid.*

<sup>18</sup> National Security and Intelligence Review Agency, *Reviews* (2021) <<https://nsira-ossnr.gc.ca/reviews>>.

<sup>19</sup> *Intelligence Commissioner Act*, SC 2019, c 13, s 50.

The UK also does not have a direct equivalent to IGIS. However, its Intelligence and Security Committee of Parliament can examine the operations of MI5, MI6 and GCHQ.<sup>20</sup> This reduces the need for a separate executive oversight body. The UK also has substantial oversight of intelligence-gathering powers through the Investigatory Powers Commissioner's Office (IPCO). The IPCO comprises an Investigatory Powers Commissioner, Deputy Commissioner, and 16 judicial commissioners, all retired superior court judges, who independently authorise the use of covert powers by more than 600 public authorities.<sup>21</sup>

Each country's model is slightly different, and we agree that IGIS is unique in that it is the longest standing independent statutory office with the powers of a royal commission. We also agree that IGIS provides a 'gold standard' of intelligence oversight within the Australian system. This does not negate the need for strong judicial and parliamentary oversight of intelligence functions, and examples from the other Five Eyes members could provide additional avenues for NIC oversight in the future. However, as discussed above, IGIS provides a type and level of oversight for intelligence functions that no other review body in Australia can currently provide. For these reasons, we emphasise the need to include the intelligence functions of Home Affairs and AFP within its remit.

Yours sincerely,

Dr Keiran Hardy and Professor George Williams

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<sup>20</sup> *Justice and Security Act 2013* (UK) c 18, s 2.

<sup>21</sup> See Investigatory Powers Commissioner's Office, *Judicial Commissioners* (2021) <<https://www.ipco.org.uk/who-we-are/judicial-commissioners/>>.