



Review of the Office of National Intelligence Bill 2018 and the Office of National Intelligence (Consequential and Transitional Provisions) Bill 2018

Submission to the Parliamentary Joint Committee on Intelligence and Security

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Introduction

The Inspector-General of Intelligence and Security (IGIS) is an independent statutory officer who reviews the activities of the Australian intelligence agencies including the current Office of National Assessments (ONA). Information about the role and functions of the IGIS under the *Inspector-General of Intelligence and Security Act 1986* (IGIS Act) is provided at **Attachment A**. The Office of National Intelligence Bill 2018 (the ONI Bill) and the Office of National Intelligence (Consequential and Transitional Provisions) Bill 2018 implement the recommendation of the 2017 *Independent Intelligence Review* to establish an Office of National Intelligence (ONI) as an independent statutory agency reporting directly to the Prime Minister. The role, functions and staff of ONA are to be subsumed into ONI. This submission is intended to provide the Parliamentary Joint Committee on Intelligence and Security with information about the current oversight of ONA by the IGIS and the expected effect of the Bills on the future oversight of ONI by the IGIS.

Key points

The key points made in this submission are as follows.

- The IGIS does not have any significant concerns about the proposed amendments.
- Following the establishment of ONI, the current regime of inspections and analytic independence inquiries by the IGIS will continue but with an expanded emphasis on the open source function and compliance with the privacy rules.

Role of the Inspector-General of Intelligence and Security

ONA is one of the six agencies currently overseen by the IGIS (see Attachment A). The IGIS also has cooperative arrangements with other agencies that oversee the national intelligence community (NIC)¹ and works collaboratively with the Inspector-General of the Australian Defence Force.

Whilst the IGIS currently does not have jurisdiction to inquire into complaints about ONA (which will be preserved in the ONI Bill in relation to ONI),² the IGIS can inquire of her own motion into a matter that is brought to her attention by any person.

Recent inspections of ONA activities

For many years the IGIS exercised a 'light touch' inspection regime with respect to the activities of ONA, given ONA was not directly collecting covert intelligence. Its activities were therefore less likely than those of the collection agencies to intrude upon the personal affairs of Australian persons.³ As explained below, the broader open source function, the new privacy rules and the approach to enterprise management are likely to change the emphasis of the IGIS inspection regime and the relationship between the IGIS and ONI.

¹ The Office of the Commonwealth Ombudsman, the Australian Human Rights Commission, the Office of the Australian Information Commissioner and the Australian Commission for Law Enforcement Integrity.

² Section 8(3) of the IGIS Act.

³ Office of the Inspector-General of Intelligence and Security, *Annual Report 2015-2016*, p. 30 and *Annual Report 2014-2015*, p. 38. Annual reports are available at <https://www.igis.gov.au/publications-reports/annual-reports>

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Four IGIS inquiries have focused on the analytic independence of ONA.⁴ The most recent such inquiry was completed in January 2017. The inquiry was not prompted by any particular concern, but was intended to update previous inquiries. As with the previous inquiries, this inquiry found no evidence of interference with the independence of ONA assessments. It made no formal recommendations.⁵ The IGIS anticipates that periodic inquiries into analytic independence will continue as resources allow.

In 2017-18, IGIS officers conducted inspections examining ONA's compliance with its privacy guidelines and reviewed ONA's policies and handling of open source information as part of a cross-agency project. In these inspections only a small number of interpretative and administrative errors were identified, however, none of these errors led to intelligence information about an Australian person being disseminated without an appropriate basis for doing so. As with previous inspections, they revealed that ONA is generally compliant with the requirements of its privacy guidelines and takes privacy responsibilities seriously.⁶

Leadership of the NIC

ONI's functions will include leading the NIC.⁷ ONI, intelligence agencies and agencies with an intelligence role or function together form the NIC.⁸ Paragraph (e) of the definition of 'agency with an intelligence role or function' in section 4 of the ONI Bill captures the intelligence activities of the Department of Home Affairs, the Australian Federal Police and the Australian Transaction Reports and Analysis Centre to the extent that the activity 'relates, or may relate, to national intelligence priorities, requirements or capabilities'. It similarly captures the intelligence activities of the Department of Defence (other than those activities undertaken by the Defence Intelligence Organisation or the Australian Geospatial-Intelligence Organisation). The IGIS notes, without commenting on the underlying policy, that this approach will link the legislative definition to concepts that are not set down in legislation, and which may therefore change over time. For example, an activity currently conducted by the Department of Home Affairs that relates to a current national intelligence priority may not relate to a priority in the future. If the priority changes or is removed, ONI's remit will correspondingly be changed or diminished.

ONI is to have the role of promoting the collective performance of the NIC agencies through its leadership and enterprise management functions. Examples of the ways in which ONI might provide leadership are in section 8(2) and include 'identifying particular areas of intelligence focus that require greater integration and *overseeing* appropriate action' (emphasis added). ONI is also to have an evaluation function which includes evaluating the adequacy of resources (section 9(1)(b)). This is a different oversight role to that of the IGIS (noting that ONI's function relates to intelligence integration and considering efficiency and effectiveness).

ONI's enterprise management functions will be supported by various arrangements that may be examined in future IGIS inspections. These arrangements include that set out in section 39 which

⁴ Inquiries were conducted in 2005, 2007, 2013 and 2017. Summaries are available in the respective annual reports and on the IGIS website at <https://www.igis.gov.au/publications-reports/public-reports>

⁵ Office of the Inspector-General of Intelligence and Security, *Annual Report 2016-2017*, pp. 11 and 32.

⁶ Office of the Inspector-General of Intelligence and Security, *Annual Report 2016-2017*, pp. 11 and 32.

⁷ See sections 7(1)(a) and 8 of the ONI Bill.

⁸ See the definition of 'national intelligence community' in section 4 of the ONI Bill.

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provides for the voluntary disclosure of information to ONI by NIC agencies. NIC agencies will hold information that directly relates to ONI's enterprise management functions, including its evaluation, leadership and coordination roles.

Open source function

ONI will be established with broad statutory functions, including a function of collecting open source intelligence, and can therefore be expected to collect and use more information, including more personal information, than ONA. The activities of the Open Source Centre are currently conducted as part of ONA's assessment function under section 5 of the *Office of National Assessments Act 1977*.

The open source function in proposed section 7(1)(g) of the ONI Bill is to 'collect, interpret and disseminate information relating to matters of political, strategic or economic significance to Australia that is accessible to *any section of the public*' (emphasis added).

In conducting oversight of the legality of ONI's activities, the IGIS will form an independent view on whether individual collection activities are supported by the section 7(1)(g) function. Assessing whether information is accessible to 'any section of the public' is more complicated than it may seem. Examples of where a difficult assessment may be required include activities in closed forums where membership must be approved by an administrator and/or requires payment of a fee, or where membership is limited to those with specialist skills, knowledge or access to technology. The assessment may involve questions of fact and degree in individual cases. There may also reach a point where the persons to whom the information is accessible cannot be regarded as a section of the public because the 'section' is so confined that it becomes private.

Given that several NIC agencies collect open source information, when overseeing this collection the IGIS will be well positioned to compare the governance arrangements of different agencies for managing collection, sharing and protection of this information.

Privacy rules

The ONI Bill includes a requirement in section 53 that the Prime Minister make privacy rules regulating ONI's collection of identifiable information under the open source function. The privacy rules must also regulate ONI's communication, handling and retention of identifiable information more generally. The Bill does not contain a statutory requirement that the privacy rules be made public. The IGIS considers that privacy rules applicable to ONI should be made public as are those applying to agencies under the *Intelligence Services Act 2001* (the ISA). The Australian Security Intelligence Organisation (ASIO) Ministerial Guidelines are also publicly available on the ASIO website.

Assumed identities

ONI is also to have access to the use of the assumed identities scheme in Part 1AC of the *Crimes Act 1914* for the purposes of the open source function.⁹ ONI will not be able to request evidence of an assumed identity (such as a driver's licence) but will instead rely on other agencies to obtain evidence of an assumed identity on its behalf if required. The IGIS's expectation is that ONI will have a robust

⁹ See the Office of National Intelligence (Consequential Amendments and Transitional Provisions) Bill 2018, Schedule 2, item 32.

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internal management and auditing scheme under the *Crimes Act 1914*. The IGIS is likely to review those arrangements once they are operational.

Secrecy provisions

The ONI Bill relocates the secrecy provisions currently in Part 6 of the ISA in sections 42 to 46 of the Bill. The IGIS does not have any concerns about how the provisions apply to disclosures made to, or by, IGIS officials for the purposes of those persons performing functions or duties or exercising powers as IGIS officials.

Changes to the IGIS Act

The IGIS does not have any concerns about the amendments to the IGIS Act contained in the Office of National Intelligence (Consequential Amendments and Transitional Provisions) Bill 2018.¹⁰ Most of the changes reflect the new arrangements by replacing references to ONA or the Director-General of ONA with references to ONI or the Director-General of National Intelligence. In addition, there is a proposed new requirement that ONI give a copy of directions from the Prime Minister to the IGIS,¹¹ which will enable the IGIS to consider ONI's compliance with the Prime Minister's directions. The proposed change to section 35 of the IGIS Act is that IGIS annual reports must include 'Inspector-General's comments on the extent of compliance by ONI, during the period to which the report relates, with privacy rules made under section 53 of the *Office of National Intelligence Act 2018*'.¹² This would place on a statutory footing the longstanding practice that IGIS annual reports comment on ONA's compliance with its privacy guidelines.

¹⁰ Items 51 to 65 of Schedule 2.

¹¹ Item 64 of Schedule 2, which is a proposed change to section 32B(1) of the IGIS Act.

¹² Item 65 of Schedule 2.

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ATTACHMENT A

Role of the Inspector-General of Intelligence and Security

The IGIS is an independent statutory officer charged with overseeing the activities of the Australian intelligence agencies namely,

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

The Office of the IGIS falls within the Attorney-General's portfolio. The IGIS is not subject to direction from the Prime Minister, or other ministers, on how responsibilities under the *Inspector-General of Intelligence and Security Act 1986* (IGIS Act) should be carried out. The Office currently has 24 staff.

The IGIS Act provides the legal basis for the IGIS to conduct inspections of the intelligence agencies and to conduct formal inquiries either of the Inspector-General's own motion, or at the request of a Minister, or in response to complaints.

The overarching object of IGIS oversight is to ensure that each intelligence agency acts legally and with propriety, complies with ministerial guidelines and directives, and respects human rights. A significant proportion of the resources of the Office are directed to monitoring agencies' activities through ongoing inspections. These are designed to reveal any breaches as well as to identify issues within agencies, including about governance and control frameworks, before there is a need for major remedial action. IGIS staff have access to all premises and 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, where relevant, the power to require any person to answer questions and produce documents, to take sworn evidence, and to enter agency premises. IGIS inquiries are conducted in private because they almost invariably involve highly classified or sensitive information. Conducting an inquiry is resource intensive but provides a rigorous means of examining a particular complaint or systemic matter within an agency.

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.¹³

¹³ The Hon M Turnbull MP, Prime Minister and Cabinet Portfolio Budget Statements 2018-19, *Budget Related Paper No 114*, 8 May 2018, p. 278.

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