

**Senate Standing Committee on Finance and Public Administration
Intelligence and Security Legislation Amendment (Implementing
Independent Intelligence Review) Bill 2020**

Attorney-General's Department

Hearing date: 10 November 2020
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Question type: Spoken

Jenny McAllister **asked the following question:**

Senator McALLISTER: Is anyone considering legality and propriety in the case of the Department of Home Affairs?

Ms Chidgey: We have to take the detail on notice. I think that they would also potentially have some additional coverage, at least for the ABF elements.

Senator McALLISTER: In terms of legality and propriety?

Ms Chidgey: It's sort of different to IGIS. But some of the functions of the Ombudsman, say, in relation to the AFP, relate to things like looking at controlled operations, use of surveillance devices and reviewing that. It's not identical to IGIS oversight, but it would enter into some of those issues of legality in terms of has it complied with the legislative requirements for some of those operations.

Senator McALLISTER: Is anyone considering the question of propriety? Is that in the mandate of any of the other oversight bodies beyond the IGIS?

Ms Chidgey: Not in those terms. I think we'd agreed to take on notice for Senator Patrick more detail on the oversight arrangements for all of the agencies.

The response to the Senator's question is as follows:

All government bodies (and their executives and officers) -- including the Department of Home Affairs and its Intelligence Division-- are expected to act in accordance with the law and in accordance with the Australian Public Service Commission's Code of Conduct. This includes (amongst other things):

- behaving honestly and with integrity ;
- acting with care and diligence;
- treating everyone with respect and courtesy, and without harassment;
- complying with all applicable Australian laws; and
- acting at all times behave in a way that upholds the Australian Public Service (APS) Values and Employment Principles, and the integrity and good reputation of Commonwealth agencies and the APS.

The *Inspector-General of Intelligence and Security Act 1986* (IGIS Act) provides that it is a function of the Inspector-General of Intelligence and Security (IGIS) to consider the “legality and propriety” of particular activities performed by agencies within their jurisdiction. For the IGIS’s oversight, this means ensuring that:

- intelligence agencies operate within and comply with the legislation governing their activities, and with ministerial guidelines and directives (legality), and
- the use of powers by intelligence agencies is appropriate and acceptable in the circumstances (propriety).

While a similar reference to propriety does not appear in establishing legislation for other oversight functions, other oversight frameworks do have scope to consider whether officers are acting appropriately and acceptably in the execution of their functions.

The Commonwealth Ombudsman, the Australian Commission for Law Enforcement Integrity (ACLEI), the Australian National Audit Office (ANAO), the Australian Human Rights Commission (AHRC), and Office of the Australian Information Commissioner (OAIC) provide specialised oversight on matters within their jurisdiction. In particular:

- The Commonwealth Ombudsman may, in response to a complaint or of their own motion, consider any action that is a matter of administration performed by the Department of Home Affairs. This includes considering complaints about actions and decisions to determine whether they are wrong, unjust, unlawful, discriminatory or just plain unfair. The Ombudsman also oversees the Department’s use of powers to preserve and access stored communications and telecommunications data under the *Telecommunications (Interception and Access) Act 1979* (Cth) (TIA Act).
- ACLEI investigates and reports on corruption issues within the Department of Home Affairs.
- ANAO conducts audits of the Department’s financial statements and performance measures.
- AHRC has the power to inquire into any act or practice that is discriminatory or inconsistent with or contrary to any human rights.
- OAIC oversees compliance with the *Freedom of Information Act 1982* (Cth) (FOI Act) and the *Privacy Act 1988* (Cth) (Privacy Act), and may initiate investigations in response to a complaint or on its own motion.

The outcomes of recent reviews and audits conducted by these bodies into the Home Affairs portfolio are available on their respective websites.

Additionally, decisions made by the Department and portfolio agencies are subject to judicial review by the courts. A significant number of administrative decisions made by the Department of Home Affairs are also subject to merits review by the Administrative Appeals Tribunal.

Jenny McAllister and Rex Patrick **asked the following question:**

Senator McALLISTER: I might place some questions on notice because it's a detailed thing to go through in the room. But I would appreciate some additional information and an assessment from the department about what matters are and are not being addressed in the current oversight arrangements. The concern being expressed in the Merchant L'Estrange report is that there's in fact a whole range of intelligence activities that are secret in nature that are not being the subject of oversight. I'm trying to understand whether or not there are adequate substitutes in place in the current arrangements. So I might put some questions on notice.

Senator PATRICK: If you are going to take some of these on notice, whilst there's also scope for, for example, corruption or warrants, there will be instances where, unlike the IGIS, who may decide to initiate an investigation into a particular area and they can do that, a lot of these sorts of oversights are initiated by complaint. So they sit idle until such time as a complaint or an allegation is made. I understand that, for warrants, there are reports that go to the Ombudsman, and it's not as though the Ombudsman necessarily actively seeks to examine that, but simply relies on data that is provided to the Ombudsman by the agency. So there's scope but there's also the way in which it's conducted—for example, if there's what you'd call an interrupt, where something happens that causes an action and then it might sit idle for a year before someone else makes a complaint.

Ms Chidgey: Yes, we can touch on that. ACLEI does have an own motion power. And, for the Ombudsman, it's right for, say, controlled operations, that they're doing more a review of the AFP's compliance with all the legal requirements largely on a review of documents. But they can choose to sort of do that.

Senator PATRICK: I would like that description included in the questions taken on notice, as you talk about the scope, and also the nature of the oversight.

Ms Chidgey: Yes.

Rex Patrick **asked the following question:**

Senator PATRICK: Maybe on notice you could provide, perhaps, in particular, the agencies that are not covered by the IGIS, and you could map out what coverage they do have in respect of oversight of operations. I just want to build that picture up. I understand it's likely to be different for AUSTRAC, as it is for AFP and for the other bodies that conduct intelligence and operations.

Ms Chidgey: Yes, we'll take that on notice.

The response to the Senators' questions is as follows:

Existing Oversight

The Commonwealth Ombudsman (Ombudsman), the Australian Commission for Law Enforcement Integrity (ACLEI), the Australian National Audit Office (ANAO), the Australian Human Rights Commission (AHRC), and Office of the Australian Information Commissioner (OAIC) have jurisdiction

in relation to the AFP, ACIC, AUSTRAC, and the Department of Home Affairs (including its Intelligence Division), although this might differ in some respects from agency to agency (for example, the ACIC is not subject to the *Privacy Act 1988*).

Each of these bodies provides specialised and effective oversight over discrete subject matter, and has a range of powers to support them in performing their oversight functions. This is detailed further below.

These bodies are also subject to parliamentary oversight mechanisms, including specific mechanisms for the ACIC and AFP through the Parliamentary Joint Committee on Law Enforcement, and through the Parliamentary Joint Committee on Intelligence and Security (PJCIS) (for the AFP's terrorism functions).

The following information outlines oversight bodies' coverage of the AFP, ACIC, AUSTRAC and the Department of Home Affairs. It does not address oversight bodies jurisdiction or activities beyond these agencies.

Nature and scope of jurisdiction

The **Ombudsman** has a broad jurisdiction to consider actions that relate to matters of administration (s5 *Ombudsman Act 1976* (Ombudsman Act)).

In addition to its general jurisdiction, the Ombudsman oversees the use of the following covert and intrusive powers to assess compliance with legislative requirements associated with the use of these powers. These include:

- telecommunications interceptions by the ACIC and AFP (Chapter 2 *Telecommunications (Interception and Access) Act 1979* (Cth) (TIA Act))
- stored communications by the AFP, ACIC and the Department of Home Affairs (Chapter 4A TIA Act)
- telecommunications data accessed by the AFP, ACIC and Department of Home Affairs (Chapter 4A TIA Act). This excludes telecommunications data that is accessed outside of the TIA Act (e.g. *Migration Act 1958* (Cth) and the *Telecommunications Act 1997* (Cth) (Telecommunications Act)).
- surveillance devices use by the AFP and ACIC (Part 6 *Surveillance Devices Act 2004* (Cth))
- controlled operations under Part IAB of the *Crimes Act 1914* (Cth) (Crimes Act) (Division 4, Part IAB Crimes Act)
- industry assistance powers under the Telecommunications Act (s317ZRB Telecommunications Act)
- Delayed Notification Search Warrants, Control Orders, Preventative Detention Orders and Prohibited Contact Orders (Part IAAB Crimes Act and Division 105 of the *Criminal Code Act 1995* (Cth)).

The Ombudsman has additional responsibilities in relation to the AFP's professional standards and AFP conduct and practices issues (Part V of the *Australian Federal Police Act 1979*).

During an Ombudsman inspection, there may be a range of issues identified, including minor administrative errors, instances of serious non-compliance and systemic issues. The Ombudsman may make suggestions for improvement or make formal recommendations about particularly serious issues and/or instances where an issue has not been addressed by the agency despite previous findings.

ACLEI investigates and reports on corruption in law enforcement agencies. ACLEI prioritises serious corruption and systemic corruption issues. The terms corruption, corruption issues, serious corruption, significant corruption issue, systemic corruption are defined in ss5, 7, 8 *Law Enforcement Integrity Commissioner Act 2006* (LEIC Act).

The **ANAO** audits financial statements and performance statements. Financial audits provide relevant and reliable information about a reporting entity's financial performance and position. The ANAO's performance audits identify areas where improvements can be made to aspects of public administration, and often make specific recommendations to assist entities to improve their performance (Part 4 of the *Auditor-General Act 1997* (Auditor-General Act)).

The **AHRC** may inquire into complaints of unlawful discrimination, any act or practice that may be inconsistent with or contrary to any human right (s11 *Australian Human Rights Commission Act 1986* (AHRC Act)).

The **OAIC** monitors, investigates and reports on agency compliance with the *Freedom of Information Act 1982* (FOI Act) and the *Privacy Act 1988* (Privacy Act) as well as reporting to the Attorney-General on the Commonwealth government's collection, use, disclosure, management, administration and storage of information more broadly.

Initiation of oversight

The **Ombudsman** may consider matters in response to a complaint or by their own motion (s5 Ombudsman Act).

ACLEI may investigate a matter upon receiving a referral or notification, or on the Integrity Commissioner's own initiative (Division 1, Part 4 LEIC Act).

ANAO reports on audits of financial statements to the Parliament twice a year. **ANAO** may perform a performance audit at any time (s17 Auditor-General Act). The Auditor-General has discretion in the performance or exercise of Auditor-General functions or powers. In exercising the mandated and discretionary functions and powers, the Auditor-General is not subject to direction from anyone in relation to: whether or not a particular audit is to be conducted; the way in which a particular audit is to be conducted; or the priority to be given to any particular matter.

The **AHRC** may initiate an inquiry into any act or practice that may be inconsistent with or contrary to any human right in response to a complaint, of their own motion, or if requested to do so by the Attorney-General (s20 AHRC Act). The AHRC may initiate an inquiry into any act or practice (including any systemic practice) that may constitute discrimination in response to a complaint, of their own motion, or if requested to do so by the Attorney-General (s32 AHRC Act).

The **OAIC** may investigate acts or practices that might breach the Privacy Act in response to a complaint or of their own motion (s40 Privacy Act). The OAIC may investigate an action taken by an agency in the performance of functions or the exercise of powers under the FOI Act on a complaint from a person, or on the Information Commissioner's initiative (Part VIIB FOI Act).

Powers

Each of these oversight bodies has powers that enable them to question persons to obtain information, require the production of documents and to access premises for the purposes of oversight.

ACLEI has additional powers under Part 9 of the LEIC Act, and include:

- coercive information-gathering hearings and notices
- telecommunications interception and data access
- electronic surveillance
- controlled operations and assumed identities, and
- search warrants.