



**Australian Government**

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**Department of the  
Prime Minister and Cabinet**

**Joint Submission to the Parliamentary Joint  
Committee on Intelligence and Security**

- Department of the Prime Minister and Cabinet
- The Office of National Assessments

**Office of National Intelligence Bill 2018**

**and**

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

**July 2018**

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## Introduction

1. The Department of the Prime Minister and Cabinet (PM&C) and the Office of National Assessments (ONA) welcome the opportunity to provide a submission to the Parliamentary Joint Committee on Intelligence and Security (PJCIS) to assist the Committee in its consideration of the Office of National Intelligence Bill 2018 (the ONI Bill) and the related Office of National Intelligence (Consequential and Transitional Provisions) Bill 2018 (C&T Bill).
2. These Bills were introduced into Parliament by the Attorney-General, the Hon Christian Porter MP, on 28 June 2018, and referred to the Committee by the Prime Minister on the same day. Detailed information on the specific provisions in these Bills is included in their respective Explanatory Memorandums.

## Recommended amendment

3. Development of the ONI Bill overlapped with the PJCIS' consideration — and the subsequent amendment — of the National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2018 (the Espionage and Foreign Interference Bill).
4. Noting the Committee's recommendations on the Espionage and Foreign Interference Bill, and the form in which that Bill passed the Parliament, PM&C recommends that the ONI Bill, including Explanatory Memorandum, be amended to remove s 43 (*Offence—subsequent communications of certain information*) in its entirety.

## Background

5. On 18 July 2017, the Prime Minister announced the most significant reorganisation of Australia's national security arrangements in decades, including the establishment of an Office of National Intelligence (ONI). A copy of the Prime Minister's media release of 18 July 2017 is at **Attachment A**.
6. The creation of an ONI was a recommendation of the 2017 Independent Intelligence Review (the Review) conducted by Mr Michael L'Estrange AO and Mr Stephen Merchant PSM. The Review's Terms of Reference are at **Attachment B** and its recommendations are at **Attachment C**.
7. The ONI Bill will establish an ONI in accordance with the recommendations and intent of the Review. The C&T Bill will provide technical amendments to other legislation to support this process. Further legislative changes required to implement the other recommendations of the Review have been, or will be, brought forward separately.

### The 2017 Independent Intelligence Review and the case for an enterprise management approach to Australia's intelligence agencies

8. The Review found that Australia's intelligence agencies have a strong record of achievement in protecting the security of Australians, are highly capable and effective, and are staffed by highly professional and dedicated officers of great integrity. It also acknowledged the strong culture of accountability within Australia's intelligence agencies.
9. However, the Review also assessed that the intelligence community will increasingly face challenges in areas such as coordination, prioritisation and resource management, evaluation, and integration of intelligence capabilities. In particular, it found that effective leadership of the intelligence community was impeded by the lack of a central authority with an appropriately explicit remit, the nature of the federated intelligence structures, and an insufficient number of officers across the community with comprehensive cross-agency experience.

10. The central theme of the Review's recommendations was to provide a pathway for Australia's intelligence community to take individual agency excellence to an even higher level of collective performance. Accordingly, the recommendations focused on facilitating a national intelligence enterprise that is agile, innovative and effective in responding to the challenges of a rapidly evolving geostrategic and security environment.
11. A keystone of the Review's recommendations was to establish ONI as a statutory agency within the Prime Minister's portfolio.

#### Membership of the National Intelligence Community – definition of an agency with an intelligence role or function

12. Traditionally, the Australian Intelligence Community (AIC) has included ONA, the Australian Security Intelligence Organisation (ASIO), the Australian Secret Intelligence Service (ASIS), the Defence Intelligence Organisation (DIO), the Australian Geospatial-Intelligence Organisation (AGO) and the Australian Signals Directorate (ASD). However, the Review found that the increasingly interconnected nature of modern national intelligence activities and challenges provided a compelling case for expanding the membership of the intelligence community. The Review supported establishing a National Intelligence Community (NIC) that included the six agencies of the AIC as well as the broader range of intelligence functions from across government in the Australian Criminal Intelligence Commission (ACIC), the Department of Immigration and Border Protection (now the Department of Home Affairs), AUSTRAC and the Australian Federal Police (AFP).
13. The ONI Bill establishes that the NIC will include:
  - a. the six AIC agencies and the ACIC in their entirety — defined in the ONI Bill as 'intelligence agencies'; and
  - b. the intelligence functions of Home Affairs, AUSTRAC, the AFP and the Department of Defence (excluding DIO and AGO, which are already captured as agencies in their own right) — defined in the ONI Bill as 'agencies with an intelligence role or function'.
14. This approach reflects the fact that all security challenges, no matter how disparate, increasingly require coordinated intelligence to support whole-of-Government policy responses across foreign, security, criminal and financial intelligence domains. In addition, there is growing commonality to the technology, techniques and capabilities which now underpin all intelligence functions, irrespective of their domain. This commonality needs to be exploited to the maximum effect to fully realise the benefits for the NIC and for Australia's national security. In effect, this is about getting the greatest return for each dollar invested in our intelligence capability. Finally, the Review intended that DGNI's leadership and coordination of all NIC agencies should encompass the totality of their intelligence functions, including capabilities which address threats outside 'traditional' national security, such as the collection of criminal intelligence.
15. The definition of an agency with an intelligence role or function was the result of close consultation with affected agencies, and strikes a balance between their concerns — including that an ONI should not impinge on their operational independence — and a desire to achieve the intent of the Review to bring together Australia's intelligence capabilities in an integrated enterprise. To address concerns that ONI's powers and functions could be exercised beyond an agency's intelligence role or function, ss 4(1) defines AUSTRAC, the AFP, Home Affairs, and Defence as agencies with an intelligence role or function but, importantly, only to the extent that they are performing that role or function. This restriction is strengthened by paragraph 10(1)(b): that DGNI must ensure ONI performs its functions in ways that do not inappropriately impact on, or encroach on, the functions, powers and responsibilities of an agency with an intelligence role or function.

## From the Office of National Assessments to the Office of National Intelligence

16. ONI will subsume the existing functions, resources and staffing of ONA.
17. In line with the Review's recommendations, ONI will have two key roles — managing Australia's national intelligence enterprise, and producing national and strategic intelligence assessments. ONI will also advise the Prime Minister on intelligence matters. ONI's functions are set out in Part 2 Division 2 of the ONI Bill.

### Enterprise management

18. The ONI Bill will establish ONI's enterprise management role as broader than ONA's current remit to coordinate and evaluate Australia's foreign intelligence activities, and will cover a wider range of national intelligence matters. This approach is consistent with the Review's findings on the importance of creating a genuine national intelligence enterprise to harness the synergies between foreign, security, criminal and financial intelligence.
19. The Review found that the coordination of Australia's intelligence agencies would be more effective with a single, central source of leadership with a clear mandate — particularly at the nexus between the different intelligence domains. The Review suggested the establishment of an ONI to fill leadership role.
20. Paragraph 7(1)(a) of the ONI Bill establishes that one of ONI's functions is to lead the NIC. Section 8 sets out how ONI will provide this leadership by detailing the main outcomes to be achieved and outlining some examples of ways in which ONI might achieve these outcomes.
21. This approach strikes a balance between providing a clear mandate and being overly prescriptive on the face of the legislation. Section 8 has been drafted to provide ONI with a broad, high-level remit to lead and coordinate the NIC, without legislating specific activities and areas in which ONI will be involved. This approach will mitigate the risk of unintended consequences that might arise from being overly prescriptive in the legislation. Specifying activities or areas in which ONI must play a leadership role could be seen to imply that ONI does not have a role, or has a more restricted role, in other aspects of leadership and coordination that are not listed. As such, the examples provided in the note to s 8 are indicative of some of the areas in which ONI might play a leadership role, but this is not an exhaustive list.
22. This approach is consistent with the fact that although the Review outlined areas in which it envisaged ONI would lead the NIC, it did not mean to restrict ONI's remit to just those areas. The Review intended that ONI's role would evolve as the changing demands of twenty-first century intelligence continued to shape the NIC.
23. Section 8 also reflects the Review's recognition of the benefits of adopting a 'light touch' approach to coordination. Through the drafting process, some agencies had raised concerns that being too specific in the legislation could be interpreted as providing ONI with a more hands-on role in those areas than was intended. The broad nature of s 8 and the restrictions placed on ONI's functions in s 10 have addressed these concerns.
24. Another key part of ONI's enterprise management role includes the evaluation of the performance of individual agencies and of the NIC as a whole. Paragraph 7(1)(b) and s 9 establish ONI's evaluation functions, which largely build on and strengthen ONA's existing evaluation functions. Paragraph 9(1)(d) — which provides that the Prime Minister may direct ONI to evaluate an agency or agencies to assess the NIC's effectiveness in relation to a specific matter — is consistent with the Review's intention that ONI and the Director-General of National Intelligence (DGNI) provide a single point of accountability to the Prime Minister on the performance of the intelligence community. An example of how this provision is intended to be

used would be for the Prime Minister to direct ONI to conduct a review into an intelligence failure.

### Intelligence assessments

25. The Review recommended that ONI's assessment role would continue to focus on producing national and strategic foreign intelligence assessments. Paragraph 7(1)(c) achieves this by continuing ONA's existing function to prepare assessments on international matters of political, strategic or economic significance to Australia. This provision adds a clarification that ONI's 'international matters' assessment function includes preparing assessments on domestic aspects of such international matters.
26. However, the Review also considered that ONI's assessment capability would need to have greater scale and scope, particularly in light of the geopolitical, economic and technological issues that will make Australia's strategic environment more complex and unpredictable. The Review's findings also stressed the importance of promoting integration and synergies across the different intelligence domains. And ONI's assessment role would need to support ONI's position as the principal advisory agency to the Prime Minister on intelligence matters.
27. Therefore, although ONI's assessment role will retain a focus on strategic foreign intelligence assessments, paragraph 7(1)(d) will provide ONI with an additional function to prepare strategic-level intelligence assessments on other matters of political, strategic or economic significance to Australia. This goes beyond the clarification that ONI can assess domestic aspects of international matters; it allows ONI to prepare strategic assessments on matters that do not have an international connection. In performing this function, ONI may have access to a greater amount of personal information relation to Australians. However, ONI's assessment focus will remain at the strategic, rather than individual, level.
28. This new function can only be undertaken in support of ONI's other functions (such as providing advice to the Prime Minister on national intelligence matters) or where it would complement the work of the NIC. This limitation gives effect to the Review's intent that ONI would complement the roles and responsibilities of other NIC agencies, and in particular that security intelligence assessments would primarily remain the responsibility of the ASIO, and that the DIO's assessment role would remain unchanged.
29. ONA's existing analytic independence will remain, and will cover ONI's expanded assessment remit. Subsection 12(2) prevents the Prime Minister from directing DGNI in respect to the content of ONI's assessments. Additionally, s 19 gives DGNI a responsibility to keep ONI free from bias and ensure that it does not do anything that may be seen to further or protect the interests of any particular section of the community.

### The Director-General of National Intelligence

30. The ONI Bill establishes DGNI as the head of ONI, and sets out DGNI's functions and powers. In addition to DGNI's role in managing ONI, ss 15(2) gives DGNI a leadership role in the NIC. This reflects the Review's recommendation that DGNI be the head of the NIC. Such a role gives DGNI a clear remit that extends beyond the current role of the Director-General of ONA.
31. The Review also recommended that DGNI be the Prime Minister's principal adviser on matters relating to the NIC; s 17 requires that DGNI keep the Prime Minister informed on matters relating to the NIC. In line with similar provisions in other legislation (such as for the Director-General of Security or the Director-General of ASIS), DGNI has a requirement to keep the Leader of the Opposition in the House of Representatives informed on intelligence matters that DGNI considers significant.

32. The ONI Bill establishes mechanisms for DGNI to be able to give effect to his or her role as the head of the NIC. In particular, ss 20(1) enables DGNI to issue directions to NIC agency heads where he or she considers it necessary to enable ONI to perform its functions under paragraph 7(1)(a) (to lead the NIC), and under ss 21(1) DGNI can issue guidelines to agency heads in order to assist ONI or DGNI perform their functions.
33. These powers are consistent with the Review's intent that DGNI would not direct the specific activities of agencies, but would direct the coordination of the NIC; DGNI must consult with relevant agency heads before issuing a direction or guideline, and the same restrictions in s 10 and s 16 (see below) apply to DGNI's use of directions and guidelines. Subsections 20(3) and 21(3) also provide additional restrictions on the effect of DGNI's directions and guidelines.

## The Office of National Intelligence and the National Intelligence Community

### Defining the boundaries of the Office of National Intelligence's role

34. The Review envisaged a 'light touch' approach to the coordination and management of Australia's national intelligence enterprise, which would complement the independence and responsibilities of NIC agencies. It intended that ONI and DGNI would not direct, or control agencies' operational activities, nor interfere with their statutory responsibilities; they would instead direct the coordination of the NIC to ensure appropriate synergies across the full suite of intelligence capabilities.
35. The carve outs provided in s 10 are an important way of ensuring the independence of NIC agencies in line with the Review's intent. Subsection 10(1) requires ONI to perform its functions in ways that do not inappropriately impact on, or encroach on, the functions, powers and responsibilities of a NIC agency, of a department in relation to a NIC agency in its portfolio, or of a statutory office holder relating to the NIC. Subsection 10(2) sets out more specifically some of the elements that ONI's functions do not include and further protects the independence of agencies. Subsection 10(2) is not intended to be an exhaustive list of activities that would have an inappropriate impact on agencies. Subsections 16(4) and (5) mirror these restrictions for DGNI.
36. These restrictions ensure that ONI's and DGNI's remit remain appropriately at the strategic level and that ONI will not be involved in the types of covert intelligence activities of other intelligence agencies, and that ONI can neither direct agencies to carry out operational activities, nor to use specific methods or means when carrying out such operations.
37. Some agencies also had concerns that ONI would be able to evaluate matters of legality, propriety or integrity, which would duplicate the role of the Inspector-General of Intelligence and Security (IGIS) or the Australian Commission for Law Enforcement Integrity. To address these concerns, the ONI Bill includes a provision in paragraph 10(2)(d) that prevents ONI from inquiring into the legality, propriety or integrity of activities undertaken by an intelligence agency or an agency with an intelligence role or function.

### The Office of National Intelligence and Home Affairs

38. The establishment of ONI and of the Home Affairs portfolio are part of the Government's reforms to Australia's national security and intelligence architecture. ONI will interact with Home Affairs on three levels.
39. As a policy department, Home Affairs will be a customer of ONI's intelligence product. In this role, Home Affairs will benefit from the broadening of ONI's assessment and open source functions. Home Affairs, as a policy department, has also been included in the ONI Bill as a



permanent member of the National Assessments Board to reflect the broader scope of ONI's national intelligence remit.

40. As a national security coordinating department, Home Affairs will work alongside ONI to ensure that Australia's responses to national security issues are coordinated and aligned across the range of government capabilities. Intelligence is one part of this approach. Home Affairs will work across its portfolio to support comprehensive policy development, consolidated strategic planning and coordination, and to ensure resources are carefully directed to ensuring a safer, more secure Australia. ONI will focus on coordinating Australia's intelligence enterprise across several portfolios to maximise synergies across the full suite of Australia's intelligence capabilities. Close interaction between the two coordination bodies will be important.
41. As a NIC agency, Home Affairs will be subject to ONI and DGNI's mandate to coordinate Australia's intelligence enterprise, and it will also be subject to DGNI's directions and guidelines. However, ONI's remit only covers Home Affairs to the extent that it is performing intelligence roles or functions as defined in s 4. Further, the restrictions set out in s 10 and s 16 protect the independence and operational activities of Home Affairs as they do for other NIC agencies.

### The Office of National Intelligence and Defence

42. As with Home Affairs, ONI will interact with the Department of Defence as both a policy department and as an agency with an intelligence role or function. As a policy department, Defence will also benefit from the broadening of ONI's assessment and open source functions.
43. The intelligence functions carried out by DIO and AGO are already covered in the NIC. However the broader department has been included as a NIC agency in order to capture those intelligence capabilities, roles and functions that exist outside DIO and AGO (ASD became a statutory agency on 1 July and is not part of the Department of Defence). The inclusion of the intelligence capabilities, roles and functions of the Department of Defence will not capture the Australian Defence Force.
44. Although the Review did not recommend specifically including Defence as a separate agency within the NIC, this approach is consistent with the intent of the Review to capture those intelligence capabilities and functions outside the six AIC agencies. It is also consistent with the approach taken to Home Affairs.

### The Office of National Intelligence and personal information

#### Open source intelligence

45. Paragraph 7(1)(g) will support ONI's operation of the Open Source Centre (OSC), which currently conducts its activities as part of ONA's assessment function under s 5 of the *Office of National Assessments Act 1977* (ONA Act).
46. The inclusion of a specific function to collect publicly available information is consistent with the Review's recommendation that the OSC be enhanced as a centre of expertise for open source collection, analysis, tradecraft and training. In addition to supporting ONI's all-source assessment functions, this specific provision allows ONI to enhance its open source capabilities in support of broader NIC objectives. This provision also enhances transparency and accountability by making the OSC's role explicit in legislation.
47. The reference to 'accessible to any section of the public' is intended to capture information that is generally available to the public, including information that requires conditions to be met before it can be accessed, for example, the payment of a fee or membership of a group. It does not require information to be available to all sections of the public. The function does not authorise ONI to undertake unlawful activity to obtain the information.



48. By uncoupling the OSC from ONA's assessment function, paragraph 7(1)(g) has the effect of expanding ONI's remit to collect information about matters broadly relating to political, strategic or economic significance to Australia. In addition, the C&T Bill amends the *Crimes Act 1914* to give ONI access to the assumed identity regime for the purpose of performing its functions under paragraph 7(1)(g).
49. Access to the assumed identities regime will support the OSC's access to a range of rapidly-evolving internet-based platforms. For example, access to some subscription services or social media platforms increasingly requires identity verification before permitting access. Although access to such platforms could be obtained through Australian Government accounts, in many cases it is not desirable for access to these services to be directly attributable to the Australian Government; attributable access could indicate an intelligence interest in particular matters or the nature of Australia's intelligence collection priorities.
50. ONI's broader remit to collect publicly available information and access to the assumed identity regime may, together, enable ONI greater access to identifiable information of Australians than ONA currently has access to. To safeguard the privacy of Australians, the Prime Minister must make privacy rules in relation to ONI's function under paragraph 7(1)(g) (see below). PM&C commissioned the Australian Government Solicitor to undertake a Privacy Impact Assessment in relation to the ONI Bill, which raised no significant privacy concerns and noted that the ONI Bill 'provides a stronger, more transparent regime for the handling and protection of personal information than currently exists for ONA'. A copy of the Privacy Impact Assessment is at **Attachment D**.

#### Access to information

51. The sections in Part 4 Division 1 of the ONI Bill facilitate ONI's access to information for the purpose of performing its functions. The intent in these provisions is to allow agencies to share information with ONI without compelling them to do so, with one exception — as set out in the following paragraph.
52. Although most information provided to ONI will be voluntary, s 37 of the ONI Bill enables DGNI to make a written request that a Commonwealth authority provide information relating to international matters — including domestic aspects — of political, strategic or economic significance to Australia. A Commonwealth authority must provide such information if requested, unless it would otherwise be prevented by a law of the Commonwealth or a state or territory. However, DGNI can only issue a written request under s 37 in relation to ONI's international assessments function under paragraph 7(1)(c). This provision reflects ONA's existing entitlement to such information under s 9 of the ONA Act. Further, before issuing such a request DGNI must consult with, and consider any concerns raised by, an affected Commonwealth authority, including any concerns relating to privacy.
53. ONI's functions under the ONI Bill — particularly in relation to ONI's collection of publicly available information, and its expanded assessments function — may result in ONI receiving a greater amount of information relating to Australians, and for a broader range of reasons, than ONA does currently. ONI's focus is intended to remain at the strategic, not the individual, level. However, in recognition of the potential for ONI to have access to a greater amount of personal information, the Bill includes mechanisms to ensure the appropriate protection and treatment of information held by ONI, including as set out in the section below on accountability and oversight. In addition, s 41 of the ONI Bill requires ONI to put in place measures to protect any information given to it by the NIC.

## Secrecy provisions

54. Part 4 Division 2 of the ONI Bill sets out secrecy provisions that will protect ONI information. These are substantially the same as provisions in the *Intelligence Services Act 2001* (ISA) which currently govern ONA information and which will be repealed by the C&T Bill. Moving these secrecy provisions into the ONI Bill will simplify arrangements.
55. As above, PM&C recommends that the ONI Bill, including Explanatory Memorandum, be amended to remove s 43 (*Offence—subsequent communications of certain information*) in its entirety. This would harmonise the ONI Bill with the Espionage and Foreign Interference Bill — which passed Parliament on the same day that the ONI Bill was introduced.
56. This secrecy offence was included primarily to facilitate fluid engagement between ONI and ‘outsiders’ in academia and business — enabling the explicit protection of ONI information without requiring a formal agreement or arrangement. While removing this offence may have a minor impact on some ONI engagement, we assess this would be limited and manageable.

## Accountability and oversight

### Privacy rules

57. Section 53 governs privacy rules made by the Prime Minister, which will protect the privacy of Australians.
58. Given ONI’s open source intelligence collection remit will be expanded beyond international matters and their domestic aspects, ONI may collect an increased amount of publicly available information on Australian citizens. To protect the privacy of Australians in this regard, ss 53(1) requires that the Prime Minister issue privacy rules that regulate: ONI’s collection of information under paragraph 7(1)(g) to the extent that it is identifiable information; and the communication, handling or retention by ONI of identifiable information.
59. The IGIS’s remit will include overseeing ONI’s compliance with its privacy rules. Although the C&T Bill includes an exemption providing that the PJCIS’s functions do not include reviewing ONI’s privacy rules, which is consistent with arrangements for other intelligence agencies, the IGIS must brief the PJCIS on the content and effect of the rules if requested by the PJCIS, or if the rules change.
60. ONA is currently consulting with relevant agencies to finalise the Privacy Rules. A draft version of the Privacy Rules will be provided to the Committee at the hearing.

### Oversight of the Office of National Intelligence

61. The Review recognised that oversight is a central tenet of society’s trust in the intelligence community. Accordingly, the C&T Bill includes amendments to the *Inspector-General of Intelligence and Security Act 1986* and the ISA to ensure that appropriate oversight regimes apply to ONI. The C&T Bill also provides that the IGIS’s inquiry functions in relation to ONI includes ONI’s compliance with directions given by the Prime Minister, and requires that the Prime Minister provide copies to the IGIS of any guidelines or directions given to ONI.
62. The PJCIS will also maintain its oversight role over ONI with the same exceptions that apply to ONA. However, unlike the current blanket exemption to reviewing ONA’s coordination and evaluation activities, the PJCIS will have a role in reviewing some aspects of ONI’s leadership functions.
63. This reflects the fact that ONI’s enterprise management role will influence NIC activities that are covered by the PJCIS’ oversight role. For example, the Review recommended that ONI would be responsible for developing and overseeing the implementation of a strategic approach to the

development of the NIC workforce management. Such a role would affect NIC activities that are covered by the PJCIS's function to review agencies' administration and expenditure. However, the C&T Bill amends ss 29(3) of the ISA to provide that the PJCIS's functions do not extend to reviewing anything done by ONI in its leadership role that relates to a matter that is currently excluded from the Committee's remit.

64. Broader oversight recommendations proposed by the Review would be considered in separate legislation.

### Cooperation

65. Subsection 13(1) allows ONI, in the performance of its functions, to cooperate with people or entities within or outside Australia. However, DGNI must provide approval in writing before ONI can cooperate with an authority of another country, and DGNI must provide written monthly updates to the Prime Minister of each approval, variation or revocation given. The Prime Minister may, at any time, cancel an approval given by DGNI. This section is consistent with similar provisions relating to other intelligence agencies.

## Attachment A: Prime Minister's Media Statement

**18 JULY 2017**

The Turnbull Government will undertake the most significant reform of Australia's national intelligence and domestic security arrangements in more than 40 years.

The reforms will restructure and strengthen Australia's Intelligence Community, establish a Home Affairs portfolio and enhance the Attorney-General's oversight of Australia's intelligence, security and law enforcement agencies.

Australia faces an increasingly complex security environment, evolving threats from terrorism and organised crime, and the development of new and emerging technologies, including encryption.

In view of these developments, the Prime Minister announced a review of Australia's Intelligence Community last year.

Mr Michael L'Estrange and Mr Stephen Merchant, and their adviser, Sir Iain Lobban, have finalised their report to Government. We thank them for their thorough and ground-breaking work.

The review concluded that Australia's intelligence agencies are highly capable and staffed by skilled officers. It also made many important recommendations to transform these agencies into a world-class intelligence community.

The review highlighted how changing security threats and technologies are driving the need for closer cooperation between our domestic security and law enforcement agencies.

For over a decade, successive Governments have responded to worsening security trends with ad hoc arrangements to strengthen coordination and cooperation between Australia's intelligence, security and law enforcement agencies.

These arrangements have been highly effective. Intelligence and law enforcement agencies have successfully interdicted 12 imminent terrorist attacks since September 2014. Operation Sovereign Borders, has also prevented successful people smuggling ventures for nearly three years.

However, the Government believes that the evolving and complex threats to Australia's security require more enduring and better integrated intelligence and domestic security arrangements.

We have accepted the recommendations of the Australian Intelligence Community review as a sound basis to reform Australia's intelligence arrangements.

The Government will establish an Office of National Intelligence, headed by a Director-General of National Intelligence, and transform the Australian Signals Directorate into a statutory agency within the Defence portfolio.

The Government will also establish a Home Affairs portfolio of immigration, border protection and domestic security and law enforcement agencies.

The new Home Affairs portfolio will be similar to the Home Office of the United Kingdom: a central department providing strategic planning, coordination and other support to a 'federation' of independent security and law enforcement agencies including the Australian Security Intelligence Organisation, the Australian Federal Police, the Australian Border Force and the Australian Criminal Intelligence Commission.

These arrangements will preserve the operational focus and strengths of frontline agencies engaged in the fight against terrorism, organised crime and other domestic threats.

In view of these significant reforms, the Government will also strengthen the Attorney-General's oversight of Australia's intelligence community and the agencies in the Home Affairs portfolio.

Strong oversight and accountability is important to give the public confidence that our agencies not only safeguard our nation's security, but do so respecting the rights and liberties of all Australians.

The Attorney-General will continue to be the issuer of warrants under the ASIO Act, and Ministerial Authorisations under the Intelligence Services Act and will continue to administer the Criminal Code Act 1995 and the Crimes Act 1914.

The Attorney-General's portfolio will incorporate the Inspector-General of Intelligence and Security and the Independent National Security Legislation Monitor. The Government will also consider measures to strengthen the operation of both roles.

In addition, the Attorney-General's portfolio will house the Commonwealth Ombudsman, which will remain an independent statutory body.

These reforms are significant and complex; they will take time to fully implement.

Planning to implement the changes to the Australian Intelligence Community, the establishment of the Home Affairs portfolio and the strengthening of the Attorney-General's portfolio will be undertaken within the Department of the Prime Minister and Cabinet.

The Attorney-General, the Minister for Immigration and Border Protection as Minister-designate for Home Affairs, and the Minister for Justice will work with the Department of the Prime Minister and Cabinet to develop these plans with a view to their implementation from early 2018.

These reforms are driven by serious threats to Australia's security and the Government's determination to keep Australians safe and secure.

They will complement work underway to implement the Government's 2016 Defence White Paper, including investments in new combat capability for the Australian Defence Force.

The Government will also present a Foreign Policy White Paper later this year.

## Attachment B: 2017 Independent Intelligence Review Terms of Reference

The 2017 independent review of the Australian Intelligence Community (AIC) will prepare findings and recommendations on the AIC and related issues below in a classified report for the Government, along with an unclassified version of that report.

The review will be completed in the first half of 2017 and will focus on the Office of National Assessments, the Australian Secret Intelligence Service, the Australian Security Intelligence Organisation, the Australian Signals Directorate, the Defence Intelligence Organisation and the Australian Geospatial-Intelligence Organisation.

It will also examine the relationship and engagement between those agencies and the members of the broader National Intelligence Community, including the Australian Federal Police, the Department of Immigration and Border Protection, the Australian Criminal Intelligence Commission, and the Australian Transaction Reports and Analysis Centre.

The review will consider, among other things:

- how the key aspects of our security environment and the nature of security threats have changed in recent times, including as a result of technological advancements, and how they are likely to change further over the coming ten years or so;
- how effectively the AIC serves (and is positioned to serve) Australian national interests and the needs of Australian policy makers;
- whether the AIC is structured appropriately, including in ensuring effective co-ordination and contestability;
- whether the AIC is resourced appropriately, including to ensure the right balance of resources across the AIC and that agency resources are properly matched against national security priorities, and the impact of the efficiency dividend;
- whether legislative changes are needed, including to the *Intelligence Services Act 2001*;
- whether capability gaps, including technological, are emerging and how these might be met, noting potential efficiencies and that any new proposals would need to be consistent with the Government's overall fiscal strategy;
- the effectiveness of current oversight and evaluation arrangements; and
- the development path of overseas intelligence partners and lessons for Australia.

The Department of the Prime Minister and Cabinet will establish a secretariat for the review and provide logistics support to the review as required.

The review team will have full access to all material applicable to its examination. Relevant departments and agencies are to co-operate fully with the review and provide any requested assistance.

## Attachment C: Summary of the Recommendations of the 2017 Independent Intelligence Review

### STRUCTURE/ARCHITECTURE

**Recommendation 1:** An Office of National Intelligence (ONI) be established as a statutory authority within the Prime Minister's portfolio, and that:

- a) ONI be led by a Director-General (DGNI) and this appointment be at departmental Secretary level;
- b) DG ONI be the head of the National Intelligence Community (NIC) as well as the Prime Minister's principal adviser on intelligence community issues, with the role including advice on the appointment of senior NIC office-holders and succession planning;
- c) DGNI be a member of the Secretaries Committee on National Security;
- d) without directing the specific activities of agencies, DGNI be able to direct the co-ordination of the NIC to ensure there are appropriately integrated strategies across the suite of NIC capabilities;
- e) DGNI chair an expanded National Intelligence Co-ordination Committee and that its membership include the Chief of the Defence Force or their representative;
- f) DGNI chair a new Intelligence Integration Board;
- g) DGNI's roles and responsibilities be supported by a new legislative mandate which would include the provision of statutory independence for the position of DGNI; and
- h) DGNI be accountable to the Prime Minister and the National Security Committee of Cabinet for the performance of the NIC generally, and agencies in particular, in relation to National Intelligence Priorities and the provision of relevant input to Ministerial and Cabinet decision-making.

**Recommendation 2:** The ONI encompass two main areas of responsibility led by Deputy Directors-General (at the Senior Executive Service Band 3 level) responsible for Intelligence Enterprise Management (including intelligence integration) and Assessments, and that:

- a) the DGNI be given the authority and responsibility for advising government on intelligence collection and assessment priorities, and allocating responsibility for intelligence collection across the intelligence agencies;
- b) DGNI report to the Prime Minister and the National Security Committee of Cabinet on a regular basis to provide a holistic view of performance against priorities and to make recommendations on ways of closing intelligence gaps, making choices among relative priorities, and in consultation with the heads of relevant intelligence and policy agencies ensuring the appropriate mix of coverage;
- c) DGNI have responsibility for new arrangements for agency evaluation that are appropriately rigorous across specific mandates, that are similar to the Functional and Efficiency Reviews currently led by the Department of Finance, that are conducted by senior ONI and Department of Finance staff supplemented as appropriate by competent experienced external reviewers, and that make practical assessments of progress in relation to prioritisation, effectiveness, resource allocation, capability development and co-ordination; and
- d) DGNI provide the Prime Minister with a written personal overview every two weeks on key issues for the intelligence agencies, and that this overview be supplemented by meetings with the Prime Minister every two weeks.



**Recommendation 3:** Integration in areas of high intelligence focus be improved by:

- a) establishing a dedicated ONI position to facilitate closer co-ordination, evaluation and integration across national counter-terrorism intelligence activities as a whole;
- b) [classified recommendation previously agreed by the National Security Committee of Cabinet on 18 July 2017 (MT17/0510/NSC refers)];
- c) [classified recommendation previously agreed by the National Security Committee of Cabinet on 18 July 2017 (MT17/0510/NSC refers)];
- d) the Australian Cyber Security Centre (ACSC) operating as part of the Australian Signals Directorate (ASD), and that:
  - i. staff from other agencies be seconded to the ACSC but also retain their existing organisational authorities and ability to access data, information and capabilities from their home organisations;
  - ii. a Head of the ACSC be appointed as the single focus of accountability to the Government for cyber security, and provide a six-monthly report to Cabinet on proposed cyber security priorities, progress in implementing them and emerging cyber issues;
  - iii. one Minister have primary responsibility for the ACSC and cyber security under arrangements to be determined by the Prime Minister, noting that the authorities under which ASD would continue to operate would derive from the Minister for Defence (as currently required by s 3A of the *Intelligence Services Act 2001*);
  - iv. an Intelligence Co-ordinator for Cyber Security be appointed to more effectively meet and manage the growing expectations of the ACSC, particularly in safeguarding the security of government networks, responding to incidents, and providing the intelligence to support policy and international engagement;
  - v. governance of the ACSC be provided by the current Cyber Security Board (the Board) chaired by the Secretary of the Department of the Prime Minister and Cabinet, and in addition to its existing membership the Board also include DGNI and CEO-level representatives of critical national infrastructure sectors including telecommunications, health care, financial institutions, other services, energy, water and ports;
  - vi. ASD's legislative mandate specify its role as the national information and cyber security authority, including functions to combat cyber crime and to provide advice to the private sector on cyber security matters; and
  - vii. ACSC's cyber hotline for Government agencies and the private sector operate 24 hours a day, 7 days a week, and a 24/7 capability to manage public messaging and policy advice in relation to rapidly emerging cyber events also be established.

**Recommendation 4:** The ONI be responsible for leading and co-ordinating data management and ICT connectivity initiatives across the National Intelligence Community, and that the Open Source Centre (OSC) be integrated into ONI's Intelligence Enterprise Management role and enhanced as a centre of expertise for open source collection, analysis, tradecraft and training.

**Recommendation 5:** Current Office of National Assessments analyst numbers be increased by at least 50 per cent to support ONI's intelligence assessment role, and that:

- a) ONI be responsible for preparing a morning Daily Brief for the Prime Minister on intelligence issues of significance;

- b) an ONI Assessment Consultation Board be established, chaired by the DGNI and consisting of senior leaders from ONI, other intelligence agencies and relevant policy departments as well individuals from business, non-government organisations, universities and think-tanks who can add relevant perspectives to intelligence assessment matters; and
- c) ONI develop a more intensive and substantive program of interaction with experts outside of government to inform assessments.

**Recommendation 6:** The Australian Signals Directorate (ASD) be made a statutory authority within the Defence portfolio reporting directly to the Minister for Defence, and that:

- a) the Head of ASD be appointed at a level of seniority equivalent to the Directors-General of the Australian Security Intelligence Organisation and the Australian Secret Intelligence Service;
- b) the existing organisational arrangements that integrate the support to military operations capability within ASD be reaffirmed and strengthened;
- c) a senior military officer be appointed as the principal ASD Deputy Director at a rank commensurate with the responsibilities and accountabilities of the role; and
- d) a dedicated joint ASD–Defence team be established to manage ASD’s transition to a statutory authority, drawing on relevant expertise within and outside of government, and reporting to the National Security Committee of Cabinet.

#### CAPABILITY AND FUNDING

**Recommendation 7:** A Joint Capability Fund administered by the Office of National Intelligence be established to support the development of shared capabilities, with the total amount in the Fund being equivalent to the Efficiency Dividend levied on the intelligence agencies.

**Recommendation 8:** Changes be made to the application of the Efficiency Dividend to the intelligence agencies as follows:

- a) the Efficiency Dividend be applied to 100 per cent of Australian Signals Directorate (ASD) funding with effect two years after ASD’s establishment as a statutory authority; and
- b) the Efficiency Dividend be applied to 100 per cent of the funding of the Office of National Intelligence (ONI) with effect two years after ONI’s establishment as a statutory authority.

**Recommendation 9:** An Intelligence Capability Investment Plan (ICIP) be established that identifies the major capability projects that agencies seek agreement to commence over the period of the Forward Estimates, and that the DGNI prepare the ICIP annually for consideration by the National Security Committee of Cabinet, noting that:

- a) The ICIP should also be presented in conjunction with a comprehensive overview of the National Intelligence Community’s (NIC) existing funding and commitments.
- b) The ICIP should include the projects which ASD has in Defence’s Integrated Investment Program (DIIP), and that the associated funding be transferred from the Defence budget to ASD after it transitions to a statutory authority. The current phases of ASD’s DIIP funding should continue to be administered by the Department of Defence, and over time, later phases of existing projects, as well as their replacements and future projects, should move into the ICIP.
- c) The ICIP, in its first iteration, be presented to government with options for overall funding envelopes based on NIC funding and indexed at 1.5 and 3 per cent real growth per year, with effect from 2018–19.

**Recommendation 10:** Proposals for new funding for important long-term intelligence capability initiatives be assessed against agreed principles, including:

- a) additional funding should be focused primarily on Australia's own intelligence needs;
- b) the likely return on investment should be specified; and
- c) funding should be phased over time and subject to periodic review against objectives.

**Recommendation 11:** The ONI be responsible for developing and overseeing the implementation of a strategic approach to the development of the National Intelligence Community workforce as part of its intelligence enterprise management responsibilities.

**Recommendation 12:** The Australian Security Intelligence Organisation (ASIO) receive additional resourcing to allow it to second staff to the Australian Government Security Vetting Agency (AGSVA) as soon as possible, and that the situation with AGSVA Top Secret (Positive Vetting) clearances be reviewed in early 2018 to allow time for the current remediation program to have effect. If processing times still exceed six months, alternative options for Top Secret (Positive Vetting) clearances should be explored.

**Recommendation 13:** Data analytics and ICT connectivity, including the establishment of an intelligence community computing environment in which technical barriers to collaboration are minimised, be one of the highest priorities of a more structured approach to technological change and for the funding of joint capabilities.

**Recommendation 14:** The ONI lead a more structured approach to the National Intelligence Community's responses to technological change, with a high priority given to:

- a) establishing a National Intelligence Community Science and Technology Advisory Board;
- b) creating a National Intelligence Community Innovation Fund to support the development of prototypes for transitioning research outcomes into operational systems; and
- c) supporting a National Intelligence Community Innovation Hub to facilitate ways in which government, industry and academia could come together to address capability needs and solutions and create new linkages.

#### LEGISLATION

**Recommendation 15:** A comprehensive review of the Acts governing Australia's intelligence community be undertaken to ensure agencies operate under a legislative framework which is clear, coherent and contains consistent protections for Australians. This review should be carried out by an eminent and suitably qualified individual or number of individuals, supported by a small team of security and intelligence law experts with operational knowledge of the workings of the intelligence community.

**Recommendation 16:** Amendments to the Ministerial authorisation (MA) regime in the *Intelligence Services Act 2001* (ISA) and associated processes be made to address practical difficulties arising from implementation of the regime. Such amendments, to be pursued in advance of the comprehensive review recommended above, would include:

- a) Introducing a class-based MA regime to enable ISA agencies to produce intelligence on a class of Australian persons involved with proscribed terrorist organisations. The class authorisation should be issued by the responsible Minister with the agreement of the Attorney-General and overseen by the Inspector-General of Intelligence and Security (IGIS). Class authorisations should last for a maximum period of six months but could be renewed. ISA agencies should maintain a current list of the Australians on whom they are seeking to produce intelligence on under the authorisation, outlining the justification for their continued coverage. Agencies should have to report to the responsible Minister within six months of the original authorisation.
- b) Introducing a class-based MA regime to enable ISA agencies to undertake activities to produce intelligence on Australian persons when the agencies are operating in support of the Australian Defence Force (ADF). This regime would be subject to the same oversight requirements as recommended above in relation to class authorisations for Australian persons involved with proscribed terrorist organisations.
- c) Introducing a requirement for all ISA agencies to seek an MA for activities likely to have a direct effect on an Australian person.
- d) Requiring ISA agencies to obtain MAs only for activities involving the use of covert collection capabilities by including a definition of 'producing intelligence' in the ISA. For the Australian Secret Intelligence Service, Ministerial authorisation should continue to be required for tasking an agent or network of agents to produce intelligence on an Australian person or class of Australian person overseas, or when requesting an international partner to do likewise. We also recommend amending the definition of 'intelligence information' in the ISA.
- e) Permitting an ISA agency to act immediately and without an MA in situations where it is reasonable to believe that an Australian person consents to the ISA agency producing intelligence on that person. In these circumstances, the ISA agency should be required to notify the responsible Minister and the IGIS as soon as possible and at a maximum, within 48 hours. In situations involving a threat to security, the Minister responsible for the Australian Security Intelligence Organisation (ASIO) should also be advised.
- f) Providing that when an MA involves a threat to security, the Minister responsible for the ISA agency first consider the case prepared by their own agency in consultation with ASIO. If the Minister agrees with the arguments presented by the ISA agency, the Minister should then consult with and obtain the agreement of the Attorney-General before issuing the authorisation.

**Recommendation 17:** Regular briefings be held involving the 'Agency Heads' (as defined by the Intelligence Services Act 2001), their responsible Ministers, and the Attorney-General and Director-General of Security, on intelligence collection activities overseas which, if compromised, could impact on Australia's foreign policy or international relations.

**Recommendation 18:** The co-operation provisions in Divisions 2 and 3 of Part 3 of the *Intelligence Services Act 2001* (ISA) be streamlined to enhance co-operation amongst agencies. These changes, also to be pursued in advance of the comprehensive review recommended above, would include:

- a) clarifying that two ISA agencies co-operating with one another can act jointly under a single Ministerial authorisation from the relevant Ministers; and
- b) extending the co-operation regime for activities undertaken in relation to the Australian Security Intelligence Organisation to all ISA agencies and to activities undertaken both within and outside Australia.

**Recommendation 19:** The Director-General of the Australian Secret Intelligence Service (ASIS) be able to authorise activities under Schedule 2 of the *Intelligence Services Act 2001* concerning the use of weapons and self-defence techniques by ASIS staff members and persons co-operating with ASIS. In addition to the existing requirement in relation to notifying the Inspector-General of Intelligence and Security, the Director-General should also be required to notify the Minister responsible for ASIS of any new authorisations or changes to existing authorisations on a monthly basis.

**Recommendation 20:** Existing consultation arrangements for the development of legislative reform proposals be strengthened to ensure legislative amendments are coherent and progressed in a timely manner.

**Recommendation 21:** The oversight role of the Parliamentary Joint Committee on Intelligence and Security (PJCIS) and the Inspector-General of Intelligence and Security (IGIS) be expanded to apply to all ten agencies within the National Intelligence Community, with oversight of the Australian Federal Police, the Department of Immigration and Border Protection, and the Australian Criminal Intelligence Commission limited to their intelligence functions, and with current oversight arrangements in relation to the Office of National Assessments applied to the Office of National Intelligence.

**Recommendation 22:** The Office of the Inspector-General of Intelligence and Security be allocated additional resources to enable it to sustain a full-time staff of around 50.

**Recommendation 23:** The role of the Parliamentary Joint Committee on Intelligence and Security (PJCIS) be expanded by amending relevant legislation to include:

- a) a provision enabling the PJCIS to request the Inspector-General of Intelligence and Security (IGIS) 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;
- b) a provision enabling the PJCIS to review proposed reforms to counter-terrorism and national security legislation, and to review all such expiring legislation;
- c) provisions allowing the PJCIS to initiate its own inquiries into the administration and expenditure of the ten intelligence agencies of the NIC as well as proposed or existing provisions in counter-terrorism and national security law, and to review all such expiring legislation;
- d) provisions enabling the PJCIS to request a briefing from the Independent National Security Legislation Monitor (the Monitor), to ask the Monitor to provide the PJCIS with a report on matters referred by the PJCIS, and for the Monitor to provide the PJCIS with the outcome of the Monitor's inquiries into existing legislation at the same time as the Monitor provides such reports to the responsible Minister; and
- e) a requirement for the PJCIS to be regularly briefed by the Director-General of the Office of National Intelligence, and separately by the IGIS.

## Attachment D: Privacy Impact Assessment

**Attached on the following pages.**

**REPORT**

**PRIVACY IMPACT ASSESSMENT: ESTABLISHING THE OFFICE OF NATIONAL  
INTELLIGENCE**

19 June 2018

**To:**  
Home Affairs and Intelligence Review Implementation Taskforce  
Department of the Prime Minister and Cabinet

**Justin Hyland**  
Senior Executive Lawyer

**Danielle Chifley**  
Senior Lawyer

**Kate McLaren**  
Lawyer



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## REPORT

### PRIVACY IMPACT ASSESSMENT – ESTABLISHMENT OF OFFICE OF NATIONAL INTELLIGENCE

#### 1. INTRODUCTION

- 1.1. The Department of the Prime Minister and Cabinet (**the Department**) has asked AGS to conduct an independent privacy impact assessment (**PIA**) of the establishment of the new Office of National Intelligence (**ONI**). The creation of ONI was a primary recommendation of the 2017 Independent Intelligence Review. The Review also recommended that a new position of Director-General of National Intelligence<sup>1</sup> be established to head ONI and the national intelligence community and be the principal advisor to the Prime Minister on intelligence community issues.
- 1.2. The Department is leading the development of the Office of National Intelligence Bill 2018 (**ONI Bill**) and the Office of National Intelligence (Consequential and Transitional Provisions) Bill 2018 (**C&T Bill**) to establish ONI and the position of Director-General.
- 1.3. In practical effect, the existing Office of National Assessments (**ONA**) will continue in existence under the new name of ONI. It is proposed that ONA's governing legislation, the *Office of National Assessments Act 1977* (**ONA Act**), be repealed and replaced by the ONI Act. ONI will absorb the current roles, functions and staff of ONA, and be given some new functions and powers. The C&T Bill would make consequential amendments to update other Commonwealth legislation and provide for necessary transitional arrangements.
- 1.4. Currently, ONA's functions include:
  - a. preparing assessments and reports on international matters that are of political, strategic or economic significance to Australia
  - b. co-ordinating Australia's foreign intelligence activities, and matters of common interest to Australia's foreign intelligence agencies
  - c. conducting evaluations of Australia's foreign intelligence activity.<sup>2</sup>
- 1.5. The ONI Bill expands ONA's existing functions encompassing assessment, coordination and evaluation and also makes provision for ONI to provide leadership in the 'national intelligence community' (**NIC**), defined in cl 4 of the ONI Bill to mean the ONI, each intelligence agency and each agency with an intelligence role or function. Read with the definitions of 'intelligence agency' and 'agency with an intelligence role or function' in cl 4, the NIC therefore extends to the 6 'traditional'

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<sup>1</sup> References to 'the Director-General' in this PIA are to be read as references to the Director-General National Intelligence, unless otherwise specified – for example, 'Director-General of ONA'.

<sup>2</sup> ONA Act s 5.

agencies of the Australian Intelligence Community<sup>3</sup>, as well as the Australian Criminal Intelligence Commission (**ACIC**), and the following agencies with an intelligence role or function:

- the Australian Transaction Reports and Analysis Centre (**AUSTRAC**)
- the Australian Federal Police (**AFP**),
- the Department of Home Affairs
- the Department of Defence (other than AGO or DIO).

The Director-General will not only head ONI, but also lead the NIC.<sup>4</sup>

### Scope of this PIA

- 1.6. The purpose of this PIA is to assess and make observations about the potential privacy implications of the establishment of ONI as proposed under the ONI Bill and the consequential amendments to the *Privacy Act 1988* (**Privacy Act**) proposed under the C&T Bill.
- 1.7. ONA is not subject to the Privacy Act, and it is proposed that ONI also not be subject to the Privacy Act.<sup>5</sup> Nonetheless, the Department has consulted with the Office of the Australian Information Commissioner and considers that it is appropriate for a PIA to be conducted to assess the privacy impacts of the ONI and C&T Bills.
- 1.8. The focus of this PIA is the privacy implications of the ONI Bill and the proposed consequential amendments to the Privacy Act that would be effected by the C&T Bill. It has been prepared with reference to the instructions we have received from the Department about the settled policy position of the Government as reflected in the draft Bills. The purpose of the PIA is limited to analysing and making observations concerning the potential impact of the draft Bills as drafted on the privacy of individuals, in particular by comparison with the current operation of ONA.

### Assumptions made

- 1.9. We have prepared this PIA on the assumption that the ONI Bill and the C&T Bill so far as it would amend the Privacy Act are enacted in their current form.<sup>6</sup> For this reason, the comments we make and the conclusions we reach in this PIA should be taken to apply only to the Bills as presently proposed. If the ONI Bill is amended before it is enacted or the C&T Bill amends the Privacy Act in a different way to what

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<sup>3</sup> ONA/ ONI, the Australian Security Intelligence Organisation (**ASIO**), Australian Secret Intelligence Service (**ASIS**), Australian Signals Directorate (**ASD**), Australian Geospatial-Intelligence Organisation (**AGO**) and Defence Intelligence Organisation (**DIO**).

<sup>4</sup> See in particular cl 15 and cl 16 of the ONI Bill.

<sup>5</sup> See discussion below at 4.1-4.3.

<sup>6</sup> Draft ONI Bill dated 12 June 2018 at 08.32 AM; draft C&T Bill dated 7 June 2018 at 11.14 AM.

is currently proposed, then we recommend the Department consider obtaining a further or updated PIA to address the effect of those changes.

## 2. EXECUTIVE SUMMARY

- 2.1. The ONI Bill expands ONA's existing functions and in carrying out its information collection and reporting functions ONI may be involved in the collection of more information. However, to the extent this includes personal information of Australians, relevant provisions of the ONI Bill are positively directed towards enhancing the protection of personal privacy compared to the current position with ONA.
- 2.2. While ONI will not be subject to Privacy Act, the ONI Bill establishes a legislative framework for ONI's handling of information, including a secrecy regime and privacy rules for the protection of 'identifiable information'. This term is defined in essentially the same way as 'personal information' in the Privacy Act,<sup>7</sup> except that:
  - it is limited to information about Australian citizens and permanent residents
  - considering the definition of 'permanent resident' in cl ^4, it extends to certain bodies corporate.<sup>8</sup>
- 2.3. The proposed privacy rules are intended to be analogous to those applicable to other intelligence agencies. The relevant responsible Ministers in relation to ASIS, AGO and ASD are under s 15 of the *Intelligence Services Act 2001* to make written rules regulating the communication and retention of intelligence information concerning Australian persons, having 'regard to the need to ensure that the privacy of Australian persons is preserved as far as is consistent with the proper performance by the agencies of their functions.' Clause ^53 of the ONI Bill is in similar terms, including a requirement that in making the proposed privacy rules, the Prime Minister must first consult with the Inspector-General of Intelligence Security (IGIS) and the Attorney General (the Minister responsible for the Privacy Act).
- 2.4. The ONI Bill also includes provisions which specifically require ONI to consider, and take steps to protect, personal privacy. For example, there is an express requirement to consider privacy in the exercise of ONI's compulsory information gathering power.
- 2.5. Amendments to the Privacy Act in the C&T Bill and certain provisions of the ONI Bill will facilitate government agencies, including certain agencies with an intelligence function as defined in the ONI Bill, providing information, including personal information, to ONI. However, ONI will be required to handle any information it obtains in accordance with the information handling and secrecy regimes established under the ONI Bill and the privacy rules.

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<sup>7</sup> Whenever the term 'personal information' is used in this PIA, it has the meaning given to that term in s 6 of the Privacy Act.

<sup>8</sup> See the definition of 'identifiable information' in cl ^4 of the ONI Bill as compared with the definition of 'personal information' in s 6 of the Privacy Act. The only material difference is that 'identifiable information' is limited to information about Australian citizens and permanent residents, and 'permanent residents' includes certain bodies corporate. See also the discussion below at paragraph 5.42.

- 2.6. Overall, in our view the relevant provisions of the ONI Bill provide a stronger and more transparent regime for the handling and protection of personal information than currently exists for ONA.

### 3. METHODOLOGY

- 3.1. In preparing this PIA, we have considered the following material:
- Office of National Intelligence Bill 2018<sup>9</sup>
  - Office of National Intelligence (Consequential and Transitional Provision) Bill 2018<sup>10</sup>
  - ‘ONA Guidelines to Protect the Privacy of Australians’ (23 June 2017)
  - Preliminary draft ‘Rules to protect the privacy of Australians’<sup>11</sup>
  - *Office of National Assessments Act 1977*
  - *Privacy Act 1988*.

### 4. NON-APPLICATION OF THE PRIVACY ACT

- 4.1. The Privacy Act does not apply to ONA, and it is not proposed that it will apply to ONI. Instead, a separate regime for the handling of personal information and the protection of privacy will be established by the ONI Bill, adapted to the functions and operation of ONI including its function of providing leadership in the NIC.
- 4.2. The ONA Act currently does not impose any obligations or make any provisions in relation to privacy, although the Director-General of ONA has published privacy guidelines.<sup>12</sup> What is proposed under the ONI Bill is a regime that we understand has been developed with the intention of providing the maximum possible protection of personal privacy without, consistent with the approach in relation to other intelligence agencies, requiring ONI to comply with the Privacy Act.
- 4.3. In this section we consider the current application of the Privacy Act, and the amendments proposed to the Privacy Act by the C&T Bill. We consider the significance of these changes further below at 4.10 - 4.11.

#### Currently

##### ***Acts and practices of ONA and some other NIC agencies not covered by Privacy Act***

- 4.4. The acts and practices of particular ‘intelligence agencies’ are effectively exempt from the operation of relevant provisions of the Privacy Act.<sup>13</sup> ‘Intelligence agency’ is

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<sup>9</sup> Draft dated 12 June 2018 at 8.32 AM.

<sup>10</sup> Draft dated 7 June 2018 at 11.14 AM.

<sup>11</sup> We have only been provided with a preliminary draft of these Rules which may therefore be amended and differ from the form in which we have seen them when finalised.

<sup>12</sup> See further below at 5.41.

<sup>13</sup> Privacy Act s 7(1)(a)(i)(B) - read with *Freedom of Information Act 1982*, Div 1 of Pt 1 of Sch 2 – and s 7(2)(a).

defined in s 6(1) of the Privacy Act to mean ONA, ASIO and ASIS. The acts and practices of the ACIC,<sup>14</sup> DIO, AGO and ASD<sup>15</sup> are similarly excluded.

- 4.5. The acts and practices of other agencies and organisations relating to records that originated with or which have been received from these 7 agencies are also excluded from the operation of the Privacy Act.<sup>16</sup>

***Disclosure of personal information by other agencies to ONA subject to Privacy Act***

- 4.6. If an agency or organisation to which the Privacy Act applies discloses personal information to ONA, it is required to comply with the disclosure provisions in Australian Privacy Principle (APP) 6.
- 4.7. In contrast, the Privacy Act includes a specific exemption for acts or practices that involve disclosure of personal information to ASIO, ASIS or ASD.<sup>17</sup> This means that the Privacy Act has no application to, and therefore does not constrain, the disclosure of personal information to those agencies.

**Proposed amendments to Privacy Act under the C&T Bill**

***Acts and practices of ONI not covered by Privacy Act***

- 4.8. It is proposed that the definition of 'intelligence agency' in the Privacy Act be amended by substituting ONI for ONA.<sup>18</sup> Accordingly, like ONA, ONI will be effectively exempt from the operation of the Privacy Act.

***Further exemption for disclosure of personal information by some agencies***

- 4.9. It is proposed that the Privacy Act be amended to provide an exemption for the provision of personal information to ONI by agencies with an intelligence role or function, as defined in the ONI Bill. The term is defined in the ONI Bill to mean AUSTRAC, the AFP, the Department of Home Affairs and the Department of Defence (other than AGO and DIO) to the extent the agency performs specific functions relating to intelligence.<sup>19</sup> These 4 agencies are the only agencies within the NIC that are not otherwise exempt from the operation of the Privacy Act.<sup>20</sup>

**Implications of proposed amendments to the Privacy Act**

- 4.10. Under the proposed amendments, ONI would, as ONA is now, be exempt from the operation of the Privacy Act. This is consistent with other key intelligence agencies which are also exempt from the operation of the Privacy Act. This in part reflects the

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<sup>14</sup> Privacy Act ss 7(1)(a)(iv), 7(2)(c).

<sup>15</sup> Privacy Act s 7(1)(ca) – read with *Freedom of Information Act 1982*, Div 2 of Pt 1 of Sch 2 – and s 7(2)(b).

<sup>16</sup> Privacy Act s 7(1)(f), (g) and (h).

<sup>17</sup> Privacy Act s 7(1A).

<sup>18</sup> C&T Bill, cl 85.

<sup>19</sup> C&T Bill cl 86, read with definition of 'agency with an intelligence role or function' in cl 4 of the ONI Bill.

<sup>20</sup> See cl 4 of the ONI Bill, definition of 'national intelligence community'.

unique nature of the work of these agencies in relation to intelligence and information collection.

- 4.11. The other amendment to the Privacy Act proposed in the C&T Bill would have the effect of exempting acts or practices involving the disclosure of personal information to ONI by the other agencies with an intelligence role or function as specified in the ONI Bill. At present, such acts or practices for those agencies are covered by the Privacy Act. While this change restricts the application of the Privacy Act, it is limited in scope. Only the acts or practices of the 4 relevant agencies would be exempt from the operation of the Privacy Act.

## **5. OVERVIEW OF IMPLICATIONS OF THE ONI BILL FOR PROTECTION OF PRIVACY**

- 5.1. There are 4 ways in which the establishment of ONI in accordance with the ONI Bill has the potential to impact on personal privacy:

- a. ONI will be established with statutory functions that mean it can be expected to collect more information than ONA, including more personal information
- b. the ONI Bill makes provision for ONI to gather and for other government agencies to provide it with information, and imposes obligations on ONI with regard to the use and protection of information provided to it in these ways
- c. the ONI Bill contains secrecy provisions restricting the communication of ONI information
- d. the ONI Bill provides for the making, and ONI's compliance with, privacy rules relating to identifiable information.

- 5.2. In the discussion that follows, we will consider each of these matters in turn and will:

- describe what is proposed and compare it with the existing regime in the ONA Act
- identify the implications for the handling, or flow, of personal information
- analyse the privacy implications of the proposal.

- 5.3. This discussion concerns the privacy implications of the relevant aspect of the ONI Bill, and the mechanisms for handling information and protecting privacy that would be established by the ONI Bill. ONI will need to comply with these mechanisms when dealing with personal information it collects, either intentionally or incidentally, in the performance of its functions.

### **a. ONI's statutory functions compared with ONA**

- 5.4. The statutory functions of ONI under the ONI Bill have implications for the amount of personal information the new agency will handle.

#### ***Existing arrangements under the ONA Act***

- 5.5. Section 5(1) of the ONA Act sets out the functions of ONA, and relevantly includes the function:



‘to assemble and correlate information relating to international matters that are of political strategic or economic significance to Australia and [to prepare reports and assessments]’ (s 5(1)(a)).

**The ONI Bill**

5.6. ONI’s functions are set out in cl ^7 of the ONI Bill and relevantly include:

(c) to:

(i) assemble, correlate and analyse information relating to international matters that are of political, strategic or economic significance to Australia, including domestic aspects relating to such matters; and

(ii) prepare assessments and reports in relation to such matters in accordance with the Government’s requirements;

(d) to:

(i) assemble, correlate and analyse information relating to other matters that are of political strategic or economic significance to Australia; and

(ii) prepare assessments and reports in relation to such matters in accordance with the Government’s requirements;

if doing so would support the performance of any other function or the Director-General’s functions, or complement the work of other intelligence agencies;

...

(g) 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;

5.7. There are 2 key ways in which ONI’s functions, as compared with ONA, may have privacy implications.

5.8. First, ONA’s functions refer to dealing with ‘information relating to international matters that are of political strategic or economic significance to Australia’. The Bill clarifies that ONI’s functions include ‘domestic aspects’ that relate to such international matters (cl ^7(c)(i)), and to information relating to ‘other matters that are of political strategic or economic significance to Australia’ (cl ^7(d)).

5.9. Secondly, ONA does not have a specific statutory function of collecting, interpreting and disseminating information relating to matters of political, strategic or economic significance to Australia in relation to publicly accessible information. ONA’s Open Source Centre collects, analyses and researches publicly available information (which may include personal information) concerning international developments that affect Australia’s national interests in support of its functions. However, consistent with the scope of the agency’s current functions, we understand ONA’s open source collection activities are focussed on the collection of information or intelligence relevant to the activities of persons outside Australia.

5.10. The changes in cl ^7(1)(g) of the ONI Bill will support ONI’s operation of the Open Source Centre by making it clear that ONI’s functions include collecting, interpreting

and disseminating information that is publicly accessible. This recognises the agency's current activities in relation to publicly available information. The collection of publicly accessible 'identifiable information' will be regulated by privacy rules.<sup>21</sup> Through amendments to be made to the *Crimes Act 1914* (Crimes Act) in the C&T Bill,<sup>22</sup> for the purposes of ONI carrying out its function under cl 7(1)(g),<sup>23</sup> this collection could lawfully be effected where necessary via an assumed identity under and in accordance with Part IAC of the Crimes Act. This brings ONI broadly in line with ASIO and ASIS as being an intelligence agency that may apply for an authority to acquire or use an assumed identity under that Act (although with some limitations).<sup>24</sup>

### ***Privacy implications***

- 5.11. To the extent that the performance of its functions will require the collection, use or disclosure of personal information, ONI may be dealing with more identifiable information than ONA; that is, ONI may collect and handle the personal information of more Australian citizens. This means there is an increased need as compared with ONA for ONI, should it be established, to take steps to ensure the appropriate handling of such information.
- 5.12. Additionally, material collected using the new function in cl 7(1)(g) is likely to be much less sensitive from its open source nature than information collected from other intelligence agencies.

### **b. The ONI Bill will facilitate ONI gathering of information, but impose obligations on its use and protection**

- 5.13. ONA is not subject to a statutory information handling framework, although it has a statutory entitlement to certain kinds of information. The ONI Bill will provide ONI with a statutory right to gather certain information, which may include personal information and for other government agencies to provide it with such information, but will also impose obligations on ONI with regard to the use and protection of that information.

### ***Existing arrangements under the ONA Act***

- 5.14. Subject to relevant legislative and secrecy provisions, ONA may access information that relates to international matters collected by other Commonwealth agencies in accordance with their governing functions. This includes:
  - a. personal information about Australians for ONA's assessment or evaluation functions

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<sup>21</sup> See further below at 5.40 and following).

<sup>22</sup> See cl 26-44 of the C&T Bill.

<sup>23</sup> See proposed s 15KA(3) to be inserted by cl 32 of the C&T Bill.

<sup>24</sup> Unlike other those other intelligence agencies, ONI will not be able to apply to a court for an order under Part IAC of the Crimes Act relating to the making of entries in a register of births, deaths or marriages (see cl 34 and 35 of the C&T Bill); it must also comply with requests from a participating jurisdiction for evidence of an assumed identity (see cl 42).

- b. personal information about intelligence agency employees for ONA's evaluation functions.
- 5.15. More specifically, the Director-General of ONA is entitled under s 9 of the ONA Act to 'full access to all information relating to international matters that are of political, strategic or economic significance to Australia, being information in the possession of any Department, Commonwealth authority or arm of the Defence Force', except where furnishing that information would contravene the provisions of any law of the Commonwealth or any law of a Territory.
- 5.16. However, the ONA Act does not make any specific provision for the voluntary sharing of information with ONA by intelligence agencies or Commonwealth agencies more generally. In practice intelligence agencies and other Commonwealth agencies share information with ONA pursuant to the statutory functions and powers of those agencies and subject to any legislative or other restrictions on the disclosure of information, such as secrecy provisions and, where relevant for the particular agency, the Privacy Act.
- 5.17. As a matter of general administrative law principle, 'the purpose for which a power to require disclosure of information is conferred limits the purpose for which the information disclosed can lawfully be disseminated or used'.<sup>25</sup> Where a power to compel information is conferred under a statute, the power may only be used for the purpose for which it is conferred, whether stated expressly, or identifiable by implication. It follows that where information is obtained through the exercise of such a power, the information may not be used for purposes unrelated to the purpose for which it was obtained.
- 5.18. The ONA Act does not otherwise provide for any additional statutory restrictions on ONA's use of personal information. The 'ONA Guidelines to Protect the Privacy of Australians', which are currently administratively made, nevertheless provide that ONA may only communicate intelligence information concerning Australian persons 'where it is necessary to do so for the proper performance of ONA's functions or where such communications are required by law'.

### ***The ONI Bill***

- 5.19. The ONI Bill will give ONI the power to require Commonwealth authorities<sup>26</sup> to provide it with information relating to international matters in certain circumstances. The ONI Bill will also provide for the voluntary disclosure of information to ONI by:
- Commonwealth authorities for the purpose of ONI performing its functions under cl 7(1)(c) or (d)

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<sup>25</sup> *Johns v Australian Securities Commission* (1993) 178 CLR 408 at 423.

<sup>26</sup> Defined in cl 4 of the ONA Bill in a way that includes Commonwealth government agencies and Departments, the Defence Force, bodies established or continued in existence for a public purpose under a law of the Commonwealth (established bodies) and bodies corporate in which the Commonwealth or an established body has a controlling interest.

- intelligence agencies for the purposes of ONI performing its functions.<sup>27</sup>

*Power to require the provision of information relating to international matters*

5.20. Clause ^37 of the ONI Bill provides:

**^37 Requirement to provide information, documents or things to ONI relating to international matters**

- (1) For the purpose of ONI performing its function under paragraph ^7(1)(c), the Director-General may make a written request that a Commonwealth authority provide information, documents or things in its possession that relate to:
  - (a) international matters of political, strategic or economic significance to Australia; or
  - (b) domestic aspects relating to such international matters.
- (2) Before making a written request of a Commonwealth authority under subsection (1), the Director-General must:
  - (a) consult with the Commonwealth authority; and
  - (b) consider any concerns raised by the Commonwealth authority, including concerns about:
    - (i) a contract, arrangement or understanding that would prohibit or limit the Commonwealth authority's ability to provide information, documents or things that would otherwise need to be provided in response to a request; or
    - (ii) the need to provide personal information (within the meaning of the *Privacy Act 1988*) in response to a request.
- (3) A Commonwealth authority must provide any information, documents or things to ONI in response to a written request by the Director-General under subsection (1), unless and to the extent that a law of the Commonwealth, or of a State or Territory prohibits the provision (however described) of the information, documents or things.

Note: For limits on the use that ONI may make of such information, documents or things, see section ^40.

- 5.21. Before compelling the production of information that relates to international matters and domestic aspects relating international matters under cl ^37, the Director-General must consult with the relevant Commonwealth authority and consider any concerns raised, as specified in cl ^37(2), including any concerns about the 'need to provide personal information (within the meaning of the *Privacy Act 1988*) in response to a request' made pursuant to that provision.
- 5.22. Furthermore, any information provided pursuant to the compulsory information gathering power in cl ^37 may only be used for the purposes of ONI's function in cl ^7(1)(c) (i.e. analysis, assessments and reports relating to international matters). The only exception to this restriction is where the head of the Commonwealth

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<sup>27</sup> Other obligations in relation to ONI's use and protection of identifiable information are also specified. These provisions are summarised below.

authority that provided the information gives written authorisation for its subsequent use in relation to the performance of another of ONI's functions, the exercise of ONI's powers, or the performance or exercise of the Director-General's functions or powers: cl ^40.

*Voluntary provision of information*

- 5.23. The ONI Bill authorises the voluntary provision of information to ONI by Commonwealth authorities and intelligence agencies, in certain circumstances. These provisions are each expressed in permissive terms, with the effect that where the agency, in its discretion, seeks to disclose information to ONI for the purposes of ONI's functions, the agency is authorised to do so, regardless of whether it could otherwise do so under the agency's own statutory functions.
- 5.24. Clause ^38(1) expressly provides that for the purpose of ONI performing its functions under cl ^7(1)(c) (analysis, assessments and reports relating to international matters) or (d) (analysis, assessments and reports relating to matters other than international matters), a Commonwealth authority 'may provide to ONI information, documents, or things that relate to matters of political, strategic or economic significance to Australia'.<sup>28</sup> Information may be provided to ONI even if doing so would not otherwise fall within the Commonwealth authority's statutory functions: cl ^38(2).
- 5.25. In addition, cl ^39(1) provides that for the purpose of ONI performing its functions, an intelligence agency or agency with an intelligence role or function may provide to ONI information, documents or things that relate, or may relate, to any of ONI's functions (cl ^39(1)). The relevant agency may provide information, documents or things to ONI under cl ^39 even if doing so would not otherwise fall within that agency's statutory functions (cl ^39(2)).

*Use and protection of information*

- 5.26. The ONI Bill will introduce new obligations on the Director-General in relation to the use and protection of certain information, documents or things.
- 5.27. As noted above at 5.22, cl ^40 ensures information, documents or things obtained in the exercise of the compulsory power in cl ^37 is only used for the purposes of the ONI's function under ^7(1)(c) unless the head of the relevant Commonwealth authority expressly agrees otherwise.
- 5.28. Clause ^41 of the ONI Bill makes special provision for the protection of information, documents or things provided to ONI under Division 1 of Part 1 of the Bill by intelligence agencies or an agencies with an intelligence role or function. This clause requires the Director-General to make arrangements with the head of the relevant agency for the protection of such material provided to ONI. Failing this, and subject to cl ^40, ONI must take all reasonable steps to ensure that the information,

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<sup>28</sup> Note, while the draft reviewed limited cl 38(1) to matters '(other than international matters)', we understand this was a drafting error due to the express reference in that provision to cl ^7(1)(c).

documents or things provided by the relevant agencies are appropriately stored, accessed, used or further disclosed.

***Privacy implications***

- 5.29. These provisions of the ONI Bill will ensure that ONI has broad scope to collect information from other agencies, either compulsorily or voluntarily, for the purposes of its functions. This could include personal information.
- 5.30. The compulsory information gathering power in cl ^37 is broad and applies to 'Commonwealth authorities', itself a broadly defined term under the ONI Bill. However, the power is not entirely unconstrained. It is limited to only certain of ONI's functions. It can be exercised to compel the provision of information by Commonwealth authorities only for the purpose of the ONI performing its functions relating to international matters. Additionally, the Director-General is obliged to consider any privacy concerns raised by the relevant Commonwealth authority prior to the exercise of the power. This will ensure privacy considerations are relevantly considered in the exercise of the power.
- 5.31. The provisions supporting the voluntary disclosure of information relevant to the ONI's functions do not expressly require consideration of privacy. Clause ^38 is permissive of a Commonwealth authority providing information to ONI even if doing so would not otherwise fall within the scope of that authority's statutory functions.
- 5.32. Most Commonwealth authorities will be subject to the Privacy Act. Those agencies are subject to obligations under the Privacy Act that preclude personal information about an individual that was collected for a particular purpose being used or disclosed for a secondary purpose, unless the individual has consented to the use or disclosure, or a relevant exception applies.<sup>29</sup>
- 5.33. One such exception is where the use or disclosure of the information is 'required or authorised by or under an Australia law'. It appears that cl ^38(2) of the ONI Bill will enable Commonwealth authorities to voluntarily disclose personal information obtained for the purposes of their own functions to the ONI on the basis the disclosure will be 'required or authorised by law' for the purposes of the Privacy Act.
- 5.34. Clause ^39 similarly provides for the voluntary disclosure of information to ONI by intelligence agencies. As noted above when discussing the proposed amendments to the Privacy Act under the C&T Bill, these agencies will not be subject to the restrictions on the disclosure of personal information in the Privacy Act when disclosing information to ONI.<sup>30</sup>

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<sup>29</sup> See in particular Australian Privacy Principle (APP) 6 in the Privacy Act. APP 6.1 relevantly prohibits the disclosure of personal information for a purpose other than that for which it was collected. APP 6.2 and 6.3 provide for various exceptions to the prohibition.

<sup>30</sup> We have not considered the implications of cll 38 or 39 for the disclosure of information to ONI other than to the extent the disclosing agency is otherwise subject to the Privacy Act. Commonwealth authorities and intelligence agencies will be subject to their own establishment legislation including applicable secrecy provisions when disclosing information to others, but any analysis of the secrecy provisions in other legislation is outside the scope of this PIA.

- 5.35. Significantly, ONI will have express legislative obligations in relation to the use and protection of information it collects, including personal information. Clause ^40 prohibits the use of information obtained in the exercise of the compulsory power in cl ^37 for purposes other than that for which it was obtained, except in very specific circumstances. To the extent that cl ^37 is used to compel the provision of personal information, it is expressly clear that it cannot generally be used for broader or other purposes. Furthermore, the obligation on ONI to make arrangements for the protection of information provided to ONI by other intelligence agencies emphasises the importance of proper and tailored handling and management of information, including personal information. These features of the ONI Bill are positive from a privacy management perspective.

**c. The ONI Bill contains secrecy provisions restricting the communication of ONI information**

- 5.36. ONI will be subject to a secrecy regime under which criminal penalties may be imposed in relation to unlawful communication of information. This regime will have obvious implications for the communication of personal information by ONI.

***Existing arrangements under the ONA Act***

- 5.37. ONA is subject to agency-specific offence provisions in the *Intelligence Services Act 2001 (ISA)* relating to the unauthorised communication of information and unauthorised dealing with records and recording of information. There are also various Commonwealth laws which would restrict those working for ONA from disclosing official information.<sup>31</sup> However, the ONA Act itself makes no additional provision for the maintenance of confidentiality in, or secrecy of, information collected or held by the agency.

***The ONI Bill***

- 5.38. By contrast, ONI will be subject to the secrecy regime in Part 4 Division 2 of the ONI Bill. This includes a number of criminal offences relating to the unlawful communication of information:
- a. Clause ^42 provides that it is an offence for a person who comes to know information held by ONI in connection to its functions, or otherwise relating to ONI's functions, because they are a staff member or contractor (or equivalent) of ONI to communicate that information within ONI unless this is in the course of their duties as a staff member or in accordance with the contract, and outside ONI unless they have authorisation.<sup>32</sup>
  - b. Clause ^43 provides that it is an offence for other persons (i.e. not current or former staff members or contractors) who come to know this type of information to communicate this information intending to cause harm to national security or

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<sup>31</sup> See for example s 70 of the *Crimes Act 1914*.

<sup>32</sup> Clause ^42 is in analogous terms to existing s 40A of the ISA, which will be repealed by the C&T Bill, cl 79.



to endanger the health or safety of another person, or knowing that the communication will, or is likely to, have that effect.

- c. Clause ^44 provides for offences concerning unauthorised dealing with records and unauthorised recording of this type of information.<sup>33</sup>

There are various exceptions to these offences, including if the information is lawfully available, or the communication is to the IGIS.

#### ***Privacy implications***

- 5.39. It is beyond the scope of this PIA to analyse the operation of the ONI Bill's secrecy obligations and offence regime. However, it is relevant when considering the privacy impacts of the ONA Bill to observe that the secrecy provisions are more restrictive of the communication of ONI's information, including personal information, than the provisions in the Privacy Act relating to the disclosure of personal information.<sup>34</sup>

#### **d. ONI will be required to comply with privacy rules in relation to 'identifiable information'**

- 5.40. While ONA has administratively developed guidelines relating to privacy, ONI will be legislatively required to comply with privacy rules, aimed at the protection of identifiable information, promulgated for the agency by the Prime Minister following consultation with the IGIS and Attorney General.

#### ***Existing arrangements under the ONA Act***

- 5.41. As already noted, ONA is exempt from the operation of the Privacy Act. Nothing in the ONA Act or any other legislation requires ONA to comply with any other form of privacy rules. Unlike the *Intelligence Services Act 2001* agencies (ASIS, AGO and ASD), ONA is not required by legislation to have agency specific privacy rules or guidelines in place. However, following a review of the *Intelligence Services Act 2001* co-ordinated by the Department in 2005-6, a decision was made that ONA should be subject to privacy guidelines consistent with those applicable to those other intelligence agencies. The current guidelines are the 'ONA Guidelines to Protect the Privacy of Australians' dated 23 June 2017 and available on ONA's website.

#### ***The ONI Bill***

- 5.42. The ONI Bill requires under cl ^53 that the Prime Minister make rules (the **privacy rules**) regulating the collection of 'identifiable information' under cl ^7(1)(g) (collection, interpretation and dissemination of publicly accessible material), and the communication, handling and retention by ONI of 'identifiable information' generally. 'Identifiable information' is defined in cl ^4 in the same way as 'personal information'

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<sup>33</sup> Clause ^44 is in analogous terms to existing ss 44J and 44K of the ISA, which will be repealed by the C&T Bill, cl 79.

<sup>34</sup> See in particular APP 6.

in the Privacy Act, except that it is limited to the information of Australian citizens and permanent residents<sup>35</sup> (rather than individuals generally).

- 5.43. Significantly, cl ^53(5) provides that ONI must not collect or communicate identifiable information except in accordance with the privacy rules.
- 5.44. In making the privacy rules, the Prime Minister must have regard to the need to ensure that the privacy of Australian citizens and permanent residents is preserved 'as far as is consistent with the proper performance by ONI of its functions' (cl ^53(3)). Further, the Prime Minister must consult with the Director-General, the IGIS and the Attorney-General before making the privacy rules, including by providing them with a copy of the proposed rules.
- 5.45. Draft privacy rules have been prepared which are in broadly analogous terms to the 2017 'ONA Guidelines to Protect the Privacy of Australians', and the privacy rules of ASIS, AGO and ASD. Like the ONA, ASIS, AGO and ASD privacy rules, the draft ONI privacy rules:
- state that identifiable information can only be retained, and may be communicated, where it is necessary to do so for the proper performance of ONI's functions, or where this is required or authorised by or under another Act,
  - require that ONI take reasonable steps to ensure that identifiable information that ONI retains or communicates is recorded or reported in a fair and reasonable manner
  - require that ONI take steps to facilitate the IGIS's oversight role, including providing IGIS access to all identifiable information held by ONI, consulting with the IGIS about communication, retention and handling of identifiable information, and advising the IGIS of any breach of these rules
- 5.46. In addition to these more general requirements, the draft privacy rules also impose specific obligations in relation to the collection of identifiable information under cl ^7(1)(g), including that:
- a. the Director-General develop policies and procedures to be observed by ONI in the performance of this function
  - b. ONI obtain the authorisation of the Minister responsible for the Act before undertaking an activity for the specific purpose of collecting identifiable information, and the Minister may only give authorisation if satisfied of certain matters.

#### ***Privacy implications***

- 5.47. The inclusion of a privacy rules regime in the ONI Bill clearly supports enhanced privacy protection. The proposed privacy rules are intended to be consistent with the analogous rules applying to other agencies in the NIC. Where necessary and

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<sup>35</sup> The definition of 'permanent resident' in cl ^4 includes a natural person who is a permanent resident and also certain (Australian) bodies corporate, which means 'identifiable information' in this respect has a broader meaning than 'personal information' which is limited to natural persons.

appropriate these agency specific privacy rules can be tailored in recognition of the nature and purpose of the agency's national security functions.

- 5.48. The privacy rules are to be made by the Prime Minister and not the agency itself. In making the proposed rules, the Prime Minister must consult not only with the Director-General of the agency, but also the IGIS and Attorney General. This consultation will ensure the rules are informed by the independent advice and consideration of both national security and broader legal perspectives, including in relation to privacy.

## **6. OVERALL EFFECT AND IMPACT OF THE CHANGES**

- 6.1. Key aspects of the ONI Bill are positively directed towards the management and protection of personal information and privacy, but in a manner which is seen as appropriate to the functions of ONI as a national intelligence agency. Some of these requirements are broadly similar to those imposed on other agencies within the NIC, such as the statutory requirement to have privacy rules.
- 6.2. ONI's information collection and reporting functions are such that it can be expected to collect more information than ONA. This is recognised in the ONI Bill, which provides a stronger, more transparent regime for the handling and protection of personal information than currently exists for ONA.