



Inquiry into the Counter-Terrorism Legislation Amendment Bill (No. 1) 2015

Submission to the Parliamentary Joint Committee on Intelligence and Security

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Inspector-General of Intelligence and Security

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Executive summary

Many of the proposed amendments in the Counter-Terrorism Legislation Amendment Bill (No.1) 2015 do not directly affect the responsibilities of the Inspector-General of Intelligence and Security (IGIS) or the Australian intelligence community (AIC) agencies. Schedule 12 is most relevant, as it proposes amendments to the *Australian Security Intelligence Organisation Act 1979* (ASIO Act) to enable ASIO to provide security assessments directly to State and Territory authorities, rather than via a Commonwealth agency. The IGIS has not identified any concerns with this proposal, noting the existing rights of notice and review continue to apply. A question does arise as to whether an amendment should also be made to section 61 of the ASIO Act to refer to State and Territory authorities.

Schedule 17 of the Bill provides for disclosure of protected taxation information to Australian government agencies for the purpose of preventing, detecting, disrupting or investigating conduct that relates to a matter of security. While the proposed amendment uses the ASIO Act definition of 'security', the agencies to which such information can be provided are quite extensive and most will not be within the IGIS' jurisdiction. Existing provisions in the *Taxation Administration Act 1953* include an exception for on-disclosure of protected information by an ASIO officer to the IGIS or a staff member of the IGIS office for the purpose of performing the IGIS' duties in relation to ASIO. The Committee may wish to consider the oversight arrangements where protected taxation information is disclosed to other Australian government agencies under the proposed provision.

Other amendments in the Bill are of less direct relevance to the IGIS, however, interaction between security and intelligence agencies and other Australian government agencies is of interest to the IGIS. The amendments relating to control orders for young persons and monitoring warrants may be relevant to cases where the person is the subject of security intelligence interest as well as the subject of a law enforcement investigation. The IGIS does not have any specific comments on these amendments, but will follow the progress of all amendments in the Bill with interest.

Background

Role of the Inspector-General of Intelligence and Security

The Inspector-General of Intelligence and Security (IGIS) is an independent statutory officer who reviews the activities of the Australian intelligence agencies:

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

The *Inspector-General of Intelligence and Security Act 1986* (IGIS Act) provides the legal basis for the IGIS to conduct inspections of the intelligence agencies and to conduct inquiries of the IGIS' own motion or at the request of a Minister.

The overarching purpose of IGIS' activities is to ensure that each intelligence agency acts legally and with propriety, complies with ministerial guidelines and directives, and respects human rights. A significant proportion of the resources of the office is directed towards ongoing inspection and monitoring activities, so as to identify issues, including about the governance and control frameworks within agencies, before there is a need for major remedial action. OIGIS staff can access all documents of the intelligence agencies and the IGIS is often proactively briefed about sensitive operations.

The inspection role of the IGIS is complemented by an inquiry function. In undertaking inquiries the IGIS has strong investigative powers, including the power to require any person to answer questions and produce relevant documents, take sworn evidence, and enter agency premises. IGIS inquiries are conducted in private because they almost invariably involve highly classified or sensitive information, and the methods by which it is collected. Conducting an inquiry is resource intensive but provides a rigorous way of examining a particular complaint or systemic matter within an agency.

The IGIS has a statutory role in providing expert evidence to the Administrative Appeals Tribunal (AAT) and the Information Commissioner in disputed Archives and Freedom of Information matters. The IGIS also has a coordination and oversight role under the *Public Interest Disclosure Act 2013* (the PID Act) in relation to the intelligence agencies.

Schedule 12 – Security assessments

The Bill proposes to amend the ASIO Act to enable ASIO to furnish security assessments directly to State and Territory authorities. Currently ASIO can only do so if the security assessment relates to a designated special event. In other cases the security assessment must be provided to a sponsoring Commonwealth agency to transmit to the State or Territory authority.

The Bill would not change existing accountability mechanisms in the ASIO Act, which provide rights of notice and review. Subject to the one query below, the IGIS has no concerns with this proposed amendment.

Section 61 of the ASIO Act does not currently refer to State and Territory authorities or tribunals. The Bill does not propose any change to this. Section 61 provides:

Where an assessment has been reviewed by the Tribunal, every Commonwealth agency concerned with prescribed administrative action to which the assessment is relevant, and any tribunal, person or authority having power to hear appeals from, or to review, a decision with respect to any prescribed administrative action to which the assessment is relevant, shall treat the findings of the Tribunal, to the extent that they do not confirm the assessment, as superseding that assessment.

ASIO can currently provide security assessments to States and Territories (for designated special events or otherwise via a Commonwealth agency), and the IGIS is not aware of any circumstance where the fact that section 61 does not apply to State or Territory authorities has led to a decision or action being taken that is inconsistent with a decision of the AAT in reviewing a security assessment. On one hand, the Bill does not change the existing provisions in this regard. However, by enabling ASIO greater flexibility to furnish security assessments directly to State and Territory authorities, the Bill indirectly highlights the limitations of the safeguard in section 61 if a State or Territory authority were minded to make a decision or take action inconsistent with a decision of the AAT.

Schedule 17 – Disclosures by taxation officers

The Bill proposes a new exception to the non-disclosure offence provisions in the *Taxation Administration Act 1953*. The amendment would permit Australian Taxation Office (ATO) officials to disclose protected information to Australian government agencies for the purpose of preventing, detecting, disrupting or investigating conduct that relates to a matter of security. Security has the same meaning as in section 4 of the ASIO Act. The definition of ‘Australian government agencies’ in section 995-1 of the *Income Tax Assessment Act 1997* includes Commonwealth, State and Territory agencies.

ATO may currently disclose information to an authorised ASIO officer ‘for the purpose of performing ASIO’s functions under subsection 17(1) of the ASIO Act’. The IGIS has oversight of any requests by ASIO for, and disclosures by ATO to ASIO of protected information as part of its functions under the IGIS Act. Section 355-185 supports the IGIS oversight role by providing an exception to the disclosure offence enabling an authorised ASIO officer to disclose protected information to the IGIS or member of IGIS staff.

While the amendment in the Bill uses the ASIO Act definition of ‘security’, the IGIS will not necessarily have oversight of disclosures made under this provision unless they are made to an AIC agency. Where an AIC agency is a member of a multi-agency or multi-jurisdictional body that is the recipient of protected taxation information, the IGIS would expect that the agency would provide information about such disclosures on request by the IGIS. As a matter of practice, the IGIS probably would not expect to review such information in routine inspections without specifically requesting details – particularly if an AIC agency is not the lead agency for a multi-agency body. Other oversight bodies, such as the Commonwealth Ombudsman and relevant State and Territory oversight bodies, may also need to consider if and how they will review disclosures of protected taxation information made to multi-agency and multi-jurisdictional bodies.

Noting that there is currently a specific exception for ASIO officers to disclose protected taxation information provided by the ATO to the IGIS, the Committee may wish to consider whether a similar exception in favour of other relevant oversight bodies is required to ensure that there can be appropriate oversight of disclosures made under the proposed provision.

Other amendments

Many of the other amendments in the Bill relate more to the operations and activities of law enforcement agencies, so will not directly affect oversight by the IGIS, however, there is often overlap and interaction between law enforcement and security investigations in counter-terrorism cases. While decisions to seek a control order for a young person or a monitoring warrant will be made by law enforcement agencies, they will often relate to persons who have been or continue to be subjects of security investigation. Where this is so, it is likely that there would be regular information sharing, in accordance with relevant legislative frameworks, between ASIO and law enforcement agencies prior to seeking a control order or monitoring warrant. Information sharing is also likely in relation to any developments and information obtained by law enforcement agencies under monitoring warrants that may also be relevant to security. ASIO and law enforcement agencies have established procedures for managing cases where there is overlap in their respective investigative roles, including interaction through the Joint Counter-Terrorism Teams.

The main other amendments with potential implications for the AIC, and therefore of some interest to the IGIS, are the proposed amendments to the *National Security Information (Criminal and Civil Proceedings) Act 2004* (NSI Act). The proposed amendments will enable courts to make a range of orders in relation to the use of national security information in control order proceedings. It is possible that information provided by AIC agencies may sometimes be relevant to such proceedings, and may therefore be the subject of a NSI Act application. The IGIS understands that AIC agencies have well established procedures for providing information to law enforcement and prosecutorial agencies where that information could be used in legal proceedings and for consultation in relation to any such proceedings. IGIS also notes that there may continue to be some instances where, despite additional measures proposed in this Bill, certain information may be considered so sensitive that any disclosure would be harmful to national security, and on that basis AIC agencies may decline to share the information or allow it to be used in any legal proceeding.