

Committee Secretary

Parliamentary Joint Committee on Intelligence and Security

PO Box 6021

Parliament House

Canberra ACT 2600

11 February 2021

**Re: Intelligence Oversight and Other Legislation Amendment (Integrity Measures) Bill  
2020**

To the Committee,

We are grateful for the opportunity to make a submission to this inquiry. We do so as members of the Griffith Criminology Institute (Dr Hardy) and the Gilbert + Tobin Centre of Public Law (Professor Williams). We are solely responsible for the views and content in this submission.

We welcome the introduction of Intelligence Oversight and Other Legislation Amendment (Integrity Measures) Bill 2020 (Cth) ('the Bill') and support its enactment. Improving oversight of Australia's intelligence agencies, and other agencies with an intelligence role or function, remains an important task. We support this comment in the Minister's Second Reading Speech:

Intelligence functions require a specialised form of oversight, to ensure that the agencies performing them are acting appropriately and in accordance with the legislative frameworks

governing their use. Robust oversight gives parliament and the Australian people assurance that intelligence functions are being used for their intended purpose.<sup>1</sup>

Changes to improve intelligence oversight are needed because Australia lacks the same levels of oversight as other members of the Five Eyes network. For example:

- In the UK, the Intelligence and Security Committee of Parliament can examine the ‘expenditure, administration, policy and operations’ of MI5, MI6 and GCHQ.<sup>2</sup> This is more extensive than the powers available to the Parliamentary Joint Committee on Intelligence and Security (PJCIS), which can only examine agencies’ administration and expenditure.
- In the US, the Senate Select Committee on Intelligence provides ‘vigilant legislative oversight over the intelligence activities of the United States to assure that such activities are in conformity with the Constitution and laws of the United States’.<sup>3</sup> Similarly, this provides stronger legislative oversight, as it encompasses intelligence activities and questions of legality.
- In Canada, the National Security and Intelligence Review Agency (NSIRA) is a body of appointed experts that reports to Parliament. The NSIRA has access to all classified information held by Canada’s intelligence agencies, with the only exception being Cabinet documents.<sup>4</sup> This specialised, expert body was established in 2019 to replace the Security Intelligence Review Committee, which was Canada’s equivalent to the PJCIS.

This Bill makes a step in the right direction to achieving more robust oversight of Australia’s intelligence activities. However, we believe that it does not go far enough. Specifically, it does not extend oversight to all agencies with an ‘intelligence role or function’.<sup>5</sup> As noted in the Minister’s speech, this phrase is used in the *Office of National Intelligence Act 2018* (Cth)

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<sup>1</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 9 December 2020, 11022 (Porter).

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

<sup>3</sup> US Senate Select Committee on Intelligence, *About the Committee* (last accessed 20 October 2020) <<https://www.intelligence.senate.gov/about>>.

<sup>4</sup> *National Security and Intelligence Review Agency Act*, SC 2019, c 13, s 9(1).

<sup>5</sup> *Office of National Intelligence Act 2018* (Cth), s 4.

(‘ONI Act’) to define the National Intelligence Community (NIC), which includes AUSTRAC, the Australian Federal Police (AFP), Home Affairs and the Department of Defence.<sup>6</sup>

The current Bill does not expand intelligence oversight with regard to each of these agencies. Rather, it would achieve two more limited goals. The proposed changes would:

- Expand the remit of the Inspector-General of Intelligence and Security (IGIS) to include AUSTRAC and the Australian Criminal Intelligence Commission (ACIC);
- Expand the remit of the PJCIS to include AUSTRAC but not ACIC;

These changes would achieve significantly less oversight compared to those recommended by the 2017 Independent Intelligence Review. That review concluded that there was a ‘compelling case for a consistent oversight regime to apply to *all the intelligence capabilities that support national security*’.<sup>7</sup> It recommended that the remit of the IGIS and PJCIS be expanded to a further 10 agencies, including the AFP and Home Affairs.<sup>8</sup> Changes in line with these recommendations were proposed in a Private Member’s Bill which was introduced to the Senate in February 2020.<sup>9</sup> That Bill has not progressed any further through Parliament.

The government has justified a narrower approach based on the recommendations of the Comprehensive Review of the Legal Framework of the National Intelligence Community (‘Comprehensive Review’). The Comprehensive Review disagreed with the 2017 Independent Intelligence Review in recommending that the AFP and Home Affairs *not* be included within

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<sup>6</sup> *Office of National Intelligence Act 2018* (Cth), s 4.

<sup>7</sup> Commonwealth of Australia, Department of the Prime Minister and Cabinet, *2017 Independent Intelligence Review* (Department of the Prime Minister and Cabinet, 2017) 116 (emphasis added).

<sup>8</sup> *Ibid.*

<sup>9</sup> Intelligence and Security Legislation Amendment (Implementing Independent Intelligence Review) Bill 2020 (Cth).

the remit of IGIS.<sup>10</sup> This was recommended partly to avoid duplicating oversight mechanisms, and partly because the functions of the AFP and Home Affairs are more diverse, with intelligence functions representing only a smaller part of their overall activities and departmental structure.<sup>11</sup> According to the government, this contrasts with ACIC and AUSTRAC, whose intelligence functions ‘are more substantial and more aligned with the traditional AIC agency activities’.<sup>12</sup> The government has also justified a narrower approach on the basis that the AFP is overseen by the Parliamentary Joint Committee on Law Enforcement, and because Home Affairs ‘regularly appears’ before parliamentary committees.<sup>13</sup>

We disagree with the reasoning behind this narrower approach. While the proportion of intelligence activities conducted by an agency may differ, the rationale for expanding intelligence oversight lies in the specialised nature of those activities, not their extent or the departmental structure under which they are organised. As the Minister noted when introducing this Bill, ‘[i]ntelligence functions require a specialised form of oversight’.<sup>14</sup> Even if intelligence functions represent a small proportion of an agency’s activities, this does not negate the need for specialised accountability mechanisms. In any case, the fact that Home Affairs and the AFP are listed in the ONI Act’s definition of an ‘agency with an intelligence role or function’,<sup>15</sup> meaning they are part of Australia’s NIC, suggests that these functions are not incidental.

The government’s concerns about creating overlap and duplication are also overstated. First, the fact that representatives from Home Affairs appear before the PJCIS across its various

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<sup>10</sup> Denis Richardson AC, *Comprehensive Review of the Legal Framework of the National Intelligence Community* (Commonwealth of Australia, 2020) (*‘Comprehensive Review’*) vol 3, 262.

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

<sup>12</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 9 December 2020, 11021 (Porter).

<sup>13</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 9 December 2020, 11022 (Porter).

<sup>14</sup> *Ibid.*

<sup>15</sup> *Office of National Intelligence Act 2018* (Cth), s 4.

inquiries is not equivalent to the PJCIS having oversight of that agency's administration and expenditure. More substantially, the IGIS has specialised functions and powers which mean it can provide more rigorous oversight of intelligence activities compared to a parliamentary committee or other statutory offices, such as the Commonwealth Ombudsman. The statutory functions of the IGIS are to investigate the propriety of intelligence activities, whether intelligence activities comply with laws and regulations, and whether intelligence activities are contrary to human rights or constitute discrimination.<sup>16</sup> These functions are more specialised compared to those held by other oversight bodies, and they are supported by stronger powers akin to those held by a Royal Commission. For example, the functions of the Commonwealth Ombudsman are (more broadly) to investigate complaints relating to the administration of federal agencies.<sup>17</sup> The Commonwealth Ombudsman can equally compel the production of information and documents, but the Attorney-General can issue a certificate preventing disclosure for national security reasons.<sup>18</sup> No similar override is available in IGIS inquiries,<sup>19</sup> meaning that the IGIS's access to classified information is secured to a higher degree.

These specialised inquiry functions and powers of the IGIS – beyond those currently available to other integrity bodies – are essential to ensuring that agencies are held accountable for their intelligence activities. In other words, even when intelligence activities may be overseen to some extent by another body, this is not equivalent to having oversight by IGIS. Indeed, the unique position of the IGIS in this regard was highlighted by the Comprehensive Review:

Australia's IGIS is ... unique. The role of the IGIS is a 'gold standard' and long-standing feature of the Australian framework. The IGIS has significant powers that are akin to a Royal

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<sup>16</sup> *Inspector-General of Intelligence and Security Act 1986* (Cth) s 8.

<sup>17</sup> *Ombudsman Act 1976* (Cth) s 5.

<sup>18</sup> *Ombudsman Act 1976* (Cth) s 9.

<sup>19</sup> *Inspector-General of Intelligence and Security Act 1986* (Cth) s 18.

Commission, and they enable the IGIS to inquire into the legality and propriety of intelligence agency operations, compliance with ministerial guidelines and directives, and consistency with human rights. The IGIS's effectiveness is also enhanced by its statutory independence and full access to an agency's information.<sup>20</sup>

We therefore recommend that the Bill expand the remit of the IGIS and the PJCIS to include Home Affairs and the AFP, to ensure that the intelligence functions of those agencies are exposed to the same 'gold standard' of accountability. Even if this did create some degree of overlap in specific inquiries, the legislation already deals with this possibility by requiring the IGIS to consult with the Auditor-General and Ombudsman to avoid duplication.<sup>21</sup>

Yours sincerely,

Dr Keiran Hardy and Professor George Williams

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<sup>20</sup> *Comprehensive Review*, above n 10, vol 2, 59-60.

<sup>21</sup> *Inspector-General of Intelligence and Security Act 1986* (Cth) s 16.