



Defence Amendment (Call Out of the Australian Defence Force) Bill 2018

Submission to the Senate Legal and Constitutional Affairs Legislation Committee

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Introduction

The Inspector-General of Intelligence and Security (IGIS) is an independent statutory officer who reviews the activities of the Australian intelligence agencies. This submission is intended to provide the Senate Legal and Constitutional Affairs Legislation Committee (the Committee) with information about the scope of IGIS jurisdiction when considering the Defence Amendment (Call Out of the Australian Defence Force) Bill 2018 (the Bill). The purpose of the submission is not to raise concerns about the proposed expansion of call out powers – that is a policy matter of which the IGIS does not have a view. The purpose of the submission is only to note various matters, including that the Bill does not regulate the ability of the Australian Defence Force (ADF) to use its intelligence capabilities to support call out. The use of intelligence capabilities is governed by other laws.

Key points

The key points made in this submission are as follows.

- The proposed changes to enhance the ability of the ADF to support state and territory police in response to incidents of domestic violence occurring in Australia, including terrorism, will not change the scope of IGIS oversight in this area, which is currently limited to the oversight of the six Australian intelligence agencies.
- The proposed changes do not alter the ADF's right to use its intelligence capabilities onshore; this issue is governed by existing legislation.

Role of the Inspector-General of Intelligence and Security

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

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

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

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

The overarching object of IGIS oversight is to ensure that each intelligence agency acts legally and with propriety, complies with ministerial guidelines and directives, and respects human rights.¹ A significant proportion of the resources of the Office are directed to monitoring agencies' activities through

1 See s 8 of the IGIS Act in relation to the general jurisdiction of the IGIS.

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ongoing inspections. These are designed to reveal any breaches as well as to identify issues within agencies, including about governance and control frameworks, before there is a need for major remedial action. IGIS staff have access to all premises and documents of the intelligence agencies and the IGIS is often proactively briefed about sensitive operations.

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

The Inspector-General also receives and investigates complaints and Public Interest Disclosures about the Australian intelligence agencies. These may come from members of the public as well as from current and former staff of the agencies.

Changes to the Office of the IGIS

In response to the recommendations of the *2017 Independent Intelligence Review* the government has announced that the jurisdiction of the IGIS will be extended to include the intelligence functions of the Home Affairs Department, the Australian Federal Police (AFP), the Australian Criminal Intelligence Commission and the Australian Transaction Reports and Analysis Centre. Resources for the IGIS will be increased to allow the Office to sustain a full time staff of 55 and to allow the agency to move to new premises.²

Scope of oversight in this area

The Bill will amend Part IIIAAA of the *Defence Act 1903* which provides the legislative framework authorising the ADF to be called out to use force to resolve incidents of significant violence occurring in Australia. The legislation would make it easier for the States and Territories to request ADF support where necessary to assist in the event of a violent or terrorist incident. The Bill lowers the bar to be met before assistance can be provided. Currently a condition for making a State protection order is that the authorising Ministers are satisfied that 'the State is not, or is unlikely to be, able to protect itself against the domestic violence' (s 51B(1)(a)). Under proposed new s 35(2)(a)(ii) the authorising Ministers must consider 'whether the utilisation of the Defence Force would be likely to enhance the ability of the State or Territory to protect the State or Territory against the domestic violence'.

Whilst ministerial decisions are not subject to IGIS oversight, where intelligence has been collected by an agency that supports the case for call out, this could be subject to IGIS oversight, depending on the agency collecting the intelligence. The IGIS oversees ASD, AGO and DIO, but does not oversee the ADF (but can be requested to inquire into 'any intelligence or security matter relating to a Commonwealth agency').³ To the extent that intelligence is collected and shared by these agencies, or by the other agencies within IGIS remit (currently ASIO, ASIS or ONA) they are subject to oversight by the IGIS.

2 The Hon M Turnbull MP, Prime Minister and Cabinet Portfolio Budget Statements 2018-19, *Budget Related Paper No 114*, 8 May 2018, p. 278 (an additional \$52.1 m over 5 years from 2017-18).

3 IGIS Act, s 9(1).

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Intelligence collected by State and Territory police could be subjected to any applicable State and Territory oversight as well as internal review by the Inspector-General of the ADF.⁴

The Bill also preserves Parliament's oversight role under Part IIIAAA by requiring Ministers to inform Parliament about the operation and scope of orders and declarations made under Part IIIAAA.

Other models for collaboration

ADF can also assist agencies operating under the *Intelligence Services Act 2001* (ISA) or ASIO, for example, by acting as 'affiliates'.⁵ Whilst numerous powers may be conferred on the ADF under proposed new Part IIIAAA, there might be circumstances where the ADF would need to rely on another agency getting a warrant and authorising it to act under that warrant.⁶ ADF members will need to be clear on which model (i.e. the call out model or ISA/ASIO model) they are operating under at any point in time. There may also be circumstances where both models operate in tandem in relation to the same incident. When an ADF member acts as an ASIO affiliate, for example, that member would be subject to IGIS oversight.

Laws regulating use of intelligence capabilities and their oversight

Our understanding of how the ADF usually deploys overseas is that the ADF would normally make use of its own intelligence capability and, where appropriate, that of Australian intelligence agencies, such as ASD and AGO to support its operations. Inside Australia, there are a range of laws regulating the use of various intelligence capabilities.⁷

The Bill does not empower or limit the ADF's use of these capabilities, which are governed by other laws. The operation of various laws may mean that the ADF's use of intelligence capabilities inside Australia are constrained – police warrants, for example, are often limited to evidence collection and ASIO warrants to security. ADF technical capabilities are in some cases highly classified and have not necessarily been developed to operate in the ways envisaged by, for example, the *Telecommunications (Interception and Access) Act 1979*.

State police warrants would generally be overseen by State ombudsmen and State bodies, such as law enforcement and integrity bodies. If the AFP obtains a search warrant or telecommunications intercept warrant this is overseen by the Commonwealth Ombudsman. The IGIS oversees ASIO warrants.

The IGIS also notes that proposed new s 51S(2) confers civil and criminal immunity on a member of the Defence Force who exercises powers under Divisions 3 to 5 of Part IIIAAA if the order was not validly made and the powers were exercised in good faith.

4 Under proposed new s 40(3) of Part IIIAAA, command of the Defence Force must remain with the Chief of the Defence Force.

5 See the definition in s 4 of the *Australian Security Intelligence Organisation Act 1979* (ASIO Act).

6 This would include warrants under the *Telecommunications (Interception and Access) Act 1979* (TIA Act).

7 These include State and Territory surveillance devices laws, TIA, ISA, ASIO Act, *Privacy Act 1988*, *Criminal Code Act 1995* parts 10.6 and 10.7.