



Inspector-General of Intelligence and Security Amendment Bill 2011

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Inspector-General of Intelligence and Security Amendment Bill 2011

Date introduced: 23 March 2011

House: House of Representatives

Portfolio: Special Minister of State for the Public Service and Integrity

Commencement: The substantive provisions commence the day after Royal Assent.

Links: The links to [the Bill, its Explanatory Memorandum and second reading speech](#) can be found on the Bill's home page, or through <http://www.aph.gov.au/bills/>. When Bills have been passed and have received Royal Assent, they become Acts, which can be found at the ComLaw website at <http://www.comlaw.gov.au/>.

Purpose

The Bill makes a range of amendments in order to make minor refinements to the *Inspector-General of Intelligence and Security Act 1986* (IGIS Act) in areas such as the IGIS's inquiry and reporting functions. Among the more significant amendments are those to provide the Inspector-General of Intelligence and Security (IGIS) with capacity to delegate the powers of the Office of the IGIS subject to Ministerial approval.

Background

The office of the IGIS was established in accordance with a recommendation made in December 1984 by the Royal Commission on Australia's Security and Intelligence Agencies conducted by Justice Robert Hope.¹ The office was formally established by the IGIS Act and commenced operating on 1 February 1987.

The IGIS is an independent statutory office holder whose mandate includes ensuring that Australia's six intelligence agencies (known as the Australian Intelligence Community) comply with the law and Ministerial guidelines, and act with propriety and respect for human rights. This is principally

1. Justice Hope recommended that the intelligence community's accountability would be improved if a specialist overseeing body were created. Royal Commission on Australia's Security and Intelligence Agencies 1984, General Report, para 3.26, quoted in I Carnell and N Bryan, 'Watching the watchers: how the Inspector-General of Intelligence and Security helps safeguard the rule of law', modified version of a paper given at the Safeguarding Australia 2005 Conference, Canberra, July 2005, p. 35, viewed 9 May 2011, http://parlinfo.aph.gov.au/parlInfo/download/library/jrnart/2QDK6/upload_binary/2qdk63.pdf;fileType=application/pdf#search=%22watching%20the%20watchers%22

achieved in one of two ways—the conduct of inspection activities, or the conduct of inquiries.² The IGIS has own-motion powers in addition to considering complaints or requests from Ministers.

There are currently six intelligence and security agencies which form the Australian Intelligence Community, namely:

- Australian Security Intelligence Organisation (ASIO)
- Australian Secret Intelligence Service (ASIS)
- Defence Imagery and Geospatial Organisation (DIGO)
- Defence Intelligence Organisation (DIO)
- Defence Signals Directorate (DSD)
- Office of National Assessments (ONA)

The IGIS does not have determinative or directive powers but can make recommendations as a result of inquiries conducted under the IGIS Act. When conducting an inquiry the IGIS has strong investigative powers, akin to those of a royal commission.

The mandate of the IGIS was recently expanded in the *National Security Legislation Amendment Act 2010* so that the IGIS can extend inquiries outside the Australian Intelligence Community in appropriate circumstances.³

Committee consideration

To date⁴, the Bill has not been referred to a parliamentary committee for inquiry. The Senate Scrutiny of Bills Committee's views on the Bill are not yet known, as the Committee has not released an Alert Digest since the Bill was introduced into Parliament.

2. I Carnell and N Bryan, op. cit., p. 37.

3. The Explanatory Memorandum to the National Security Legislation Amendment Bill 2010 at p. 3 states that this amendment was considered necessary because 'to fully consider an intelligence or security matter, it may sometimes be necessary for the IGIS to consider the role played by a non-Australian Intelligence Community (AIC) department or agency in relation to that matter', viewed 9 May 2011, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fbillhome%2Fr4320%22>

4. 6 May 2011.

Key provisions

Schedule 1—Amendment of the *Inspector-General of Intelligence and Security Act 1986*

Objects of the IGIS Act

Currently the objects of the IGIS Act are:

- to assist Ministers in the oversight and review of:
 - the compliance with the law by, and the propriety of particular activities of, Australian intelligence agencies
 - the effectiveness and appropriateness of the procedures of those agencies relating to the legality or propriety of their activities and
 - certain other aspects of the activities and procedures of certain of those agencies
- to assist Ministers in ensuring that the activities of those agencies are consistent with human rights
- to assist Ministers in investigating intelligence or security matters relating to Commonwealth agencies, including agencies other than intelligence agencies and
- to allow for review of certain directions given to ASIO by the Attorney-General.⁵

Item 1 would add to section 4, a new object of:

- [assisting] the Government in assuring the Parliament and the public that intelligence and security matters relating to Commonwealth agencies are open to scrutiny, in particular the activities and procedures of intelligence agencies.

IGIS inquiry and reporting functions

Items 2, 3, 5 and 6 of Schedule 1 to the Bill relate to the inquiry and reporting functions of IGIS.

Item 2 expands the capacity of IGIS to undertake full inquiries into the procedures of ASIS, DIGO and DSD. Currently subsection 8(2) of the IGIS Act provides that the functions of the IGIS include undertaking a full inquiry into the effectiveness and appropriateness of ASIS, DIGO and DSD procedures relating to the legality or propriety of these agencies.⁶ Under the existing provision such an inquiry can only be undertaken at the request of the responsible Minister. **Item 2** would have the effect of providing IGIS with the capacity to undertake such inquiries also on its own initiative.

5. Section 4 of the AGIS Act.

6. Specifically paragraph 8(2)(c).

This amendment would bring consistency across all intelligence agencies in regard to own-motion inquiries, as the IGIS Act already provides that for ASIO, DIO and ONA, inquiries can be conducted by the IGIS on his or her own motion.⁷

Item 3 repeals and re-drafts the provisions which relate to the scope of the IGIS's authority to inquire into employment matters concerning intelligence agency employees (subsections 8(5), (6) and (7)). The amendments clarify the existing role of the IGIS rather than make substantive changes.

Section 14 of the IGIS Act allows the IGIS to undertake preliminary inquiries into an intelligence agency's actions. Preliminary inquiries provide the IGIS with an option of a more limited inquiry into a matter prior to any decision to proceed (or not) with a full inquiry. Existing section 14 only allows preliminary inquiries where a complaint is made to the office of the IGIS. **Item 5** inserts **proposed subsection 14(2)** with the effect of expanding the scope of these preliminary inquiries by providing the IGIS with the capacity to undertake own-motion preliminary inquiries.

Section 22 of the IGIS Act sets out the procedures that the IGIS must follow when preparing IGIS reports relating to an inquiry into a Commonwealth agency. Amongst other things, the IGIS must give a copy of (or a version of a copy of) the report to the responsible Minister. **Item 6** inserts **proposed subsection 22(4)** and requires that if the IGIS gives a copy of the report to the responsible Minister, then the IGIS must also give a copy to the Prime Minister, where the Prime Minister requests it, or where the IGIS considers it appropriate.

Delegation of the functions and powers of the IGIS

Items 8 and 9 contain the more significant amendments in the Bill and provide for the employment by the IGIS of a person to whom some IGIS functions and powers can be delegated, subject to Ministerial approval.

Item 9 inserts **proposed section 32AA**, the delegation provision. It provides that the IGIS may delegate all or any of his or her functions or powers to do with inquiries and reports⁸ to a person referred to in new subsection 32(3) for the purposes of a particular inquiry. The delegation must be a written instrument of delegation in accordance with the *Acts Interpretation Act 1901*.⁹ In exercising those functions and powers, the delegate must comply with any written directions of the IGIS (**proposed subsection 32AA(2)**).

Proposed subsections 32(3) to 32(6) (item 8) address the employment arrangements for such a delegate. **Proposed subsection 32(3)** provides that the IGIS may employ a person to assist him or her to perform all or any of the functions and powers of the IGIS as set out in Division 3 and 4 of Part II of the Act, for the purposes of a particular inquiry and as delegated under new section 32AA.

7. See paragraph 8(1)(a) and paragraph 8(3)(c).

8. These are set out in Divisions 3 and 4 of Part II of the IGIS Act.

9. Sections 34AA, 34AB and 34.

The conditions of employment include that:

- the responsible Minister must first be satisfied that the employment of such a person is necessary and that the particular person to be employed has appropriate expertise for the inquiry (**proposed subsection 32(4)**)
- the terms and conditions of employment must be determined by the IGIS in writing (**proposed subsection 32(5)**) and
- the person proposed to be employed must be appropriately cleared for security purposes to at least the same level as staff members of ASIS, unless the responsible Minister agrees otherwise (**proposed subsection 32(6.)**)

The Minister's second reading speech acknowledges that the coercive questioning power of the IGIS is an extraordinary power and for this reason the mechanism of delegation will only be resorted to when there is a strict need.¹⁰ The speech also provides further detail about the qualities required for such an appointment, noting too that there would be very few suitable candidates for delegation. The Minister justifies the new delegation power stating that the ability to engage a suitable person to conduct a major inquiry with access to the full range of powers under the Act will ensure the IGIS has greater flexibility to expand the capacity of the Office at short notice.¹¹

As further background, it is of interest that shortly after taking up the position, the current IGIS, Dr Vivienne Thom, said she believed the number of staff currently employed (being a complement of 12 staff) was appropriate and would enable her to respond adequately to complaints and inquiries. However Dr Thom also noted her position could change if the Office were to undertake a major inquiry or gain additional functions.¹²

Confidentiality

Section 34 of the IGIS Act titled 'Secrecy' imposes confidentiality obligations on the IGIS, any former IGIS, and any present or former member of the IGIS staff. Such persons cannot communicate any information acquired by reason of their position, except in the performance of their statutory functions or the exercise of their statutory powers. In addition, subsection 34(5) exempts such persons from any obligation to produce documents or provide information to a court, tribunal, authority or person which has power to require production of documents or answering of questions.

10. G Gray, 'Second reading speech: Inspector-General of Intelligence and Security Amendment Bill 2011', House of Representatives, *Debates*, 23 March 2011, p. 2978, viewed 5 May 2011, http://parlinfo.aph.gov.au/parlInfo/genpdf/chamber/hansardr/2011-03-23/0151/hansard_frag.pdf;fileType=application%2Fpdf

11. Ibid.

12. IGIS, *Annual report 2009-10*, p. 5, viewed 6 May 2011, http://www.igis.gov.au/annual_report/09-10/index.cfm

Items 10 and 11 propose fairly minor amendments to this secrecy provision to reinforce and clarify the prohibition on disclosure to a court of documents or information where the secrecy provisions prohibit such a disclosure.

Royal Commissions

Existing section 34A, which deals with providing information to Royal Commissions, was inserted to enable AGIS to cooperate with one specific Royal Commission, namely the 1994 Samuels-Codd Commission of Inquiry into Matters Relating to the Australian Secret Intelligence Service.

Items 14 and 15 propose amendments to section 34A that would have the effect of allowing IGIS to provide information and documents to other Royal Commissions in certain circumstances. **Item 15** would repeal and replace the existing definition of [Royal] 'Commission' (**subsection 34A(7)**). The effect would be to broaden this provision to enable IGIS to release material to any Royal Commission and includes providing the materials to other persons assisting the Commission (and persons in their employment or control) when they are performing functions relating to a particular inquiry.

The Minister's second reading speech states that the proposed provision, which would require that a Commission must be expressly prescribed in regulations as authorised to seek evidence from, or cooperate with the IGIS, would avoid the IGIS being under an obligation to give evidence to all Royal Commissions at a Commission's request.¹³

As an aside, a 2010 Australian Law Reform Commission (ALRC) report, *Making Inquiries: A New Statutory Framework*¹⁴, proposed that a new Inquires Act¹⁵ should include arrangements for the IGIS to advise or assist Royal Commissions and Official Inquiries about the use or disclosure of information that may damage national security or divulge information that was communicated in confidence by a foreign government or international organisation. The report made a further recommendation proposing that section 34A of the IGIS Act be repealed, so that the IGIS is not potentially constrained from providing assistance to an inquiry in appropriate circumstances. It is of note that the current head of IGIS supports both of these recommendations.¹⁶

While the Explanatory Memorandum and the Minister's second reading speech do not refer to this report, it would seem that the proposed amendments to section 34A could be seen as a suitable response to these ALRC recommendations.

13. G Gray, op. cit., p. 2978. <http://www.alrc.gov.au/report-111>

14. Australian Law Reform Commission, *Making inquiries: A new statutory framework*, ALRC report no. 111, viewed 9 May 2011, <http://www.alrc.gov.au/report-111>

15. That would be a new Act to replace the existing *Royal Commissions Act 1902*.

16. IGIS, op. cit, p. 12.

Other amendments

The remaining amendments in **Schedule 1** are minor and consequential and include, for example, **items 12 and 13**, to rectify drafting inconsistencies caused by the 2009 and 2010 amendments to the *Freedom of Information Act 1982*.

Schedule 2—Consequential amendment

Schedule 2 contains just one amendment. **Item 1** makes a consequential amendment to the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* to update the definition of 'IGIS official' in section 5 of that Act to include reference to any person to whom the IGIS has delegated his or her functions and powers under proposed subsection 32(3) of the IGIS Act.¹⁷

17. See **items 7 and 8** of **Schedule 1** to the Bill.

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