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National Integrity Commission Bill 2018 (No 1) and (No 2)

**Submission to the
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. **Attachment A** outlines the role and functions of the IGIS, and the Government's announcement to extend IGIS jurisdiction in line with recommendations of the *2017 Independent Intelligence Review*.

The Inspector-General welcomes the opportunity to make this submission to the Legal and Constitutional Affairs Legislation Committee inquiry into the National Integrity Commission Bill 2018 (No. 1), and National Integrity Commission Bill 2018 (No. 2) ('the Bills').

Broadly, the Bills propose to establish a National Integrity Commission (NIC) with broad jurisdiction over public officials, corruption issues and public interest disclosures, supported by mandatory reporting obligations for public officials. As these functions of the NIC will have some overlap with existing functions of IGIS, this submission is provided to assist the Committee in its consideration of key areas of interaction and other practical issues relevant to the oversight of intelligence agencies.

KEY ISSUES

This submission addresses three key issues:

1. key areas of overlap between the proposed NIC's functions and IGIS's functions;
2. potential national security implications arising from the imposition of mandatory reporting obligations on officials of intelligence agencies and IGIS in certain circumstances (generally where a corruption issue is the subject of an intelligence investigation; or where intelligence agency officials engage in certain conduct in the proper performance of their functions, in reliance on applicable statutory immunities from legal liability); and
3. practical considerations for the oversight by the NIC of intelligence matters, arising from applicable security requirements.

More generally, given the high degree of specialisation involved in the oversight of intelligence agencies, the Committee may wish to consider whether aspects of the Bills could unintentionally create an overall reduction in the IGIS's ability to oversee the intelligence agencies, or could unintentionally impinge on the independence of the Inspector-General in conducting that oversight.

1. OVERLAPPING FUNCTIONS – WHISTLEBLOWERS AND CORRUPTION

NIC JURISDICTION

The NIC's functions include investigating the conduct of 'public officials', which appears to capture personnel from the six intelligence agencies currently within IGIS's jurisdiction; agencies proposed to be included within IGIS jurisdiction in future; and IGIS itself. IGIS has no concerns with IGIS staff being within the NIC's jurisdiction.

The Bills also propose to create a Whistleblower Protection Commissioner (WPC) within the NIC, who would receive and investigate 'disclosures of wrongdoing' including public interest disclosures; and investigate reprisals or other detrimental action taken against disclosers.

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IGIS JURISDICTION

The overarching purpose of IGIS oversight is to provide assurance that each intelligence agency acts legally and with propriety, complies with ministerial guidelines and directives, and acts consistently with human rights. It is anticipated that the establishment of the NIC would create the following overlap in terms of IGIS's current and proposed additional jurisdiction:

- IGIS can and does deal with issues which could be described as corruption and other misconduct as described below. Although, as explained further below, the focus of IGIS functions under the *Inspector General of Intelligence and Security Act 1986 (IGIS Act)* is the legality and propriety of intelligence agency activities rather than the investigation of individual misconduct.
- The IGIS currently handles public interest disclosures (referred to in the Bill as 'disclosures of wrongdoing') that could be handled by the WPC.

COMPLAINTS

IGIS can receive and investigate complaints about corruption or other misconduct from intelligence agency staff, members of the public, or other persons. Depending on the source and nature of the complaint IGIS can handle these complaints in accordance with the provisions of the *IGIS Act* or the *Public Interest Disclosure Act 2013 (PID Act)*, which expressly considers maladministration, abuse of public trust and 'corruption'. Since the introduction of the *PID Act*, IGIS has been notified of a small number of disclosures concerning alleged misconduct in procurement and has received a number of disclosures alleging maladministration in staffing matters. Some *IGIS Act* and *PID Act* inquiries and investigations have identified areas for improved practice but none have identified anything approaching widespread misconduct or corruption.

INSPECTIONS

Corrupt conduct or other wrongdoing could be discovered during the course of IGIS's periodic inspections. For example, IGIS reviews agency personnel's access to sensitive information.

INQUIRIES

The Inspector-General may conduct inquiries into the six intelligence agencies, and other Commonwealth agencies in certain circumstances. When conducting a formal inquiry the Inspector-General has powers akin to a royal commission. IGIS inquiries can consider allegations of inappropriate or unlawful conduct, including allegations of systemic problems or widespread misconduct. For example in 2011 the former Inspector-General conducted an inquiry into allegations of inappropriate security vetting practices; in 2010 there was an inquiry into the possible compromise of a compliance test; and in 2009 there was an inquiry into allegations that the Australian Signals Directorate had spied on the Defence Minister.

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AREAS OF DIFFERENCE

As noted above, IGIS oversight focuses principally on agency actions, for example, the adequacy of systems, policies and practices adopted by an agency to detect, prevent and respond to corruption. Unlike the NIC, the functions of IGIS are not directed to the investigation of suspected criminal conduct by particular individuals for the purposes of obtaining evidence for a potential criminal prosecution or other law enforcement action. IGIS is also limited by strict secrecy provisions in the *IGIS Act* which prevent the direct disclosure to law enforcement agencies and compulsory disclosure to a court of information obtained under the *IGIS Act*. Rather, if IGIS identified information which suggested the potential commission of an offence by an individual, IGIS would inform the relevant agency head, or in some circumstances police.¹ (If appropriate, IGIS could also inform the agency Minister, the Attorney-General and the Prime Minister.)

INFORMATION SHARING AND COOPERATION

To the extent that concurrent jurisdiction will exist between IGIS and the NIC, it will be important for both agencies to have legislative tools that clearly enable information-sharing and cooperation to avoid duplication and ensure appropriate coordination, subject to the requirements of security.

The Bills contain provisions directed to cooperation and coordination, including via joint inquiries and the establishment of a Commonwealth Integrity Coordination Committee (whose membership includes IGIS). While some technical details may need further refinement (including provisions permitting information-sharing by IGIS, and provisions dealing with the interaction between the NIC's whistleblower functions and the PID regime), IGIS supports the broad approach to cooperation contemplated by the Bills.

On a practical level, IGIS and the NIC would need to work closely to manage their concurrent jurisdiction. The IGIS and five other Commonwealth integrity agencies have recently developed a Statement of Cooperation to assist in the management of overlapping jurisdiction, which will arise if amendments to IGIS jurisdiction proposed by the *2017 Independent Intelligence Review* are enacted.

INDEPENDENCE

The Bills contain provisions that propose variously to enable or require public officials to report 'corruption issues' or 'whistleblower protection issues' or 'disclosures of wrongdoing' to the NIC or WPC (as applicable). The NIC or WPC may then take various action in relation to such an issue that 'relates to a Commonwealth agency'. This includes: conducting an investigation and directing the Commonwealth agency to which the issue relates not to investigate it; or returning a matter to the agency for investigation, and managing or overseeing that investigation.

IGIS is concerned to ensure that, if the Inspector-General were to refer an issue to the NIC or WPC that is about the actions of one of the intelligence agencies subject to IGIS oversight (as a result of information obtained by the IGIS the course of performing her functions) and the matter was referred back to IGIS, these provisions would not enable the NIC or WPC to manage or oversee the

1 *IGIS Act*, subsection 17(10) (bringing evidence of breach or duty of misconduct to the attention of agency head or Minister); and *PID Act*, section 56 (disclosure to member of Australian police force).

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investigation by IGIS. (That is, the management or oversight of the performance by IGIS of statutory oversight functions under the *IGIS Act* in relation to the issue should be independent.)

This would be incompatible with the independence of the IGIS to determine whether, and if so how, to conduct an inquiry into a matter. The Committee may wish to consider whether the concept in the Bills of a corruption issue or whistleblower protection issue or a disclosure of wrongdoing that 'relates to a Commonwealth agency' could be clarified to avoid this outcome, which may be unintended.²

2. NATIONAL SECURITY CONSIDERATIONS

In some circumstances, intelligence agencies have a legitimate national security interest in suspected public sector corruption (for example, espionage and foreign interference investigations concerning public officials, both inside and outside the intelligence agencies). These matters can be extremely sensitive and cannot be discussed in an unclassified setting. IGIS notes the possibility that the mandatory reporting provisions proposed by the Bills could trigger obligations in the following cases, and notes that the Committee may wish to consider whether this is the intended effect:

- intelligence agency heads may be required to refer their ongoing security investigations to the NIC, when these investigations may be core intelligence agency activities; and
- IGIS may also be subject to reporting obligations in respect of these investigations, which will come to her attention as a result of oversight activities, especially periodic inspections of agency activities and pro-active briefings provided by agencies. Such an outcome may have a chilling effect on the willingness of agencies to pro-actively brief the Inspector-General and her staff on some matters, this could make oversight by IGIS less effective.

The Committee may also wish to consider whether the mandatory reporting requirements, and the statutory functions of the NIC more generally, may inadvertently capture circumstances in which members of intelligence agencies engage in certain conduct in the proper performance of their duties, in reliance on applicable statutory immunities from legal liability. These immunities can, subject to applicable conditions, authorise members of intelligence agencies to engage in certain conduct that would otherwise constitute an offence. (For example, the immunity in section 14 of the *Intelligence Services Act 2001*, or the immunity in section 35K of the *Australian Security Intelligence Organisation Act 1979* for participants in special intelligence operations authorised by the Attorney-General.)

Intelligence agencies may be in a position to assist the Committee in identifying further provisions with potential security implications.

2 To avoid doubt, these concerns are limited to the performance by IGIS of statutory oversight functions under the *IGIS Act* and the *PID Act* in relation to the actions of intelligence agencies within IGIS jurisdiction. IGIS has no concerns with the application of these provisions to IGIS as an agency within the NIC's jurisdiction, in relation to suspected or alleged corruption issues or whistleblower protection issues or disclosures of wrongdoing that arise from the actions of IGIS officials themselves.

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3. PRACTICAL CONSIDERATIONS

Some features of the intelligence landscape may be relevant to the consideration of the remit and practical operations of the NIC. In particular, investigating the conduct of intelligence agency personnel and other officials with access to classified information poses particular challenges.

IGIS is a specialised oversight agency that is equipped to deal with managing highly classified information. Officers reviewing intelligence agency activities have the highest level of security clearance and the office space and equipment used by IGIS staff is accredited in accordance with the relevant security standards. The difficulties and cost of replicating this ability to deal with highly classified information in a new agency should not be underestimated.

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ATTACHMENT A

ROLE OF THE INSPECTOR-GENERAL OF INTELLIGENCE AND SECURITY

The Inspector-General is an independent statutory officer who reviews the activities of the following agencies:

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

The Office of the IGIS is part of the Attorney-General's portfolio, and was previously located in the Prime Minister's portfolio from its commencement on 1 February 1987 until 10 May 2018. The IGIS is not subject to direction from any Minister on how responsibilities under the *Inspector-General of Intelligence and Security Act 1986 (IGIS Act)* should be carried out. The Office currently has 27 staff.

The *IGIS Act* provides the legal basis for the IGIS to conduct inspections of the intelligence agencies and to conduct inquiries of the Inspector-General's own motion, at the request of a Minister, or in response to complaints. The overarching purpose of the IGIS's 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 are 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. IGIS staff have access to 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 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 complaint or systemic matter within an agency. The Inspector-General also receives and investigates complaints and public interest disclosures about the intelligence agencies. These come from members of the public and from current and former agency staff.

In response to the recommendations of the *2017 Independent Intelligence Review*, the Government announced that, subject to the introduction and passage of legislation, the jurisdiction of the IGIS will be extended to include the intelligence functions of the Department of Home Affairs, Australian Federal Police, Australian Criminal Intelligence Commission and Australian Transaction Reports and Analysis Centre. Resources for the IGIS are being increased to allow the office to sustain a full time equivalent staff of 55 (by 2019-20) and to allow the agency to move to new premises (in 2019).

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