Inspector-General of Intelligence and Security

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Dear Dr Hawke

Submission to the review of the *Freedom of Information Act 1982* and the *Australian Information Commissioner Act 2010*

Thank you for the opportunity to make a submission to this review. This submission addresses the role of the Inspector-General of Intelligence and Security in providing independent evidence in Freedom of Information reviews.

The role of the Inspector-General of Intelligence and Security

The Inspector-General of Intelligence and Security (IGIS) provides independent oversight of the work of intelligence and security agencies in accordance with the *Inspector-General of Intelligence and Security Act 1986*.

This Act provides the legal basis for the IGIS to conduct inspections of the Australian intelligence community agencies, handle complaints and to conduct inquiries. In undertaking inquiries the IGIS has strong investigative powers including the power to obtain information and can require any person to answer questions and produce relevant documents, take sworn evidence, and enter agency premises.

The overarching purpose of these activities is to ensure that each AIC agency acts legally and with propriety, complies with ministerial guidelines and directives, and respects human rights. The office of the IGIS is small, comprising the Inspector-General and twelve staff. A significant proportion of the resources of the office are directed towards on-going 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.

Although the primary focus of the IGIS relates to the activities of the AIC agencies, an amendment to the legislation made in late 2010 allows the Prime Minister to request the IGIS to inquire into an intelligence or security matter relating to any Commonwealth agency.

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The role of the IGIS in Freedom of Information matters

Sections 55ZA to 55ZD and s. 60A of the *Freedom of Information Act 1982* enable the IGIS to give independent evidence before the Information Commissioner or the Administrative Appeals Tribunal (AAT) in cases involving national security, defence or international relations exemptions and confidential foreign government communication exemptions. (Section 50A of the *Archives Act 1983* makes equivalent provision for the IGIS to give evidence to the AAT in Archives Act appeals.)

The provisions require the Information Commissioner or the AAT to call on the expertise of the IGIS in relation to those documents that the Commissioner or the Tribunal is not otherwise satisfied, on the basis of the evidence of the parties, ought to be exempt. When the provisions were introduced it was expected that the IGIS would be involved only at the final stage of the decision making process and only in those cases where the Commissioner or the Tribunal was inclined to release a document. It was anticipated that the IGIS would not be called often and as such no additional resources were provided for this new function.

Implementation

I signed a memorandum of understanding in May 2012 with the Information Commissioner whereby the IGIS would be called upon only if the Commissioner was inclined to release a document. I was not called by the Commissioner to provide evidence on any cases in 2011-12. In September 2012 the Freedom of Information Commissioner requested me to give evidence in relation to one case. After examination of each document I declined to give evidence on the basis that I reached the view that I was not appropriately qualified to give evidence on any information contained in the documents because none related in any way to my functions under the IGIS Act.

In the first case under the new provisions in the AAT the Tribunal followed a different approach. The then President decided that the relevant provisions enable the Tribunal to request that the IGIS give evidence *at any time*, even before evidence is heard from the parties (*Corby and Australian Federal Police* [2011] AAT 861). The practical result in that case was that I personally, and senior staff in my office, were obliged to consider all documents that the agencies claimed were exempt, to prepare evidence and for me to personally be available to give evidence. On the final day of the hearing, after it had heard the other evidence, the Tribunal decided it did not require me to give evidence. Similarly in another recent case involving the equivalent provisions in the Archives Act the Tribunal asked that I review the documents in issue and prepare evidence prior to the Tribunal hearing any of the other evidence, again taking a significant amount of my time and that of my senior staff. In that case the applicant withdrew days before the hearing.

I have worked with the AAT to streamline the process as much as possible within the Tribunal's current interpretation of the provisions. In October 2012 I entered a Memorandum of Understanding with the Tribunal that sets out procedures to be followed in relevant cases. The President of the Tribunal has recently issued a Practice Direction to give some guidance on at what stage in the proceedings Tribunal members might call upon the IGIS to give evidence. The Direction notes the requirement for the Tribunal to provide a mechanism of review that is fair, just, economical, informal and quick and the Tribunal's obligation to accord parties before it procedural fairness, but also requires the Tribunal to have regard to whether directions for the management of the hearing can be made consistently with those principles and at the same time consider limiting the time and resource demands on my office.

Impact on the IGIS office

I am grateful to the Information Commissioner and to the Tribunal for their cooperation in trying to make the process more efficient, but continue to be concerned that the workload for this role is significant and difficult to predict and that the current provisions may cause unnecessary work for my office and subsequent delays.

If the Tribunal was required to request me to give evidence only in respect of specific documents, or parts of documents that it was minded to release, my office might not have had to consider such a large number of documents and prepare advice to me that, ultimately, would not be required.

If the current approach continues it may result in the IGIS becoming a bottleneck in the review system and significant IGIS resources being diverted into preparing evidence which is not ultimately used by the Tribunal. This will impact on IGIS oversight of intelligence and security agencies particularly in respect of more complex inquiry work.

I am aware that there are a number of pending FOI and Archives AAT cases. These potentially include some large and complex cases where it is unlikely that I will have any relevant expertise but may still be required by the AAT to personally examine all of the documents before the Tribunal has heard any of the other evidence.

Proposal

It is appropriate for the IGIS to continue to provide expert evidence to the AAT where it is relevant. My evidence, which will always be independent, may be of assistance to the AAT in difficult national security related cases. However, rather than seeking extra resources or unnecessarily diverting my office from intelligence oversight work, I suggest that the Review consider whether the FOI Act should be amended to confirm that my evidence should only be sought in cases where, having considered the other evidence, the AAT is not satisfied a document is exempt. For consistency, the provisions relating to the Information Commissioner and the equivalent provisions in the Archives Act should also be amended.

I acknowledge that requiring that the proposed approach may, in a few cases, result in some delay. The process could sometimes require a second hearing in which the AAT takes further evidence from the IGIS (and possibly in response by the parties) on a contested document. I believe that this additional step in a small number of cases is not inconsistent with the government policy of requiring the highest level of consideration and scrutiny in cases which may potentially result in the release of information relating to national security. This approach should also prevent delay in other AAT cases caused by requiring the IGIS to review documents and prepare evidence where that evidence is not required.

Yours sincerely

Vivienne Thom
Inspector-General

7 December 2012