Inspector-General of Intelligence and Security

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Dear Ms Wynn

SUBMISSION ON ISSUES PAPER 35:
REVIEW OF THE ROYAL COMMISSIONS ACT

Thank you for the opportunity to make a submission to the Commission's review of the Royal Commissions Act and related matters.

I thought it might be helpful if I provided some comments based on my experience over the last five years in the position of Inspector-General of Intelligence and Security (IGIS).

In particular I would like to emphasise the advantages which can result from having a standing body to conduct inquiries (Question 5-2 in the Issues Paper). These advantages can include the very significant ones listed in item 1(a) in the Attorney-General's terms of reference for the Commission's review i.e. flexibility, less formality and cost-effectiveness.

Brief background

Creation of the position of IGIS was one of the recommendations of the 1984 Royal Commission on Australia's Security and Intelligence Agencies.[1] Enactment of the *Inspector-General of Intelligence and Security Act 1986* (IGIS Act) followed and the office commenced operation on 1 February 1987.

[1] Hope, Justice R.M, Royal Commission on Australia's Intelligence and Security Agencies, *General Report*, Australian Government Publishing Service (AGPS), Canberra, 1984, paragraph 3.26.

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The IGIS is an independent statutory position which exists for the purpose of reviewing the six Australian Intelligence Community agencies[2] (AIC), in respect of the legality and propriety of their activities. The IGIS has an own motion capacity and strong coercive powers and protections, set out in the IGIS Act.

Issues Paper Question 5 - 2

In Question 5-2 of the Issues paper you ask whether a permanent body should be established to conduct some types of public inquiries.

In the Issues Paper you have addressed Royal Commissions and "public inquiries" (defined as ad hoc, independent non-Royal Commission inquiries established by government), distinguishing the latter from "executive inquiries" (other forms of inquiry conducted by government departments and other permanent government agencies). Such a distinction needs to be viewed with care. Both types are, according to traditional theory, exercises of executive authority. Nor is there of necessity any difference in the degree of independence with which the inquiry can be approached.

I would observe that the degree of openness with which an inquiry can be conducted will be determined by the subject matter and consideration of sensitivities such as privacy and security. In the case of IGIS Act, inquiries must be conducted in private (section 17(1)). This is hardly surprising given the nature of the material which will be involved. The experience of other inquiries and Royal Commissions which have dealt with intelligence and security issues has been that most of the proceedings must be conducted in private.[3]

It is appropriate to view the IGIS position and this office as an independent, permanent body established to conduct inquiries into the specialised area of the AIC. Therefore, at least in respect of the AIC, there is already a permanent body to conduct inquiries.

It should also be noted that in a media release issued on 23 December 2008[4], the Commonwealth Attorney-General committed to introducing legislation to broaden the jurisdiction of the IGIS so that, subject to the approval of the Prime Minister, the IGIS can conduct an inquiry under the IGIS Act into intelligence and security issues in any Commonwealth department or agency. This commitment emphasises that for intelligence and security issues within the Commonwealth employment sector, the IGIS is generally regarded as the most appropriate independent inquiry mechanism. There

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

[3] See for example: Justice R.M, Royal Commission on Intelligence and Security, First Report, AGPS, Canberra, 1977, paragraph 3; Clarke, MJ Report of the Inquiry into the Case of Dr Mohamed Haneef, Vol 1, November 2008, p.8-9.

[4] *Comprehensive Response to National Security Legislation Reviews*, Media Release issued by the Hon Robert McClelland MP, 23 December 2008.

may occasionally be an exception to this general proposition, and I will return to this point later.

Advantages of IGIS model

There are many advantages to the IGIS model. Some of these are along the lines of the general points made in paragraph 5.13 of the Issues Paper i.e.:

- there are no establishment costs for each new inquiry
- in most cases there will be existing knowledge of the general subject matter
- staff with expertise and security clearances being immediately available, and
- a capacity for focussed preliminary research to determine if a full inquiry is warranted.

In his report on the case of Dr Mohamed Haneef, the Hon John Clarke QC noted that reaching agreement about the access, handling, storage and further use of classified material took time and greatly hampered his Inquiry's progress.[5] My office is very well practised in these matters, occupies highly secure premises and the AIC agencies have grown comfortable, over time, with the level of security practised by the office due to its history over more than 20 years of maintaining/protecting confidentiality.

When an inquiry commences there is therefore no need to provide reassurance to relevant agencies that all the necessary protections for classified material have been or will be put in place.

Importantly, as I indicated at the start of this submission, there are also the sort of major advantages indicated in 1(a) of the Attorney-General's terms of reference to the Commission, relating to the manner and form of inquiries which are conducted under the IGIS Act. These advantages are a product of the following features:

- flexibility in how inquiries are scoped and progressed
- adoption of a genuinely inquisitorial approach
- the ability to follow-up on implementation of recommendations and any changes which are effected, and
- the significant cost-effectiveness which flows from all these features.

[5] Clarke, M J, op. cit., p.4.

Notable also is that the IGIS remains accountable for inquiry processes and reports, after a report is concluded.

I will explain these major advantages in more detail below, given their importance.

IGIS inspections and inquiries

As noted earlier, the Office of the IGIS (OIGIS) has no operational or program administration or managerial functions in respect of the AIC. It exists solely as an accountability/integrity review mechanism.[6] Two forms of activity are conducted - inspections and inquiries.

Inspections usually involve visiting agencies and reviewing selected files or other records, or searching on agency systems. Some inspections are regular - for example, every month all ASIO requests for special powers warrants (such as entry and search or telecommunications interception warrants) are examined to check that they comply with the legislation, including that there is sufficient reason to use such intrusive means of intelligence collection. Other inspections are done as projects - for example, in 2008 the office searched ASIO records to see what if anything was held relating to a sample of currently serving parliamentarians. Sometimes what is first done as an inspection project can become a regular part of the inspection program.

In conducting inspection activities the office looks not just at individual cases, but also at the adequacy of the control framework the agency has in place to ensure legality and propriety.

OIGIS also receives and deals with complaints about the AIC agencies. Many complaints are handled fairly, quickly and satisfactorily by administrative rather than investigative means (i.e. by obtaining information and where appropriate suggesting corrective action by the relevant agency). Other complaints are dealt with by way of a preliminary inquiry (under section 14 of the IGIS Act), or by escalation to a full inquiry (as provided for under section 8 of the IGIS Act).

A key point is that the IGIS also has an own motion capacity. An inquiry can be commenced if, in the opinion of the Inspector-General, there is sufficient reason to do so.

This capacity can be used to respond to issues of concern which might arise from inspection activities, or which are raised by the media or the community generally.

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[6] Some commentators such as the Hon JJ Spigelman and Professor Ackerman have even suggested that integrity and accountability agencies constitute a fourth arm of government equivalent to the legislature, executive and judiciary. See Spigelman, JJ 2004, *Jurisdiction and Integrity*, Second Lecture in the 2004 National Lecture Series of the Australian Institute of Administrative Law, Adelaide, 5 August). See also Ackerman, B, 'The New Separation of Powers', *Harvard Law Review*, vol. 113, pp. 633, 694.

It can also be used to make a "health check" in relation to potential risks of illegality or impropriety. For example, in 2007 an inquiry was conducted into the independence and integrity of ONA's strategic assessments. Such review of ONA's assessment work from time to time was a recommendation of the 2004 Inquiry into Australia's Intelligence Agencies by Mr Philip Flood AO.

It is also possible for relevant ministers including the Prime Minister to request the IGIS to inquire into a particular matter. In practice this is not common, largely because this office is vigilant and proactive about issues which warrant an inquiry.

Approach to inquiries

Section 17(1) of the IGIS Act specifies that inquiries under the Act should be conducted in such manner as the Inspector-General thinks fit (although there are some procedural requirements relating to natural justice). Section 17 provides considerable flexibility about how each inquiry can be conducted. In my experience this has been extremely useful. The nature of the matters being examined and how they unfold as the investigation proceeds, can and do vary greatly. The flexibility provided by the IGIS Act facilitates a genuinely inquisitorial approach.

There is a ready ability to broaden or refocus an inquiry as the unfolding circumstances dictate. There are no rigid terms of reference - any issue within the general jurisdiction of the IGIS can be readily examined - and hence almost no argument about the scope of an inquiry or whether terms of reference need to be amended.

Generally the approach taken with inquiries is to access and review all relevant records, and then discuss issues and take statements and/or formal evidence from relevant people. However, I would emphasise that sometimes the process can be an iterative one, with some statements or evidence meaning other searches or investigations are done, and that in turn can lead to further statements or sworn evidence being taken.

The AIC agencies are well aware of the power provided by section 18 for the IGIS to compel the production of documents or enter premises. In my experience, the agencies respond readily to requests for these things and there has been no need, in practice, to issue notices under section 18 for these purposes.

I would also note that the familiarity my office has with agency record keeping and systems, means that we are aware of the sort of records which should be made available when a request is made of an agency.

Generally a graduated or proportionate approach is taken with gathering information and evidence from agency staff. Discussions are often had with a range of current or former staff. Sometimes statutory declarations or responses to formal requests for information under section 18 of the IGIS Act are then taken from those with a central role or relevant position to the events being examined.

In other cases a formal interview under s18 of the IGIS Act will be considered necessary by the Inspector-General. This can be because of suspicions about the veracity of an account given by the person, and/or to satisfy the natural justice requirements in section 17 of the IGIS Act, or because of the position the person occupies or occupied and the importance of the issue. These interviews are recorded and the evidence taken on oath or affirmation.

I would emphasise that a measured approach is taken with requiring formal interviews. In the last five years 32 formal questioning sessions have been conducted as part of six inquiries.

The questioning in these interviews is done by the Inspector-General personally. There is no provision in the IGIS Act for counsel assisting, and I do not believe one is necessary if an inquisitorial approach is being taken.

It is rare, but not unprecedented for a legal representative to be present at interview. While I have allowed a "friend" to accompany someone to an interview, I have not had any situation in the last five years where a legal representative has actually attended an interview in that capacity. Were I to allow attendance, the role of the representative would be limited to seeking clarification of questions asked, or making any oral representations on behalf of their client at the end of the questioning.

There have been occasions when I have been provided with detailed written submissions by legal representatives, and this has been useful in progressing my consideration of the issues.

Cost effectiveness

A flexible inquisitorial approach by a standing body can be highly cost effective. OIGIS usually conducts three or four full inquiries each year, as well as doing around 15 - 20 preliminary inquiries, undertaking an extensive inspection program and resolving a significant number of complaints administratively. Yet the operating appropriation for the office in FY 2009/10 totals a modest $2.1m. When compared to the cost of alternate mechanisms for pursuing such matters, this represents tremendous value for the taxpayer.

To take a specific example, the direct costs to OIGIS of the 2007-2008 inquiry into ASIO actions in respect of Mr Izhar Ul-Haque totalled $215,000. In Issues Paper 35 there are figures indicating an average cost of $33 million for each of the five Royal Commissions listed in Table 6.1, and an average of $5,160,077 for five selected recent inquiries that were not Royal Commissions (Table 6.2).

It must be acknowledged that some IGIS Act inquiries are more focused in scope than these *ad hoc* inquiries, but IGIS Act inquiries are no less incisive, and also deal with complex matters.

On occasion, because of competing demands, an IGIS Act inquiry can take longer than an *ad hoc* inquiry which has only one task e.g. the inquiry into ASIO's actions in respect of Mr Izhar Ul-Haque took nearly 12 months compared to the 8 months taken by the Clarke inquiry into the Haneef matter.

However, none of these points are anywhere near sufficient to explain the great difference in cost between OIGIS, a standing body which is flexible and inquisitorial in approach, and *ad hoc* inquiries and Royal Commissions which are relatively formal, borrow significantly from the common law adversarial approach, engage commissioners and significant numbers of lawyers at substantial rates of pay, and must be established anew on every occasion.

Continuing accountabilities

Moreover, the IGIS and OIGIS staff are accountable on a continuing basis for inquiries conducted. While the IGIS is immune from direction as to how any matter should be progressed while it is being undertaken, the IGIS does appear before both the Senate Standing Committee on Finance and Public Administration as part of the Senate Estimates process, and also from time to time, the Parliamentary Joint Committee on Intelligence and Security.

The IGIS must also produce an annual report which is tabled in the Parliament, outlining inquiry and inspection activities undertaken during the year.

Limitations

The jurisdiction of this office, as noted earlier, is currently limited to the six AIC agencies, and there is a proposal to allow extension, if the Prime Minister approves in each individual case, to intelligence and security issues in other Commonwealth departments and agencies.

Given the many advantages to which I have referred, where an issue concerns the legality and propriety of intelligence and security activities within Commonwealth departments and agencies, OIGIS is clearly the appropriate body to undertake reviews.

However, there are also limits to the matters which the IGIS should review. One is the actions of ministers themselves. Apart from some narrow exceptions[7], the IGIS Act precludes the IGIS from inquiring into actions taken by a minister.

I believe this is sound limitation because the heightened media and political interest that surrounds any direct inquiry into a minister's actions can lead to unhealthy speculation that could undermine public confidence in the integrity, impartiality and objectivity of an IGIS inquiry. It could also make it difficult for the IGIS to maintain a relationship with

[7] See s8 (8)(b) of the IGIS Act.

the political branch and achieve acceptance and implementation of IGIS recommendations.

A second limitation is where the actions of private sector bodies and/or substantive issues beyond intelligence and security matters may be involved. While the IGIS can, in the course of an inquiry, obtain information that is relevant to the activities of the AIC agencies from any person or body, the activities of people or bodies outside the AIC are not in themselves within the jurisdiction of the IGIS.

This means that there will be various situations where an inquiry by the Commonwealth Ombudsman, a parliamentary inquiry, an *ad hoc* inquiry or a Royal Commission will need to be considered. If the issues are within Commonwealth departments and agencies (including outsourced functions) then the Commonwealth Ombudsman will often be a good option.

A third limitation which should be noted is that in activities such as counter-terrorism, State and Territory entities can play major roles, including by way of joint operations with Commonwealth bodies. If there is a need to review a matter which spans Commonwealth, State and Territory entities, then one option is to have an *ad hoc* inquiry. One example of this is the proposed Council of Australian Governments (COAG) sponsored review, to commence in December 2010, into counter-terrorism legislation enacted in 2005.[8]

I would also note that States and Territories have their own review bodies, and sometimes an option might be to have reviews done in tandem by two review bodies. This would require sufficient legislative coverage for the review bodies to be able to coordinate and communicate as appropriate in undertaking their respective reviews.

IGIS and Royal Commissions

In this submission I would also like to raise a particular issue about the IGIS Act and the prohibition it effectively places on the assistance which the IGIS might provide to a Royal Commission.

Section 34 of the IGIS Act imposes obligations of secrecy on the IGIS and staff. Subsection 34(1) prevents the IGIS (and staff) from using or disclosing (to any person) information acquired by reason of holding his or her office (protected information) except where:

- the use or disclosure is in the performance of functions or duties or in the exercise of powers under the IGIS Act; or

[8] See Attachment G to COAG Communiqué of 10 February 2006 (available at: www.coag.gov.au/coag_meeting_outcomes/2006-02-10/index.cfm).

- the IGIS believes on reasonable grounds that the disclosure is necessary for the purpose of preserving the well-being or safety of a person (subsection 34(1A)).

Subsection 34(5) specifies that the IGIS (and staff) cannot be compelled to disclose protected information in a court (as defined), except where it is necessary to do so for the purposes of the IGIS Act. This is a protection from compulsion, although it leaves a discretion for the Inspector-General to decide to release information, should there not be another inhibitor to doing so.

An additional exception to the restriction on disclosing and using protected information is, in effect, created by section 34A, which provides that, despite anything in the IGIS Act or any other Act, the IGIS or an authorised staff member may give protected information to the two Commissions named in subsection 34A(7).

The secrecy provision in section 34 of the IGIS Act therefore will operate to prevent the IGIS from disclosing protected information to a Commission that is not referred to in subsection 34A(7), unless the provision of such information:

- is in the performance of his or her functions or duties or in the exercise of his or her powers under the IGIS Act; or

- falls within the exception relating to the preservation of the well-being or safety of another person set out in subsection 34(1A).

Generally, it is unlikely that many situations could arise in which either exception applied to authorise the release of protected information to a Commission in any appropriate instance.

It is my view that section 34A in the IGIS Act should be repealed, so that the IGIS is not potentially constrained from providing assistance to a Commission, should the IGIS consider it appropriate to do so.

Naturally, I would be happy to discuss any of the issues in this submission, or matters otherwise relevant to your inquiry, if that would be helpful.

Yours sincerely

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Intelligence and Security

12 May 2009