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**Review of the
National Security Legislation Amendment
(Comprehensive Review and Other Measures No 2.)
Bill 2023**

**Submission to the
Parliamentary Joint Committee on Intelligence and Security**

6 April 2023

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1. INTRODUCTION

1. The Inspector-General of Intelligence and Security (IGIS) welcomes the opportunity to make this submission to the review by the Parliamentary Joint Committee on Intelligence and Security (the Committee) of the National Security Legislation Amendment (Comprehensive Review and Other Measures No 2.) Bill 2023 (the Bill).
2. Consistent with established practices, IGIS does not make any comment on the policy underlying the Bill. Rather, this submission discusses the key features of the Bill that relate to IGIS and the implications for IGIS's role providing oversight of Australia's intelligence agencies and agencies with intelligence functions.
3. IGIS was consulted by the Attorney-General's Department during the development of the Bill, which chiefly implements a number of recommendations from the Comprehensive Review of the Legal Framework of the National Intelligence Community (the Comprehensive Review).

2. BACKGROUND

ABOUT IGIS

4. IGIS is an independent statutory agency within the Attorney-General's portfolio. The Inspector-General is an independent statutory officer appointed under the *Inspector-General of Intelligence and Security Act 1986* (IGIS Act).¹ The Hon Dr Christopher Jessup KC commenced as the Inspector-General on 8 February 2021 (having been Acting Inspector-General since 18 January 2021).
5. Under its existing jurisdiction, IGIS reviews the activities of the following six intelligence agencies:
 - Office of National Intelligence (ONI)
 - Australian Security Intelligence Organisation (ASIO)
 - Australian Secret Intelligence Service (ASIS)
 - Australian Signals Directorate (ASD)
 - Australian Geospatial-Intelligence Organisation (AGO)
 - Defence Intelligence Organisation (DIO)and the intelligence functions of the Australian Criminal Intelligence Commission (ACIC) and the Australian Federal Police (AFP), as narrowly defined in the IGIS Act.²
6. The overarching purpose of IGIS's functions is to assist Ministers in the oversight and review of the activities of each intelligence agency to ensure that they are legal and proper, comply with ministerial guidelines and directives, and respects human rights.

¹ The purposes of the IGIS include the functions of the Inspector-General referred to in sections 8, 9 and 9A of the IGIS Act (paragraph 6AA(e) IGIS Act).

² The intelligence functions of the ACIC and AFP, as defined under the IGIS Act, are the collection, correlation, analysis, production and dissemination of intelligence obtained by the ACIC or AFP from the execution of a network activity warrant; or the performance of a function, or the exercise of a power, conferred on a law enforcement officer of ACIC or AFP by the network activity warrant provisions of the *Surveillance Devices Act 2004*.

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3. MAIN AMENDMENTS

INSPECTOR-GENERAL OF INTELLIGENCE AND SECURITY ACT 1986

7. Schedule 1 Part 5 of the Bill implements recommendation 145 of the Comprehensive Review through proposed amendments to section 35 of the *Inspector-General of Intelligence and Security Act 1986* (IGIS Act). The proposed amendments would require the IGIS to include certain information in the IGIS's annual report relating to complaints made to the IGIS under Division 2 of Part II of the IGIS Act, and disclosures of information received by the IGIS under the *Public Interest Disclosure Act 2013* (PID Act).
8. The information required to be included in the IGIS's annual report in relation to complaints made to the IGIS under Division 2 of Part II of the IGIS Act would be³:
 - The number of complaints made to the IGIS;
 - The kinds of matters to which the complaints related;
 - The actions taken by the IGIS in response to the complaints, including the number of inquiries conducted by the IGIS in response to the complaints;
 - A summary of the action taken by the intelligence agencies in response to:
 - i. the complaints; and
 - ii. any conclusions and recommendations made by the IGIS as a result of the inquiries
9. The information required to be included in the IGIS's annual report in relation to disclosures of information received by the IGIS under the PID Act are broadly similar⁴, with the differences reflecting the particular requirements of the PID Act. The information required includes:
 - The number of disclosures of information received by the IGIS under the PID Act; and
 - The kinds of disclosable conduct with which the information was concerned; and
 - The actions taken by the IGIS to handle the disclosures, including:
 - i. the number of inquiries conducted under the IGIS Act; and
 - ii. the number of investigations conducted under the PID Act⁵; and
 - A summary of the actions taken by the intelligence agencies in response to:
 - i. the disclosures;
 - ii. any conclusions and recommendations made by the IGIS as a result of an inquiry or investigation;
 - iii. any other matters set out in reports relating to the inquiries or investigations
10. As a matter of practice, the IGIS already includes information about the handling of complaints made under the IGIS Act and disclosures made under the PID Act in its annual report⁶. However, these amendments will now impose a legislative requirement to do so. While the IGIS will be required to report on a broad range of information, there is also sufficient flexibility as to the detail to be included to ensure that information relating to the actions of the intelligence agencies in this context is made public to the extent possible, but without compromising national security information or the privacy of individuals⁷.

³ Schedule 1, item 15 proposed subsection (2AB).

⁴ Schedule 1, item 15 proposed subsection (2AC).

⁵ Section 49 of the PID Act enables the IGIS to inquire into a public interest disclosure under the IGIS Act.

⁶ See the *Inspector-General of Intelligence and Security 2021-2022 Annual Report*, pp 102-106.

⁷ The IGIS notes that pursuant to subsection 35(5) of the IGIS Act, the Attorney-General retains the ability to delete material from the IGIS's annual report that they consider necessary in order to avoid prejudice to security, the defence of Australia, Australia's relations with other countries, law enforcement operations or the privacy of individuals.

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11. The IGIS's public interest disclosure (PID) reporting requirements pursuant to proposed section 35(2AC) broadly align with the existing annual reporting requirements for the Ombudsman under section 76 of the PID Act. Noting that the IGIS will now be required to provide the relevant information in relation to all the disclosures it *receives* - and not just those *allocated* to it - proposed section 35(2AD) provides that the head of an intelligence agency must give the IGIS such information and assistance as the IGIS reasonably requires in relation to matters on which the IGIS is required to report under section 35. This amendment will support the provision of relevant PID-related information from the intelligence agencies to the IGIS for the purposes of the IGIS's annual report.

FREEDOM OF INFORMATION AND ARCHIVES MATTERS

12. Schedule 1 Part 8 of the Bill implements recommendation 191 of the Comprehensive Review through amendments to the *Administrative Appeals Tribunal Act 1975* and the *Archives Act 1983* (Archives Act). The amendments will require proceedings in the Administrative Appeals Tribunal (AAT) in relation to any record of ASIO or any record claimed to be an exempt record pursuant to paragraphs 33(1)(a) or (b) of the Archives Act (an 'exempt security record') to be heard in the Security Division of the AAT.⁸ These amendments thus capture records which do not necessarily originate with ASIO, such as records from other NIC agencies, and records that contain information provided by NIC agencies to other departments or agencies, such as the IGIS, concerning matters of a kind referred to in paragraphs 33(1)(a) and (b) of the Archives Act. Currently, only ASIO records subject to review by the AAT under the Archives Act can be heard in the Security Division of the Tribunal.⁹ These amendments aim to ensure that AAT proceedings concerning records containing security information, irrespective of their origin, are consistent.
13. As such, due to the agencies within IGIS's jurisdiction and the information it receives in the performance of its functions, matters relating to IGIS records on which exemptions are sought on national security grounds pursuant to section 33(1)(a) or (b) of the Archives Act, will also be heard in the Security Division of the AAT.
14. Schedule 1 Part 8 of the Bill also implements recommendation 192 of the Comprehensive Review through amendments to the Archives Act and the *Freedom of Information Act 1982* (FOI Act). Currently, where the Information Commissioner (IC) or the AAT is conducting a review in relation to a document or record sought to be exempt under s 33 of the respective Acts, the evidence of the IGIS *must* be sought prior to the decision-maker determining that the document is not an exempt document¹⁰. Further, the IGIS *must* comply with the request unless the IGIS is of the opinion that they are not appropriately qualified to give evidence on the matters the subject of the request¹¹.
15. In the 2021/22 financial year, the Inspector-General received three requests for evidence from the IC. In each of these matters, the Inspector-General was of the opinion that they were not appropriately qualified to give evidence on the matters that were the subject of the request. As the IGIS submitted to the Comprehensive Review at the time, the process is nonetheless

⁸ Schedule 1, item 26. Paragraphs 33(1)(a) and (b) of the Archives Act provides that a record is an exempt record if it contains information or a matter the disclosure of which under the Act could reasonably be expected to cause damage to security, defence or international relations of the Commonwealth; or information or matter that was communicated by a foreign entity to a Commonwealth entity, which the foreign entity advises is confidential and the confidentiality is reasonable to maintain.

⁹ Section 17B(2)(b) of the Archives Act.

¹⁰ Sections 33, 55ZB and 60A of the FOI Act and 33(1)(a) and (b) and 50A of the Archives Act.

¹¹ Sections 55ZC and 60A(5) of the FOI Act and 50A(5) of the Archives Act.

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time-consuming and imposes a burden on IGIS's resources – and in most cases, the Inspector-General is not adding any value to the IC's or AAT's review.

16. The proposed amendments will limit the circumstances in which the IC or AAT must request the Inspector-General to give evidence.¹² That is, to matters involving documents or records that are claimed to be exempt national security documents or records¹³ and where the document or record relates, directly or indirectly, to the performance of functions or duties, or the exercise of the powers of an intelligence agency (being ASIO, ASIS, AGO, DIO, ASD or ONI) or the performance of an intelligence function of the AFP or ACIC¹⁴. In effect, the Inspector-General will only be requested, and required to provide evidence, in relation to matters involving agencies within IGIS's jurisdiction (and where it is reasonable to expect the IGIS may have relevant expertise to assist the IC or AAT in their review).
17. For completeness, pursuant to the proposed amendments, the IC or AAT will also not be able to request the Inspector-General to provide evidence in relation to IGIS's own documents or records¹⁵. Although there will be no independent body to provide expert evidence in these circumstances, the IGIS would have the opportunity to provide submissions in relation to the national security exemptions sought as a matter of course.

OMBUDSMAN ACT 1976

18. Schedule 1 Part 6 implements recommendation 167 of the Comprehensive Review, by expressly excluding ASIS, AGO, ASD, DIO and ONI from the Commonwealth Ombudsman's jurisdiction. Although the Ombudsman does not currently exercise jurisdiction over these agencies by convention as they are comprehensively overseen by the IGIS, the proposed amendments to the *Ombudsman Act 1976* will provide necessary legislative clarity. For completeness, the proposed amendments will also expressly exclude ASIO from the Ombudsman's jurisdiction on the face of the legislation, although ASIO is currently excluded from its jurisdiction pursuant to the *Ombudsman Regulations 2017*¹⁶. These amendments will not impact on the role of the IGIS in relation to these agencies.

OTHER AMENDMENTS

Intelligence Services Act 2001

19. Schedule 1 Part 9 proposes to amend the *Intelligence Services Act 2001* by repealing and replacing paragraph 6(1)(e). The IGIS understands that the amendment is intended to provide certainty regarding the level of detail required to describe the directed activities in a Ministerial direction under paragraph 6(1)(e), by making clear that the Minister may direct ASIS to undertake an activity or series of activities which can be of a general or specific nature, or by way of a class or classes. The activities undertaken by ASIS pursuant to a direction under paragraph 6(1)(e) continue to be subject to IGIS's oversight.

¹² Schedule 1, items 32, 33 and 34.

¹³ Under either s 33 of the FOI Act or s 33(1)(a) or (b) of the Archives Act.

¹⁴ Section 3 of the IGIS Act defines 'intelligence agency' for the purposes of that Act.

¹⁵ Schedule 1, items 32, 33 and 34; see also s 7(2A) of the FOI Act which provides that documents (including summaries or extracts of information from documents) that have originated with, or been received from the IGIS are exempt from the operation of the FOI Act.

¹⁶ See regs 6 and 7.

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Recommendation 66

20. Schedule 1 Part 2 of the Bill implements recommendation 66 of the Comprehensive Review¹⁷. The proposed amendments will introduce new defences into the *Criminal Code Act 1995* (the Criminal Code) for the offences in subsections 474.6(1) and (3) (interference with facilities), and s 477.2(1) (unauthorised modification of data to cause impairment) and 477.3(1) (unauthorised impairment of electronic communication). A person will not be criminally liable for these offences where the person is an ASIO officer acting in good faith and in the course of the person's duties, and the conduct of the person is reasonable in the circumstances for the purpose of performing that duty¹⁸.
21. The Bill introduces a new definition of 'ASIO officer' into the Criminal Code to which these new defences will apply. An 'ASIO officer' is defined to include the Director-General of Security, an ASIO employee or an ASIO affiliate¹⁹. The definitions of 'ASIO employee' and 'ASIO affiliate' are contained in the *Australian Security Intelligence Organisation Act 1979* (ASIO Act). The IGIS notes that the definition of 'ASIO affiliate' is potentially quite broad, as it covers persons performing functions or services for the Organisation in accordance with a contract, agreement, or other arrangement, and includes a person engaged under section 85 and a person performing services under an arrangement under section 87²⁰.
22. The IGIS notes that the effect of these amendments would allow ASIO officers to engage in conduct that may otherwise be an offence under the Criminal Code without a warrant in certain circumstances. The IGIS will oversee ASIO's compliance with these provisions in accordance with its usual practice.

Recommendation 136

23. Schedule 1 Part 4 implements recommendation 136 of the Comprehensive Review. The proposed amendments will introduce an exclusion for ASIO (including ASIO officers as newly defined) in the *Crimes Act 1914* (the Crimes Act) in relation to the disclosure, filing and recording, and use of spent conviction information²¹. As such, ASIO will be able to deal with spent conviction information for the purposes of the performance of the functions, or the exercise of the powers, of ASIO²². The IGIS will oversee ASIO's compliance with these provisions in accordance with its usual practice.

¹⁷ The IGIS notes that whilst recommendation 66 did not explicitly include a reference to the computer offences in s 477.2(1) and 477.3(1) of the Criminal Code, the Comprehensive Review did consider that ASIO officers should have a targeted defence to these offences in the broader commentary (see [24.65] of the Comprehensive Review).

¹⁸ Schedule 1, items 6, 8 and 9.

¹⁹ Schedule 1, item 5.

²⁰ Section 4, ASIO Act. Sections 85 and 87 of the ASIO Act are concerned with the engagement of consultants and contractors and persons seconded to ASIO, respectively.

²¹ Schedule 1, item 14.

²² Currently under s 85ZZH of the Crimes Act, ASIO (as an 'intelligence or security agency') can only use spent conviction information for the purposes of assessing prospective employees or members of the agency; or persons proposed to be engaged as consultants to, or perform services for, the agency or a member of the agency.