

## Submission to the Parliamentary Joint Committee of Intelligence and Security

### Review of the Intelligence Services Legislation Amendment Bill 2023

#### Outline and Summary

Thank you for the opportunity to make a submission to the public consultation on the proposed Review of the Intelligence Services Legislation Amendment Bill 2023 (“the ISLAB”).

This submission has been prepared in my capacity as a Senior Research Fellow of the T.C. Beirne School of Law at the University of Queensland. However, the views expressed below are entirely my own and are not representative of the School of Law, The University of Queensland or any other government, organisation or agency.

This submission addresses several challenges if the Bill was to be enacted in its present form. I have considered only certain sections and not provided comment on all sections in the Bill. However, the absence of specific statements in this submission should not be taken to be either an endorsement or rejection of those sections.

The aim of the Bill is to amend the Inspector-General of *Intelligence and Security Act 1986* (Cth) (“IGIS Act”) and the *Intelligence Services Act 2001* (Cth) (“IS Act”) to expand the jurisdiction of the Inspector-General of Intelligence and Security (IGIS) and to permit the Parliamentary Joint Committee on Intelligence and Security (PJCIS) to refer matters to the IGIS for potential inquiry.

I am happy to provide further clarification on any area of the submission.

#### Changes to the jurisdiction of the IGIS

Part 1 of the Bill contains the major amendments to the IGIS Act, such as amending the definition of “intelligence agency” under section 3 and inserting a new definition of the term “intelligence function” into section 3A (from section 3, where it currently resides). The changes would effectively move the Australian Criminal Intelligence Commission (ACIC) from an “agency with an intelligence function” to an “intelligence agency”, as well as bringing the Department of Home Affairs and AUSTRAC as new entrants to the definition of “intelligence agency”.

Under the existing IGIS Act, an intelligence function for both the ACIC and AFP relate only to the “the collection, correlation, analysis, production and dissemination of intelligence obtained by”, or during “the performance of a function, or the exercise of a power, conferred on a law enforcement officer of ACIC”, in respect of network activity warrants.

The new amendments would see all of the financial intelligence functions of AUSTRAC being captured by the proposed expanded definition,<sup>1</sup> as the function of AUSTRAC is to assist the AUSTRAC CEO,<sup>2</sup> and the AUSTRAC CEO’s functions relate predominantly to the analysis, production and dissemination of financial intelligence<sup>3</sup> (excepting, as the Explanatory Memorandum notes, AUSTRAC’s “regulatory”

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<sup>1</sup> IGIS Act, s 3A(3) (proposed).

<sup>2</sup> *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth), s 210.

<sup>3</sup> *Ibid*, ss 212(1)(a), (aa), (da) and (e).

functions<sup>4</sup> - however, that delineation ought to be included in the legislation). As the functions of AUSTRAC and the AUSTRAC CEO are embedded within, and form part of, the broader intelligence community of Australia, it is appropriate that the amendments bringing AUSTRAC into the IGIS jurisdiction are pursued.

*Commendation 1: I **commend** the Bill for bringing the operations of AUSTRAC into the inquiry functions of the IGIS.*

*Recommendation 1: I **recommend** that the Bill incorporate a further subsection (subsection 3A(4)) immediately following the proposed subsection headed “Meaning of **intelligence function** for AUSTRAC” that states:*

*(4) To avoid doubt, the functions mentioned in paragraphs (3)(a) and (b) of this section do not include:*

*(a) the function of the AUSTRAC CEO to promote compliance with the Anti-Money Laundering and Counter-Terrorism Financing Act 2006, the regulations and the AML/CTF Rules made under that Act; or*

*(b) other functions conferred on the AUSTRAC CEO by or under any other law of the Commonwealth.*

However, the same cannot be said for the expansion of the intelligence function inquiries under the IGIS to activities of the AFP undertaken to support all of its functions under sections 8(1)(b), (baa), (bd), (be), (bf), (bg) and (bh) of the *Australian Federal Police Act 1979* (Cth).<sup>5</sup> This would mean that all intelligence activities undertaken by the AFP in pursuit of the following would be subject to IGIS jurisdiction (as well as the existing provisions of network access warrants under the *Surveillance Devices Act 2004* (Cth)):

- a.) the provision of police services in respect of laws of the Commonwealth;
- b.) the investigation of State offences that have a federal aspect;
- c.) the perform functions under the Proceeds of Crime Act 2002 ; and
- d.) to perform such protective and custodial functions as the Minister directs by notice in writing in the Gazette, being functions that relate to a person, matter or thing with respect to which the Parliament has legislative power;
- e.) the provision of police services and police support services for the purposes of assisting, or cooperating with, an Australian or foreign law enforcement, intelligence, security and regulatory agencies;
- f.) the provision of police services and police support services in relation to establishing, developing and monitoring peace, stability and security in foreign countries; and
- g.) assist or cooperation with international organisations or NGOs outside Australia in relation to the provision of police services or police support services.

The intelligence functions provided by the AFP at both strategic and operational levels is incidental to, and in support of, the AFP’s law enforcement functions, i.e., the intelligence supports broader law enforcement investigations with a view to arrest, charge and prosecution of offenders. Though some of the mechanics of AFP intelligence operations will appear similar to those conducted by agencies such as ASIO and ASIS – assumed identities, controlled operations, covert surveillance – they are

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<sup>4</sup> Being those functions which entail the compliance monitoring and enforcement activities of AUSTRAC: Explanatory Memorandum to the Intelligence Services Legislation Amendment Bill 2023, 24 at [57].

<sup>5</sup> IGIS Act, s 3A(1) (proposed).

conducted for vastly different purposes, with different triggering conditions and with different evidentiary thresholds.

Further, what constitutes an “intelligence function” for the Department of Home Affairs would be prescribed by regulation.<sup>6</sup> Those regulations “may” (but do not have to) provide for consultation requirements in relation to changes relating to the performance of intelligence functions of the Department of Home Affairs; however, any changes must be approved by the Minister for Home Affairs.<sup>7</sup> Likewise, the intelligence functions of Home Affairs are not in the same category as those conducted by agencies like ASIO and ASIS, and are unlikely as amenable to oversight by the IGIS in the same manner.

The Bill is thus a significant expansion of the IGIS and raises several concerns.

Firstly, it remains unclear why this jurisdictional amendment is being sought. In fact, the Richardson Review precluded this particular recommendation when it recommended “*The IGIS should not have oversight of the Department of Home Affairs or the AFP as recommended in the 2017 [Independent Review]*”.<sup>8</sup> The reasons that the Richardson Review gave were compelling:<sup>9</sup>

*...new oversight mechanisms should only be introduced where there is a gap in existing oversight.*

...

*The NIC is significantly more disparate than the AIC... a ‘one size fits all’ approach is not appropriate...*

...

*The IGIS does not have oversight of any department of state. Also, the intelligence function in Home Affairs is not encapsulated in a semi-autonomous agency such as DIO. Rather, it is simply another division in a wider department. Home Affairs has existing and effective oversight mechanisms for a department of state. We question the value of adding more oversight.*

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*The AFP is a law enforcement agency, not an intelligence agency. To the extent that the AFP engages in intelligence collection activities, it does so in support of its policing functions. Its intelligence function is integrated across the organisation rather than being a stand-alone unit. Extending the IGIS’ oversight to the AFP’s ‘intelligence functions’ would be challenging, to say the least, given the dispersed nature of that function across the organisation.*

There is no evidence in the Explanatory Memorandum that explains why the Richardson Review’s recommendation is being rejected. Indeed, the Government’s response to the Richardson Review indicated that the recommendation was “*agreed*”, noting:<sup>10</sup>

*The Government agrees that the IGIS should not have oversight of the intelligence functions of the Department of Home Affairs or the AFP. The intelligence functions of the Department of Home Affairs and the AFP are subject to existing and effective oversight mechanisms given the scope and nature of these functions. Neither the Review, nor the 2017 IIR, identified a gap in the*

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<sup>6</sup> IGIS Act, s 3A(4) (proposed).

<sup>7</sup> IGIS Act, ss 3A(5) and (6)(proposed).

<sup>8</sup> The Richardson Review, vol 3, at 262.

<sup>9</sup> Ibid, vol 3, at 262, [40.99]-[40.101].

<sup>10</sup> *Commonwealth Government Response to the Comprehensive Review of the Legal Framework of the National Intelligence Community* (Commonwealth of Australia, December 2020) at 45.

*existing oversight of the Department of Home Affairs or the AFP that justified including these bodies in the jurisdiction of the IGIS.*

There is a significant change in policy being enacted with this amendment, and without sufficient reasoning being provided as to why the intelligence functions of the AFP and Department of Home Affairs would be brought within the jurisdiction of the IGIS, especially in the absence of support from the Government's independent reviewer.

*Recommendation 2: I **recommend** that the Bill be amended to ensure that the intelligence functions of the AFP and the Department of Home Affairs remain excluded from the jurisdiction of the IGIS.*

Secondly, even without the inclusion of the AFP and Department of Home Affairs, the proposed changes in the Bill represent a significant increase in scope of the IGIS without an increase in funding.

The March 2022 and October 2022 Portfolio Budget Statements do not indicate any additional funding to the IGIS in the Forward Estimates which would support such changes to their functions, nor were such funds observable in the Portfolio Additional Estimates Statements 2022-23. If the Bill were to pass, the IGIS is likely to require additional funding to stand up the oversight and monitoring functions in respect of AUSTRAC, the AFP and the Department of Home Affairs. If the IGIS is not appropriately resourced, there is a significant risk that the oversight and monitoring activities in relation to these agencies will be hampered or compromised.

*Recommendation 3: I **recommend** that, if Recommendation 2 is rejected, the IGIS be appropriately funded for the proposed expansion of its jurisdiction with respect to the AFP, AUSTRAC and Department of Home Affairs.*

### **Mismatch of oversight jurisdictions**

It is also unclear about the jurisdiction of the IGIS compared to the National Anti-Corruption Commission (NACC), which commenced operation on 1 July 2023. The NACC has jurisdiction to investigate "corrupt conduct" in respect of Commonwealth agencies, which will include the AGO,<sup>11</sup> and DIO,<sup>12</sup> both of which are NIC agencies within the jurisdiction of IGIS. The NACC jurisdiction will also include "Commonwealth entities" such as the AFP, ASIO, ACIC and the Department of Home Affairs.<sup>13</sup>

Although the IGIS may refuse to inquire into a complaint that is more properly made to the NACC,<sup>14</sup> and may refer such a complaint to the NACC,<sup>15</sup> there is no need to inform the NACC when the IGIS commences an inquiry under section 11 of the IGIS Act (even if the IGIS must consult with the Auditor-General and Commonwealth Ombudsman).<sup>16</sup>

*Recommendation 4: I **recommend** that the Bill be amended such that section 16 of the IGIS Act require the IGIS to consult with the NACC before commencing an inquiry into a matter relating*

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<sup>11</sup> *National Anti-Corruption Commission Act 2022* (Cth), s 11(1), Item 6 of the Table.

<sup>12</sup> *National Anti-Corruption Commission Act 2022* (Cth), s 11(1), Item 7 of the Table.

<sup>13</sup> *National Anti-Corruption Commission Act 2022* (Cth), s 7 picks up the same definition as the *Public Governance, Performance and Accountability Act 2013* (Cth), s 10(1) and the *Public Governance, Performance and Accountability Rule 2014* (Cth), s 7 and Sch 1.

<sup>14</sup> IGIS Act, s 11(4A)(4).

<sup>15</sup> IGIS Act, s 32D.

<sup>16</sup>

*to a Commonwealth agency, with a view to avoiding inquiries being conducted into that matter by the IGIS and the NACC.*

The Bill would also expose the actions of ACIC Examiners to inquiry by the IGIS – by virtue of the removal of subsection 8(3B) – without adequate explanation for the need for that inquiry. It is clear the intended amendments are to “bring the entirety of ACIC functions within the jurisdiction of the IGIS”; however, Examiners are not employees of the ACIC and are appointed precisely because of their independence and experience outside the ACIC. Further, they are appointed at the pleasure of, and on the conditions set by, the Governor-General.<sup>17</sup> The Governor-General may also remove the Examiner from their appointment for misbehaviour.<sup>18</sup>

Neither the 2017 Independent Intelligence Review<sup>19</sup> nor the Richardson Review recommended that Examiners should specifically form part of the jurisdiction of IGIS. Indeed, it was the independence of the role of Examiners which satisfied the Richardson Review that the compulsory powers exercisable by the ACIC was appropriate.<sup>20</sup>

The Commonwealth Ombudsman should retain their jurisdiction over Examiners only, with the remainder of the ACIC falling under the jurisdiction of IGIS.<sup>21</sup>

*Recommendation 5: I **recommend** that the Bill be amended to excise the conduct of ACIC Examiners from the jurisdiction of the IGIS, in the same manner as the current section 8(3B) of the Act, and all incidental amendments relating to ACIC Examiners in the Bill be omitted.*

#### **Direction by the PJCIS and expansion of its functions**

The Bill also would insert a new section 8AA into the IGIS Act, which would stipulate that the inquiry functions of the IGIS would be enabled by request by the PJCIS made under subsection 29(2A) of the IS Act. The Committee must not review certain matters or require the Inspector-General to disclose certain information (dealt with in a new subsection 29(3) of the IS Act and clause 1 of Schedule 1 to that Act).

The functions of the PJCIS would, consistent with the expanded IGIS jurisdiction, likewise be expanded to include the intelligence functions – as per the expanded definition above – of the AFP and Department of Home Affairs, as well as those of AUSTRAC (noting the excision of AUSTRAC’s “regulatory” functions).

A new section 22A in the IGIS Act would also compel the IGIS to produce a response to the PJCIS on any such referral made under ss 29(2A) of the IS Act, unless the IGIS “*is satisfied on reasonable grounds that doing so would prejudice security, the defence of Australia or Australia’s relations with other countries*”. The IGIS must also consult with the head of intelligence agencies involved in the inquiry as to the content of the written response to the PJCIS.

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<sup>17</sup> *Australian Crime Commission Act 2002* (Cth), ss 46B and 46J.

<sup>18</sup> *Ibid*, s 46H(1).

<sup>19</sup> Michael L’Estrange, Stephen Merchant, *2017 Independent Intelligence Review* (Final report, Commonwealth of Australia, June 2017).

<sup>20</sup> Richardson Review, vol 1, 290 at [13.31].

<sup>21</sup> Especially where the courts already permit oversight of the conduct of examiners: *X7 v Australian Crime Commission* [2013] HCA 29; 248 CLR 92; 87 ALJR 858.

The subsection 29(2A) and (2B) of the IS Act would then enliven the PJCIS referral of any matter for inquiry by the IGIS by resolution, inclusive of whether or not the functions of the PJCIS actually include reviewing the matter so referred:

*(2A) The Committee may, by resolution, request the Inspector-General of Intelligence and Security to inquire into a matter (whether or not the functions of the Committee include reviewing the matter) under section 8AA of the Inspector-General of Intelligence and Security Act 1986 if the matter:*

*(a) relates to the legality and propriety (however described) of the operational activities of an agency; and*

*(b) is within the functions of the Inspector-General mentioned in that section; and*

*(c) does not relate to an individual complaint about the activities of the agency.*

*Note: The Committee must not review certain matters or require the Inspector-General to disclose certain information (see subsection (3) of this section and clause 1 of Schedule 1 to this Act).*

*(2B) The Committee must provide a copy of the request to the Minister responsible for the agency to which the matter relates.*

It is to be recalled that the IGIS has substantial compulsory investigative powers in furtherance of their inquiry functions, similar in many ways to a Royal Commission. The IGIS may summon witnesses, to question under oath, enter the premises of intelligence agencies and access all relevant information and documents.<sup>22</sup> Although the manner and exercise of the powers of the IGIS remain entirely at the discretion of the IGIS, and there is no capacity for the PJCIS to influence how, where and when the IGIS exercises those powers, there remains a significant degree of unease coupling a Parliamentary Committee with an agency with such power.

Firstly, there is a danger that the PJCIS – as a Committee of Parliament, an inherently political organisation – infect the IGIS (an independent statutory officeholder) with politicised referrals or demands for inquiries. The Richardson Review found that “*while both the IGIS’ substantive capacity and public perception of that substantive capacity are important, ultimately it was most important for the IGIS to be impartial and independent*”.<sup>23</sup>

Secondly, there is no requisite for any referral from the PJCIS to the IGIS to be connected to the functions of the Committee in the IS Act. The PJCIS is essentially empowered to refer any matter it deems worthwhile to the IGIS who must, subject to the provisions of section 11, conduct an inquiry into it.

Thirdly, the expansion of the PJCIS into the operational activities of AUSTRAC and the intelligence functions of the AFP and Department of Home Affairs runs the risk of compromising the functions of at least one other Parliamentary Committee (the Parliamentary Committee on Law Enforcement, which currently oversees the performance of the ACC and the AFP as well as undertakes parliamentary supervision of the unexplained wealth provisions of the *Proceeds of Crime Act 2002* (Cth)).

Fourthly, this amendment is entirely in conflict with the recommendations from two prior independent reviews of the intelligence legislation. Recommendation 180 of the Richardson Review

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<sup>22</sup> IGIS Act, ss 17, 18, 19, 19A.

<sup>23</sup> The Richardson Review, vol 3, at 278.

was succinct in expressing that “*The remit of the Parliamentary Joint Committee on Intelligence and Security should not be expanded to include direct oversight of operational activities, whether past or current*”. That recommendation supported a finding of the earlier 2017 Independent Intelligence Review, which concluded “*giving the PJCIS a role to conduct its own inquiries into the operations of the intelligence agencies would duplicate the reporting requirements already in place for AIC agencies in respect of the IGIS. It would also duplicate resourcing needs of the IGIS and PJCIS and it could result in simultaneous inquiries by both the PJCIS and the IGIS on the same issue*”.<sup>24</sup>

I am not aware of any Parliamentary Committee in the world which could:

- consider a matter which falls outside the functions given to that Committee by statute;
- seek the investigation of that matter by an independent body, headed by a statutory officer, with the invasive powers of a Royal Commission; and
- compel that independent body to provide it a written response on that matter at the conclusion of its inquiries (subject to a limited number of exemptions).

This proposal sets a dangerous precedent for Australian Parliamentary Committees, and I would urge Parliament to reconsider the nature of these amendments. The potential duplication of effort between the PJCIS and IGIS on the same issue, the overlap with the Parliamentary Committee on Law Enforcement, the risk of political interference into the operations of the IGIS, the risk of leaked sensitive or classified information, and the imposition on the IGIS of a mandated inquiry at the request of the PJCIS all tell against the usefulness of the proposed provision.

*Recommendation 6: I recommend that section 29(2A) and (2B) of the IS Act, as well as the incidental amendments in sections 8AA and 22A in the IGIS Act, be omitted in their entirety.*

### **Inclusion of section invoking “reasonably could” test for IGIS inquiries**

Section 11(1) of the IGIS Act compels the IGIS to inquire into action if two conditions are satisfied: firstly, that a complaint is made to the IGIS in respect of an action taken by an intelligence agency, and secondly inquiring into the complaint is within the functions of the IGIS contemplated by section 8. The inquiry is subject to the remainder of section 11.

The Bill would insert a new section 11(1)(aa), which imposes a third condition requiring that “*the Inspector-General is satisfied that the action is the kind of action that is reasonably likely to be taken by an intelligence agency*”. A Note would also be inserted at the end of section 11(1) stating that “*For paragraph (aa), action includes the making of a decision or recommendation, and the failure or refusal to take any action or to make a decision or recommendation (see subsection 3(2))*”.

The Explanatory Memorandum to the Bill states that this provision is “*necessary to clarify the IGIS’s complaint handling functions in circumstances where activity alleged in a complaint is considered to be implausible or otherwise not credible*”.<sup>25</sup>

However, there are two issues with such a provision.

Firstly, if the IGIS is concerned that a complaint made to him or her is not plausible or otherwise not credible, the IGIS is already vested with a power to decline to inquire into the action if “*having regard to all the circumstances of the case, an inquiry, or further inquiry, into the action is not warranted*”.<sup>26</sup>

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<sup>24</sup> Michael L’Estrange, Stephen Merchant, *2017 Independent Intelligence Review* (Final report, Commonwealth of Australia, June 2017) at [7.43].

<sup>25</sup> Explanatory Memorandum to the Intelligence Services Legislation Amendment Bill 2023, 32 at [114].

<sup>26</sup> IGIS Act, s 11(2)(c).

This power is entirely discretionary and exercisable by the IGIS having reached the requisite state of mind, and is not subject to review.<sup>27</sup> It is not immediately apparent why the new provision of 11(1)(aa) is required.

Secondly, and connected to that issue, the IGIS may refuse to inquire into complaints of inappropriate, unethical or unlawful behaviour by Australian NIC agencies on the basis that the action is not “*of a kind reasonably likely to have been taken by an intelligence agency*”. Even the suggested safeguard in the Explanatory Memorandum that “*this does not require the Inspector-General to be satisfied that the action has actually been taken by an intelligence agency, only that there is a reasonable likelihood that the intelligence agency could or would undertake that activity*”.<sup>28</sup>

Consider – as an extreme example – the conduct of the plaintiffs in *A v Hayden*,<sup>29</sup> in which trainees of ASIS brandished replica firearms in the lobby of a Melbourne hotel, kidnapped a hotel manager and damaged public property during a training exercise. If a complaint of similar activity was made to the IGIS with this new provision in place, the IGIS could reasonably refuse to inquire into the conduct because the kidnapping of a hotel manager is not conduct “*of a kind reasonably likely to have been taken*” by ASIS.<sup>30</sup>

It is one thing to conclude at the end of an inquiry that the activity was not one undertaken by the NIC agency in question; it is another thing entirely to preclude an inquiry on the grounds that it is was not conduct “*reasonably likely*” to have been undertaken by the agency. It would be hard to believe that any NIC agency would ever be “*reasonably likely*” to engage in conduct that is a.) in contravention of Australian law, b.) falling short of standards of propriety, or c.) discriminatory. However, it is precisely the purpose of the IGIS to inquire into such matters and be satisfied that our NIC agencies – vested as they are with some of the most intrusive and secretive powers available in a democratic country – are doing so ethically, lawfully, and compliant with all necessary procedures and policies.

*Recommendation 7: I recommend that section 11(aa) of the IGIS be omitted in its entirety.*

### **Security clearances for PJCIS members**

Item 80 of the Bill would replace section 21 of Schedule 1 of the IS Act with a new section, which reduces the security clearances required for PJCIS members. Presently the obligation is for PJCIS members to be cleared to the “*same level and at the same frequency as staff members of ASIS*”. This would be amended to “*a level and frequency: (a) appropriate for access to information and systems at the classification that the staff member requires, in accordance with government policy in relation to protective security; and (b) acceptable to all of the agency heads*”.

Although the Richardson Review made no recommendations about the security clearances for Committee members, it did note that the UK National Security and Intelligence Committee of Parliamentarians (roughly analogous to the PJCIS) were required to hold top secret security clearances to review agency operations.<sup>31</sup>

The amendment is said to be needed for “*practical implications of the change in the PJCIS’s work over time, including the increase in public hearings. Much of the work of the staff of the PJCIS does not*

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<sup>27</sup> *Administrative Decisions (Judicial Review) Act 1977* (Cth), s 3 and Sch 1.

<sup>28</sup> Explanatory Memorandum, 32 at [114].

<sup>29</sup> [1984] HCA 67; 156 CLR 532; 56 ALR 82.

<sup>30</sup> Not least of which because the functions of ASIS must not plan for, or undertake, activities that involve violence against the person or the use of weapons by staff members or agents of ASIS: IS Act, s 6(4).

<sup>31</sup> The Richardson Review, vol 3, 251 at [40.60].



*require a high level of security clearance. Obtaining high level security clearances is a lengthy process and one which may entail significant intrusions on the privacy of the person obtaining the clearance. PJCIS staff should only need to hold security clearances that are commensurate with the classification and sensitivity of the information and matters they observe”.*<sup>32</sup>

Taken together, these amendments should be viewed with concern – the PJCIS wishes to have oversight responsibilities with regards to the operational activities of NIC agencies (as evidenced by the referral pathway in s 29(2A) of the IS Act) but does not wish to also hold security clearances to the same level as employees of ASIS (as evidenced by the amendment to Sch 1, section 21 of the IS Act). It is even more concerning that Parliament should consider making these amendments despite both international practice and two independent intelligence reviews warning against precisely this course of action.

Effectively, the PJCIS should have one or the other – either they have a lower level of security clearance and are happy with higher-level and less granular picture of national security matters brought before them, **or** they are given operational-level oversight but retain security clearances to the highest possible standards.

There can be no doubt that the PJCIS is a vitally important function in the democratic functioning of Parliament, and that the members of the PJCIS strive to uphold the confidentiality and secrecy of the information they are provided with. At the same time, there is no sense in increasing the invasiveness of the PJCIS’ oversight of NIC agencies operational activities at the same time as withdrawing or reducing the safeguards intended to protect the information obtained or provided to the PJCIS in respect of those activities. Classified information that is compromised accidentally is no different to classified information that is compromised negligently or deliberately – one cannot shut the door after the horse has bolted.

*Recommendation 8: I **recommend** that section 21 of Schedule 1 of the IS Act only be enacted if the referral pathway from the PJCIS under the proposed section 29(2A) of the IS Act is omitted.*

*Recommendation 8A: Alternately, I **recommend** that if the proposed section 29(2A) of the IS Act is retained, then the amendments proposed in section 21 of Schedule 1 of the IS Act are omitted in its entirety.*

## **Conclusion**

There are some significant concerns with the proposed amendments to the IGIS Act and IS Act. Although the expansion of the jurisdiction of IGIS to include AUSTRAC is welcomed (as it will harmonise the oversight of one of Australia’s most important intelligence agencies), there are several amendments which seem to run counter to recent reviews of Australia’s intelligence legislation. In particular, the expansion of the PJCIS’ jurisdiction into the referral of operational activities to the IGIS runs counter to at least two independent legislative reviews and global practice in the oversight of intelligence activities.

Thank you for the opportunity to make this submission.

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<sup>32</sup> Explanatory Memorandum at 56 [296].