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**At the Committee's classified hearing on 26 February 2020 for its *Review of Administration and Expenditure No 18. (2018-19)*, the Inspector-General of Intelligence and Security took a question on notice from Senator Fawcett regarding possible reforms to the public interest disclosure scheme.**

*The question concerned whether the IGIS could provide a report (classified or unclassified) to the Parliamentary Joint Committee on Intelligence and Security on the following matters:*

- a) the number of disclosures made under the Public Interest Disclosure Act 2013 by current and former employees of intelligence agencies (either within the intelligence agency of which they are employed, or to the IGIS),*
- b) the number of disclosures allocated by an authorised officer of an intelligence agency to that intelligence agency for investigation, and the number of allocated disclosures that are not investigated, and*
- c) whether the IGIS identified any issues of legality or propriety in the decision-making of the authorised officers mentioned in paragraphs (b)?*

## 1. Answer

**(a)** The Inspector-General of Intelligence and Security (IGIS)'s public annual reports include statistical reporting on the number of disclosures made to the IGIS that relate to an intelligence agency within the IGIS's jurisdiction. IGIS annual reports also includes statistical reporting on disclosures made within the intelligence agencies and allocated for investigation by the agency.

Statistical reporting does not extend to disclosures that are not allocated to an agency for investigation (that is, where the authorised officer is 'satisfied, on reasonable grounds, that there is no reasonable basis on which the disclosure could be considered to be an internal disclosure').<sup>1</sup> The *Public Interest Disclosure Act 2013* (PID Act) does not require intelligence agencies to notify the IGIS of these disclosures. This is consistent with the position for non-intelligence agencies who are not required to report such cases to the Ombudsman.<sup>2</sup> However, when an authorised officer decides not to allocate a PID because they are 'satisfied, on reasonable grounds, that there is no reasonable basis on which the disclosure could be considered to be an internal disclosure' they must advise the person of other courses of action that might be available to them under other laws of the Commonwealth. In the case of matters involving the actions

<sup>1</sup> *Public Interest Disclosure Act 2013*, s 43(2); see also s 26(1), Item 1

<sup>2</sup> The Office of the Commonwealth Ombudsman has advised that Commonwealth agencies are no longer required to report the number of disclosures assessed by the authorised officer as failing to meet the threshold of a public interest disclosure as defined under the Act – see Commonwealth Ombudsman, *Annual Report 2018-19*, p. 111.

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of intelligence agencies, this would include advising the person that they could make a complaint to the IGIS.<sup>3</sup>

**(b)** The IGIS includes statistical reporting on disclosures allocated under the PID Act in the IGIS annual report.<sup>4</sup> Intelligence agencies are required to notify the IGIS if their principal officer decides not to investigate a disclosure that has been allocated, and the reasons for that decision.<sup>5</sup> The IGIS is not aware of any intelligence agency decision to not investigate a disclosure in the 2018-19 reporting period. Outside the latest reporting period, however, intelligence agencies have occasionally advised the IGIS of a decision not to investigate a disclosure under the PID Act, but rather examine the substance of the disclosure under more appropriate legislation (such as for the purposes of investigating allegations of fraud).<sup>6</sup>

**(c)** If, in fulfilling the oversight responsibilities of the PID Act or the *Inspector-General of Intelligence and Security Act 1986* (IGIS Act), the IGIS were to become concerned about a decision of an officer of an intelligence agency relating to the public interest disclosure scheme, it would be open to the IGIS to include unclassified details of that concern in an annual report. Importantly, however, of the PID Act decisions reviewed to date, no such concerns have arisen.

In addition to annual reporting, IGIS public submissions to the PJCIS' annual review of administration and expenditure contain information about the IGIS's responsibilities under the PID Act and IGIS Act (including receiving disclosures and overseeing agencies' handling of disclosures). If the Committee were to require further information, the IGIS could elaborate in an appropriate setting, either as part of a classified hearing for an administration and expenditure review, or at a separate briefing.

## 2. Clarifying 2018-19 statistical reporting

IGIS understands that there may have been some confusion regarding the reported number of PIDs in our Annual Report and ASIO's submission to the Committee's current review.

IGIS notes that ASIO's unclassified submission to the *Review of Administration and Expenditure No 18 (2018-19)* advised the Committee that during 2018-19 no disclosures were received by that agency.<sup>7</sup> The IGIS 2018-19 Annual Report similarly notes that ASIO reported to the IGIS having received no disclosures in the same period.<sup>8</sup>

However, it is noted elsewhere in the Annual Report that the IGIS received one disclosure from an employee or ex-employee of ASIO.<sup>9</sup> For clarity, this was a disclosure made to the IGIS directly from a current or former ASIO employee. IGIS understands that the same matter was not the subject of a disclosure to ASIO. Under the PID Act a current or former ASIO employee may make a disclosure *either* to an authorised officer within their agency or directly to the IGIS.<sup>10</sup>

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<sup>3</sup> *Public Interest Disclosure Act 2013*, s 44(3)(b).

<sup>4</sup> In 2018-19, for example, ASD reported one PID to the IGIS; in 2017-18 ASD had five PIDs and ASIO had four PIDs. See IGIS, *Annual Report 2018-19*, p. 61; *Annual Report 2017-18*, p. 42.

<sup>5</sup> *Public Interest Disclosure Act 2013*, s 50A.

<sup>6</sup> *Public Interest Disclosure Act 2013*, s 48(1)(f)-(g).

<sup>7</sup> ASIO, *Submission to PJCIS Review of Administration and Expenditure No 18 (2018-19)*, (Submission 9), p. 35.

<sup>8</sup> IGIS, *Annual Report 2018-19*, p. 61.

<sup>9</sup> IGIS, *Annual Report 2018-19*, p. 60.

<sup>10</sup> *Public Interest Disclosure Act 2013*, s 34 (Item 2(b) of the table).

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### Appendix: IGIS role under the PID Act

The IGIS has two primary responsibilities in the public interest disclosure scheme. First, the IGIS may receive and, where appropriate, investigate disclosures under the PID Act about suspected wrongdoing within the intelligence agencies. Second, the IGIS oversees the operation of the public interest disclosure scheme in intelligence agencies, including where a disclosure is made internally within an intelligence agency.

This second function extends to intelligence agencies' decisions about whether the disclosure satisfies the relevant definition in the PID Act, and decisions not to investigate the disclosure. For example, if a discloser is unsatisfied with any decision made by an intelligence agency relating to their internal disclosure, including whether the disclosure satisfied the relevant thresholds in the PID Act, the discloser may make a complaint to the IGIS under the IGIS Act about that conduct.

In addition to the above responsibilities, the IGIS has a statutory function to assist intelligence agencies (through education and awareness activities), and current or former public officials of those intelligence agencies, in relation to the operation of the PID Act.<sup>11</sup> On occasion, agencies have sought guidance from the Office where there is doubt about how to handle an internal disclosure.

Further, there are positive legal obligations on the IGIS to report publicly on the Office's activities during each financial year.<sup>12</sup>

#### *Intelligence agencies required to notify the IGIS of certain matters*

Intelligence agencies are required to notify the IGIS of certain matters, including:

- if an authorised officer of an intelligence agency allocates a disclosure for investigation by the intelligence agency,<sup>13</sup> and
- if a principal officer of an intelligence agency decides not to investigate a disclosure that has been allocated under the PID Act, and the reasons for that decision.<sup>14</sup>

A discloser must also be informed of these decisions as well as other courses of action that might be available to the discloser under other laws of the Commonwealth.<sup>15</sup> Where the substance of the disclosure relates to an intelligence agency, the discloser may make a complaint to the IGIS under the IGIS Act regarding:

- a refusal to allocate a disclosure (for example, on the basis that the disclosure did not satisfy the relevant criteria), or
- the way a disclosure is allocated, or
- a decision to not investigate the matter after the disclosure is allocated.

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<sup>11</sup> *Public Interest Disclosure Act 2013*, s 63.

<sup>12</sup> *Inspector-General of Intelligence and Security Act 1986*, s 35; see also *Public Governance, Performance and Accountability Act 2013*, s 46.

<sup>13</sup> *Public Interest Disclosure Act 2013*, s 44(1A)(b). As noted above, there is no requirement for the IGIS to be notified where an authorised officer decides not to allocate a disclosure but the authorised officer must inform the person of other courses of action open to them which, in this context, would include making a complaint to IGIS.

<sup>14</sup> *Public Interest Disclosure Act 2013*, s 50A.

<sup>15</sup> *Public Interest Disclosure Act 2013*, s 44(2)-(3) and 50.

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Irrespective of whether the discloser makes a complaint to the IGIS or whether the disclosure meets the legal threshold of the PID Act for investigation, the IGIS may independently decide to use her powers under the IGIS Act in relation to decisions made by intelligence agencies under the PID Act.<sup>16</sup> This action could include conducting an inspection of the relevant agency,<sup>17</sup> and commencing a formal inquiry if serious matters of concern are identified.<sup>18</sup>

### *Current annual reporting by the IGIS*

#### *IGIS Annual reports*

IGIS Annual Reports include statistical reporting of:

- disclosures to the IGIS (that concern matters relating to the Office of the IGIS and the six intelligence agencies within the IGIS's jurisdiction), and
- disclosures made to the six intelligence agencies that have been allocated for investigation within that agency.

In relation to **disclosures to the IGIS**, to the extent possible in a public document, annual reports provide details of how the matter was investigated by the IGIS, including where the substance of the matter raised under the PID Act was investigated under the IGIS Act.<sup>19</sup>

Where relevant, annual reports also include an explanation of where a disclosure about an intelligence agency was made to the IGIS but not investigated. For example, the IGIS's 2018-19 Annual Report notes an instance in which investigation of a disclosure did not proceed because the discloser withdrew the claim in order to pursue internal avenues.<sup>20</sup>

In relation to **oversight of disclosures made within the six intelligence agencies**, IGIS annual reports include information about activities undertaken by the Office to review the legality and propriety of decision-making under the PID Act.

If, in fulfilling the oversight responsibilities of the PID Act (or the IGIS Act), the IGIS were to become concerned about a decision of an officer of an intelligence agency relating to the public interest disclosure scheme, it would be open to the IGIS to include unclassified details of that concern in an annual report for the relevant reporting period.

#### *Contributions to annual reports by the Commonwealth Ombudsman*

The IGIS also has a role in meeting annual reporting obligations by collecting and collating the intelligence agencies' responses to the Commonwealth Ombudsman's annual PID survey. IGIS performs this role to ensure the protection of classified details relating to the intelligence agencies. Information about the IGIS's performance of its educative functions are also reported on by the Commonwealth Ombudsman.<sup>21</sup>

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<sup>16</sup> *Public Interest Disclosure Act 2013*, s 49.

<sup>17</sup> *Inspector-General of Intelligence and Security Act 1986*, s 9A.

<sup>18</sup> *Inspector-General of Intelligence and Security Act 1986*, s 8.

<sup>19</sup> For example, see IGIS, *Annual Report 2018-19*, 'Case Study 6: Disclosure alleging maladministration', p. 61.

<sup>20</sup> See Inspector-General of Intelligence and Security, *Annual Report 2018-19*, p. 60.

<sup>21</sup> *Public Interest Disclosure Act 2013*, s 76. See Commonwealth Ombudsman, *Annual Report 2018-19*, p. 119.