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Secretary

Parliamentary Joint Standing Committee on Intelligence and Security, Parliament of  
Australia

Parliament House, Canberra ACT

via [pjicis@aph.gov.au](mailto:pjicis@aph.gov.au)

Dear Secretary,

### **Inquiry into the Intelligence Services Legislation Amendment Bill 2023**

Please consider our joint submission to the Parliamentary Joint Standing Committee on Intelligence and Security's inquiry into the Intelligence Services Legislation Amendment Bill 2023 (hereafter 'the Bill').

In line with ASPI's Charter, this submission does not reflect a single ASPI perspective and is the opinion of the two individual authors. Nor does this submission represent the views of the Australian government or any government agency.<sup>1</sup>

This submission will argue that while the fundamentals of intelligence oversight in Australia are already sound, the measures in the Bill will further improve those arrangements. In arguing for passage of the Bill, this submission also recommends that the origins of the measures in the recommendations of the 2017 Independent Intelligence Review be acknowledged; that the nature of briefings sought via the Bill be clarified; and that the role of the Inspector-General of Intelligence & Security (IGIS) be confirmed as the key oversight body with exclusive powers to investigate and review operational matters.

#### **Background to the Bill**

We welcome the introduction of the Bill, noting it gives effect to recommendations 21 and 23 of the Independent Intelligence Review authored by Mr Michael L'Estrange AO and Mr Stephen Merchant PSM. The public version of their review (hereafter '2017 Review'), with its recommendations, was released in June 2017.<sup>2</sup> ASPI has published recent work in

<sup>1</sup> Noting Mr Taylor is on secondment to ASPI from the Australian Government, see <https://www.aspi.org.au/bio/chris-taylor>.

<sup>2</sup> Department of the Prime Minister & Cabinet, *2017 Independent Intelligence Review*, Australian Government, June 2017

relation to the enduring value of the 2017 Review and the lessons it provides for the next review of Australia's National Intelligence Community (NIC).<sup>3</sup>

The two recommendations in question were:

Recommendation 21 – 'The oversight role of the Parliamentary Joint Committee on Intelligence and Security and the Inspector-General of Intelligence and Security be expanded to apply to all ten agencies within the National Intelligence Community, with oversight of the Australian Federal Police, the Department of Immigration and Border Protection, and the Australian Criminal Intelligence Commission limited to their intelligence functions, and with current oversight arrangements in relation to the Office of National Assessments applied to the Office of National Intelligence.' (paragraphs 7.19 to 7.27)

Recommendation 23 – 'The role of the Parliamentary Joint Committee on Intelligence and Security (PJCIS) be expanded by amending relevant legislation to include:

- a) a provision enabling the PJCIS to request the Inspector-General of Intelligence and Security (IGIS) conduct an inquiry into the legality and propriety of particular operational activities of the National Intelligence Community (NIC) agencies, and to provide a report to the PJCIS, Prime Minister and the responsible Minister;
- b) a provision enabling the PJCIS to review proposed reforms to counter-terrorism and national security legislation and to review all such expiring legislation;
- c) provisions allowing the PJCIS to initiate its own inquiries into the administration and expenditure of the ten intelligence agencies of the NIC as well as proposed or existing provisions in counter-terrorism and national security law, and to review all such expiring legislation;
- d) provisions enabling the PJCIS to request a briefing from the Independent National Security Legislation Monitor (the Monitor), to ask the Monitor to provide the PJCIS with a report on matters referred by the PJCIS, and for the Monitor to provide the PJCIS with the outcome of the Monitor's inquiries into existing legislation at the same time as the Monitor provides such reports to the responsible Minister; and
- e) a requirement for the PJCIS to be regularly briefed by the Director-General of the Office of National Intelligence and separately by the IGIS.' (paragraphs 7.28 to 7.47)

Unfortunately, it has taken six years for these two recommendations to be implemented. It is to the credit of the current government, and specifically the Attorney-General, that this is finally being taken forward. It is surprising, however, that neither the Attorney-General's second reading speech of 22 June 2023 nor the Bill's Explanatory Memorandum refers to the 2017 Review or to the recommendations upon which the Bill is based.

This is disappointing, not simply because it would be a suitable acknowledgement of the origins of the Bill but also because it de-links the Bill and its measures from the more general conclusions reached by L'Estrange and Merchant in relation to the oversight architecture for Australian intelligence. Namely, that:

'[W]e consider the broad architecture of Australia's oversight arrangements remains appropriate and does not require fundamental change. Rather, our

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<sup>3</sup> Chris Taylor, *Informing Australia's next independent intelligence review: Learning from the past*, ASPI Special Report, June 2023, available at <https://www.aspi.org.au/report/informing-australias-next-independent-intelligence-review-learning-past>



recommendations [...] focus on the components of the architecture. We consider changes are needed to some of these components to ensure they are able to cope with the increasing complexity and size of Australia's modern national intelligence enterprise.<sup>4</sup>

It is our view that this conclusion remains sound and valid today.

The measures in the Bill will enhance components of the architecture by addressing the increasing complexity of intelligence and the intelligence enterprise cited in the 2017 Review. But the fundamental features of the Australian system of intelligence oversight, tried and tested over the past four decades, do not need alteration.

This isn't a case of 'if it ain't broke don't fix it', as there is certainly a need for constant improvement and adaptation to domestic and global circumstances, including changes to threats and technology. Rather, the current architecture remains best suited to the oversight of Australian intelligence and the adaptation needed is a strengthening of the current components, both individual and collective, as they were in 2017. This extends to the respective roles of the PJCIS and the IGIS, as explored further below.

This need for constant improvement even where the broad architecture is determined to be sound is another reason the absence of reference to the 2017 Review was a missed opportunity to reinforce the broader utility of periodic intelligence reviews in Australia since 2004, of which the 2017 Review was one notable contribution. That utility is vital as these periodic reviews ensure the intelligence community is not only reviewed after an intelligence-related incident or failure. Of course, there wouldn't have been a need for this specific reference, or indeed this Bill, if the 2017 recommendations had been implemented earlier.

#### Expansion of Oversight for a *National Intelligence Community*

The Bill expands the remits of the PJCIS and the IGIS to all ten agencies of the NIC, to include the Australian Criminal Intelligence Commission (ACIC) and the intelligence functions of the Department of Home Affairs, the Australian Transaction Reports and Analysis Centre (AUSTRAC) and the Australian Federal Police. This represents a minor modification to the 2017 Review's recommendation 21, through inclusion of the ACIC in whole and AUSTRAC in part (whereas the review recommended the reverse).

This expansion of the PJCIS and IGIS remits is welcome (as is the alteration noted, given AUSTRAC's significant regulatory, non-intelligence functions) and reflects the post-2017 development of a more comprehensive intelligence community to meet the myriad challenges facing Australian national security.

There is a potential hazard associated with the cross-over of these expanded remits for intelligence oversight with existing oversight mechanisms applying to some of the same agencies (for example the National Anti-Corruption Commission and the Parliamentary Joint Committee on Law Enforcement). Nonetheless these hazards of demarcation can be addressed effectively through ongoing management and awareness on the part of the PJCIS and the IGIS, and their counterparts.

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<sup>4</sup> 2017 *Independent Intelligence Review*, p.111

### Enhanced review responsibilities in relation to legislation

In line with recommendation 23(b) of the Review, the Bill will afford the PJCIS the ability to, at its own initiative, review proposed reforms to counter-terrorism and national security legislation, and all such expiring legislation.

This is a similarly welcome initiative and reflects the consistent and material contribution made by the PJCIS to the development and honing of legislation affecting Australian intelligence, since the passage of the *Intelligence Services Act 2001*.

### (Indirect) Operations oversight for PJCIS –via referral to IGIS

A key finding of the 2017 Review was that, having considered the cases made for and against extension of the PJCIS's responsibilities to include conducting its own inquiries into the operations of intelligence agencies, such operational oversight should remain the preserve of the IGIS and their office:

'In our view, it is appropriate and effective for the primary oversight of the legality and propriety of operations conducted by intelligence agencies to be carried out by the IGIS Office. With the exception of New Zealand, none of the Five Eyes partners has an oversight body directly comparable to the IGIS. Our recommendations concerning the IGIS [...] are designed to ensure that the IGIS Office can exercise comprehensive and rigorous oversight of intelligence community operations. We assess there is significant practical benefit in having the required expertise located in a single body, backed by appropriate powers and independence. 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>5</sup>

We believe this finding remains relevant today.

The 2017 Review recommended an alternative, as mirrored in the Bill, to empower the PJCIS to be able to request the IGIS conduct an inquiry into the legality and propriety of particular operational activities of NIC agencies.

In doing so the 2017 Review noted that this 'strengthening of the connection between the PJCIS and the IGIS' would 'increase the Parliament's visibility of the issues raised by the activities of the intelligence agencies without introducing duplication'.<sup>6</sup>

It would also better reflect the circumstances particular to Australian intelligence oversight, including the unique capabilities and experience, and existing remit, of the Office of the IGIS – compared to the circumstances prevailing in other (otherwise comparable) jurisdictions.<sup>7</sup>

We concur with the 2017 Review authors and support the related measure included in the Bill, in the terms drafted. Furthermore, we state our strong opposition to alternative measures seeking to dilute IGIS's exclusive conduct of inquiries into operational activities

<sup>5</sup> 2017 *Independent Intelligence Review*, p.124

<sup>6</sup> 2017 *Independent Intelligence Review*, p.124

<sup>7</sup> 2017 *Independent Intelligence Review*, pp.123-124



(as for example represented in the Parliamentary Joint Committee on Intelligence and Security Amendment Bill 2015). Such alternatives would be duplicative and sub-optimal in effect, as was concluded by the 2017 Review.

It is unfortunate, but should have come as no surprise, that the delay between 2017 and the introduction of this Bill has invited the revival of alternatives that lack the prudence of the measure recommended by L'Estrange and Merchant and given effect here. Undoubtedly it is an extension of PJCIS powers, but this recommendation does not provide the PJCIS with the ability to conduct its own inquiries into intelligence operations – rather, it allows the PJCIS to ask the appropriate body to consider undertaking an inquiry and to provide 'a' report back to the PJCIS, noting the full extent and nature of that report would be up to the IGIS and would not require inappropriate release of operational detail to the PJCIS.

Those who might be concerned about this change and/or see it as a 'slippery slope' to the duplication and sub-optimality referred to above will nonetheless be reassured by the historic confidence held by the public and intelligence community in the PJCIS and its work. This confidence should be nurtured and valued, not imperilled.

Indeed, it is our strong view that the PJCIS has been the most significant of parliamentary committees as it has transcended petty partisan politics largely because of its structure, substantive work in private hearings and the trust between its membership and the intelligence community. While all the committees of the parliament do important work, the missions of the intelligence community, dealing with life and death issues such as counter terrorism as well as matters that go to the heart of our democratic institutions such as countering foreign interference, mean the PJCIS cannot afford to become subject to routine political compromise and deal making. It would be regrettable if the ability for our intelligence community to protect Australian society and democracy ended up hampered by political deal making that is, whether we like it or not, otherwise part and parcel of the proceedings of the parliament. What has been built since the establishment of the PJCIS in 2001 should not be lost.

This is not to dismiss that there may well be some practical implementation issues associated with the proposed referral process from the PJCIS to IGIS. This includes the need to institute working arrangements between the PJCIS and the IGIS to prevent inadvertent confirmation of operationally sensitive information (such as the existence of an operational activity itself) in the subsequent reporting from the IGIS to the PJCIS (or indeed on an occasion at which the IGIS advises that they will not report either due to operational sensitivity or an independent IGIS view that the matter is not relevant). This will also require acceptance on the part of the PJCIS that in certain circumstances the reporting from the IGIS will be limited, perhaps even perfunctory, or indeed the PJCIS will not receive a report at all.

#### Annual briefings to the committee

The Bill also gives effect to the 2017 Review's recommendation 23(e) by requiring the Director-General of ONI and the IGIS to regularly brief the PJCIS. In addition, the Bill provides that the PJCIS may request a briefing from the Independent National Security Legislation Monitor.



The Bill necessarily does not specify the intended subject matter of the briefings from the ONI Director-General or the IGIS.

We support these measures as being advantageous to the further development of relations between the PJCIS and elements of the NIC, and the strengthening of the connection with the IGIS.

The text of the 2017 Review specifically suggested that the ONI Director-General should brief the PJCIS at least twice a year (ie at the time of the annual review of agencies' administration and expenditure but also separately on coordination of the NIC) and that the IGIS brief the PJCIS at least four times a year on IGIS investigations inside the NIC.<sup>8</sup>

Given the detailed prescriptions of the 2017 Review as to subject matter, there would be value in the Committee clarifying in its report on the Bill the matters upon which the Committee would likely seek such briefings.

### Other Matters

In addition, the Bill includes measures to enhance the efficient and effective functioning of the PJCIS. For example, it amends the *Intelligence Services Act* to alter the requirements for security clearances held by PJCIS secretariat staff (away from previous benchmarking to the clearance levels required of staff of the Australian Secret Intelligence Service).

We support this modification especially given the ongoing broader reforms to the conduct and management of the highest levels of security clearance within the Australian Government (ie the creation of the 'Top Secret – Privileged Access' clearance and its management by the Australian Security Intelligence Organisation).

The description in the Explanatory Memorandum indicates that the measure will also advance a move to multi-classification working within the secretariat, meaning different staff may be able to have different levels of security clearances, depending on the specific work they undertake.<sup>9</sup> This mirrors ongoing considerations within the NIC itself, in addressing workforce challenges and instituting more innovative and dynamic work practices,<sup>10</sup> although a move away from the previous blanket requirement should inspire a heightened monitoring of security practices within the secretariat during and after implementation.

We also support the proposed use of sub-committees within the PJCIS, as a means of helping address the significant workload challenges facing the committee.

The Attorney-General's second reading speech did not make reference to the Bill's amendments related to the conduct of cyber operations, including exemption from civil or criminal liability for inadvertent effect inside Australia when conducting cyber ops offshore.<sup>11</sup> We support these amendments, given the increasing importance of the cyber

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<sup>8</sup> 2017 *Independent Intelligence Review*, pp.122, 125

<sup>9</sup> House of Representatives, Explanatory Memorandum for Intelligence Services Legislation Amendment Bill 2023, p.56 (para 296)

<sup>10</sup> See for example the comments by the Director-General of ONI and the Director-General of ASIO on the National Security College podcast, 'Australia's intelligence leaders in conversation', 15 June 2023, at <https://www.oni.gov.au/role-intelligence>

<sup>11</sup> Oddly given the absence of reference to the 2017 Review, the Explanatory Memorandum specifically acknowledges that this particular measure stems from recommendation 72 of the Comprehensive Review of

‘Strong and effective oversight mechanisms do not stand in opposition to Australia’s national security interests – they are best understood as an essential part of advancing them.’<sup>12</sup>

The existence of appropriate oversight, including through entities such as the Office of the IGIS and the PJCIS, increases public trust in the intelligence community as an institution while doing so in a way that continues to empower our intelligence officers and agencies to proactively protect Australia’s society and way of life. This is evident from polling results indicating 80% of Australians regard their intelligence agencies as ‘effective at protecting Australia’s national security’ and 59% believe agencies ‘have got the balance right between protecting national security and being transparent about their activities’.<sup>13</sup> In this way, a strong intelligence community with oversight strengthens national resilience to crises, whether at home or abroad.

This combination, of strong intelligence community with appropriate but not undue oversight, also helps advance Australia’s global reputation as a leader in the field of quality and ethical intelligence that has the balance right between transparency and maintaining the secrecy required to keep Australians safe.

Further to our general support for the Bill, we recommend that in its report on the Bill, the Committee:

- 1) acknowledge the origins of the Bill’s measures in the recommendations of the 2017 Independent Intelligence Review, including the broader conclusions drawn by the review’s authors that the fundamental architecture of Australian intelligence oversight does not require alteration.
- 2) clarify, without requiring amendment to the text of the Bill itself, the nature of the briefings sought from the Director-General of the Office of National Intelligence and from the Inspector-General of Intelligence and Security.
- 3) confirm the IGIS as the key oversight body with powers to investigate and review operational matters and that the PJCIS should not be so empowered.

We would be happy to discuss our submission with the Committee, including at any forthcoming hearing.



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**Chris Taylor**, Head Statecraft & Intelligence Centre<sup>14</sup>

<sup>12</sup> Hon Mark Dreyfus MP, second reading speech for the Intelligence Services Legislation Amendment Bill 2023, House of Representatives, 22 June 2023

<sup>13</sup> Lowy Institute Poll 2020, as at <https://poll.lowyinstitute.org/charts/australias-intelligence-agencies>.

<sup>14</sup> For information on the Centre see <https://www.aspi.org.au/program/statecraft-and-intelligence-program>

