



**Law Council**  
OF AUSTRALIA

# **Intelligence Oversight and Other Legislation Amendment (Integrity Measures) Bill 2020**

**Parliamentary Joint Committee on Intelligence and Security**

**4 March 2021**

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## About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2021 Executive as at 1 January 2021 are:

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- Mr Tass Liveris, President-Elect
- Mr Ross Drinnan, Treasurer
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- Mr Greg McIntyre SC, Executive Member
- Ms Caroline Counsel, Executive Member

The Chief Executive Officer of the Law Council is Mr Michael Tidball. The Secretariat serves the Law Council nationally and is based in Canberra.

## Executive Summary

1. The Law Council of Australia is pleased to provide this submission on the Intelligence Oversight and Other Legislation Amendment (Integrity Measures) Bill 2020 (**Bill**) to the Parliamentary Joint Committee on Intelligence and Security (**Committee**). The Law Council welcomes the introduction of the Bill, and supports the proposals to:
  - extend the independent operational oversight functions of the Inspector-General of Intelligence and Security (**IGIS**) to cover the ‘intelligence functions’ of the Australian Criminal Intelligence Commission (**ACIC**) and the Australian Transaction Reports and Analysis Centre (**AUSTRAC**);
  - extend the oversight functions of the Committee, in relation to matters of agency administration and expenditure, to cover AUSTRAC to the extent of its ‘intelligence functions’;
  - confer information-sharing powers on the IGIS and other Commonwealth integrity agencies with oversight functions in relation to the ACIC and AUSTRAC. These agencies are principally the Australian Commission for Law Enforcement Integrity (**ACLEI**), Australian Human Rights Commission (**AHRC**), Commonwealth Ombudsman (**Ombudsman**) and Office of the Australian Information Commissioner (**OAIC**). The proposed amendments will enable these integrity agencies to cooperate with each other to manage any overlap in their respective oversight jurisdiction in relation to the ACIC and AUSTRAC. This includes by sharing information with each other, conducting joint inquiries, and transferring complaints by agreement, if it would be more convenient and effective for another integrity agency to examine the matters raised in a complaint;
  - confer powers on the IGIS to share information with the Inspector-General of the Australian Defence Force (**IGADF**) about matters within their concurrent jurisdiction. (For example, if an Australia Defence Force—**ADF**—member is made available to an intelligence agency to perform functions or exercise powers of the intelligence agency, either as part of a particular operation, in the nature of a secondment arrangement; or on an ongoing ‘employment-like’ basis.) The IGADF is presently able to share relevant information with the IGIS,<sup>1</sup> but the secrecy provisions in section 34 of the IGIS Act currently prevent the IGIS from sharing information with the IGADF; and
  - make several relatively minor amendments to the *Inspector-General of Intelligence and Security Act 1986* (Cth) (**IGIS Act**) to modernise outdated provisions, improve the clarity of certain drafting expressions, and enhance flexibility in the manner in which the IGIS performs their functions (referred to in this submission as ‘**modernisation reforms**’).
2. The Law Council recommends that four matters are given further consideration:
  - whether the Bill, or future legislation, should implement fully the recommendations of the *2017 Independent Intelligence Review (IIR)* in relation to oversight of the National Intelligence Community (**NIC**).<sup>2</sup> The IIR

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<sup>1</sup> Inspector-General of the Australian Defence Force Regulation 2016, ss 28G(2)(b) and (3).

<sup>2</sup> The NIC refers collectively to 10 Commonwealth agencies performing intelligence collection and analysis functions. They are: the Australian Criminal Intelligence Commission (**ACIC**), Australian Federal Police (**AFP**), Australian Geospatial-Intelligence Organisation (**AGO**), Australian Secret Intelligence Service (**ASIS**), Australian Security Intelligence Organisation (**ASIO**), Australian Signals Directorate (**ASD**), Australian Transaction Reports and Analysis Centre (**AUSTRAC**), Defence Intelligence Organisation (**DIO**), the Department of Home Affairs (**Department**), and the Office of National Intelligence (**ONI**).

recommended that the oversight remit of the IGIS and Committee should be extended to cover the 'intelligence functions' of the Department of Home Affairs (**Department**) (which was then the Department of Immigration and Border Protection) and the Australian Federal Police (**AFP**), ACIC and AUSTRAC;<sup>3</sup>

- whether the proposed statutory definition of the 'intelligence functions' of the ACIC and AUSTRAC adequately cover the entire 'intelligence life-cycle', from the collection of intelligence, through to its retention or destruction;
- whether the legislation governing the Committee and other Commonwealth integrity agencies with oversight responsibilities for NIC agencies also requires review to ensure it remains fit for purpose in contemporary circumstances, and if necessary, making similar kinds of 'modernisation reforms' to those contained in the present Bill with respect to the IGIS Act; and
- the adequacy of resourcing for the IGIS, other Commonwealth integrity agencies with responsibilities for the oversight of NIC agencies, and the Committee to perform their expanded functions, and to operate effectively in the current security environment. This includes consideration of their staffing levels, operating budgets, and access to independent technical expertise.

## Extension of the oversight functions of the IGIS

### Definition of 'intelligence functions' of ACIC and AUSTRAC

3. The key amendments in the Bill propose to expand the 'intelligence agency inquiry functions' of the IGIS to cover the activities of ACIC and AUSTRAC, but only to the extent that they involve the performance of an 'intelligence function'.<sup>4</sup> This reflects that the ACIC and AUSTRAC also perform law enforcement functions.
4. The concept of an 'intelligence function' is not used in the legislation establishing and governing the ACIC and AUSTRAC. (That is, the statutory functions conferred on the ACIC and AUSTRAC are not categorised into discrete 'intelligence' and 'non-intelligence' functions.)<sup>5</sup> Accordingly, it is necessary for the Bill to define the concept of an 'intelligence function' in the IGIS Act, for the purpose of establishing the oversight remit of the IGIS.
5. The IIR did not make specific recommendations about the substance of the definition of an 'intelligence function'.<sup>6</sup> In effect, the Bill proposes to define the concept as 'the collection, correlation, analysis, production and dissemination of intelligence' by the ACIC and AUSTRAC for the purpose of performing their statutory functions.<sup>7</sup> This means that the IGIS will be empowered to determine, as a question of fact in individual cases, whether an act or practice of the ACIC or AUSTRAC falls within this functional definition.
6. The Law Council supports this general definitional approach. It is important that the IGIS Act adopts a broad, inclusive and non-prescriptive definition of the 'intelligence

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<sup>3</sup> M L'Estrange and S Merchant, *2017 Independent Intelligence Review: Unclassified Report*, (June 2017), (**IIR Report**), recommendation 21.

<sup>4</sup> Bill, Schedule 2, item 60 (amending subsection 3(1) of the IGIS Act to insert a definition of 'intelligence function'). See also item 61 (inserting new subsection 8(3A) of the IGIS Act, prescribing the IGIS's 'intelligence agency inquiry functions' in relation to ACIC and AUSTRAC).

<sup>5</sup> See: *Australian Crime Commission Act 2002* (Cth) (**ACC Act**), section 7A (functions of ACIC); and *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) (**AML/CTF Act**), sections 210 and 212 (functions of AUSTRAC and its CEO).

<sup>6</sup> IIR Review Report, 116 at [7.20].

<sup>7</sup> Bill, Schedule 2, item 60 (amending subsection 3(1) of the IGIS Act).

functions' of the ACIC and AUSTRAC. The IGIS can only perform oversight functions, and exercise associated powers, in respect of matters that are within its statutory functions. Consequently, under-breadth in the IGIS Act definition of an 'intelligence function' of the ACIC and AUSTRAC could result in arbitrary exclusions from, or limitations on, the oversight functions of the IGIS.

7. A more prescriptive definitional approach, such as expressly deeming individual functions or activities of the ACIC or AUSTRAC as constituting those agencies' 'intelligence functions' for the purpose of IGIS oversight, would risk becoming outdated if the functions of these agencies were subsequently amended. It may also arbitrarily exclude activities which, in fact, involve the collection, correlation, analysis, production or dissemination of intelligence, but are not prescribed by the IGIS Act.
8. It is also important that the definition of an 'intelligence function' is not made overly complex, by applying extensive, *ad hoc* statutory limitations or exclusions to its general coverage. This would create the unintended consequence that the IGIS would be required to divert valuable resources away from conducting substantive oversight, in order to make complex assessments about whether a matter is within oversight jurisdiction. It may also create uncertainty for prospective complainants, including in relation to the availability of immunities for providing information to the IGIS for the purpose of their oversight function. This risks having a 'chilling effect' on the willingness of people to come forward with relevant information, and consequently, the effectiveness of oversight.
9. The Law Council also welcomes that the proposed definition of an 'intelligence function' in the IGIS Act does not incorporate by reference the definition of an 'agency with an intelligence role or function' in the *Office of National Intelligence Act 2018* (Cth) (**ONI Act**) for the purpose of ONI performing its whole-of-government coordination and enterprise management functions for the NIC. This is because the ONI Act definition is generally tied to the activities of NIC agencies, to the extent they relate to one or more of the 'national intelligence priorities'.<sup>8</sup> These priorities are set periodically by the executive government (with the advice of NIC agencies) to guide operational and budgetary prioritisation by all agencies.
10. A consequence of applying the ONI Act definition to the IGIS Act would mean that the executive government could unilaterally change the scope of independent operational oversight, through periodically setting, and changing, the national intelligence priorities, including on the advice of the agencies subject to oversight. Moreover, as the national intelligence priorities are classified, there would be no public or parliamentary transparency about the scope of the IGIS's functions from time-to-time. It is therefore important that there are two separate statutory definitions, for the discrete purposes of the ONI Act and the IGIS Act. The Law Council is pleased that the Bill recognises this issue.
11. However, the Law Council encourages the Committee to give further consideration to one aspect of the proposed definition of an 'intelligence function' of the ACIC and AUSTRAC. The concept of 'collection, correlation, analysis, production and dissemination of intelligence' does not clearly cover the actions and practices of agencies in retaining or disposing of intelligence, and in subsequently accessing and using intelligence that has been retained in their holdings.
12. The Law Council notes that IGIS currently conducts oversight of the acts and practices of the six intelligence agencies currently within its remit, in relation to the retention and destruction of intelligence. For example, the former IGIS repeatedly raised concerns with the Committee about the absence of statutory requirements for

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<sup>8</sup> ONI Act, subsection 4(1) (paragraph (e) of the definition of 'agency with an intelligence role or function').

the Australian Security Intelligence Organisation (**ASIO**) to periodically review its holdings of telecommunications data to determine whether it remains relevant to security, and dispose of intelligence that is assessed as no longer relevant.<sup>9</sup> This issue also arose in the Committee's current review of the Telecommunications Legislation Amendment (International Production Orders) Bill 2020, with respect to an absence of review and destruction requirements for foreign telecommunications data obtained under international production orders.<sup>10</sup>

13. The issue of retention and destruction will also be particularly important in the oversight of agencies' access to, and use of, 'bulk personal data'. (That is, datasets of personal information about a very large number of individuals, the majority of whom are not persons of interest. Examples include travel data, records of credit card or other financial transactions, and telephone directories. The individual datasets are held on agencies' electronic intelligence systems, and their contents can be searched collectively by inputting specific selectors, and the results analysed to identify patterns and correlations. The results can be highly intrusive to individual privacy, due to the combination of information returned from numerous, extremely large datasets.)
14. The Law Council considers that it would be valuable for the IGIS to have comprehensive oversight functions in relation to matters of retention and destruction of intelligence, for all of the agencies within its remit. This could be given effect through a simple amendment to the proposed definitions of 'intelligence function' in relation to the ACIC and AUSTRAC. This would also be consistent with findings and recommendations of the Richardson Review, which identified a need for the ACIC to be subject to privacy rules about bulk personal information concerning Australian persons (noting that the Privacy Act does not apply to that agency).<sup>11</sup>
15. If the 'intelligence agency inquiry' functions of the IGIS are not amended, the IGIS would not have a clear basis upon which to conduct oversight of the ACIC's compliance with those rules, to the extent that they covered retention and destruction.

**Recommendation 1—definition of an 'intelligence function'**

- **The proposed definition of an 'intelligence function' in relation to the ACIC and AUSTRAC in subsection 3(1) of the IGIS Act (item 162 of Schedule 2 to the Bill) should be amended to expressly include the acts and practices of ACIC and AUSTRAC in relation to the retention and destruction of intelligence.**

## Information-sharing and cooperation with other integrity agencies

16. The Law Council welcomes the policy approach evident in the Bill, that the expansion of the functions of the IGIS to cover the 'intelligence functions' ACIC and AUSTRAC does not require consequential amendments to the functions of other integrity agencies, to exclude these matters from their oversight so that they are exclusively within the remit of the IGIS. Rather, the Bill proposes to create areas of 'concurrent jurisdiction' among these integrity agencies, and equip them with legislative tools to cooperatively manage any overlap and avoid duplication or inconsistency.

<sup>9</sup> See, for example: IGIS, *Submission to the PJCIS Review of the Telecommunications Legislation Amendment (International Production Orders) Bill 2020*, (May 2020), 16-17 (referring to multiple previous instances in which the IGIS has drawn this matter to the Committee's attention, which it has identified in inspections of ASIO).

<sup>10</sup> *Ibid.* See also, Law Council of Australia, *Submission to the PJCIS Review of the Telecommunications Legislation Amendment (International Production Orders) Bill 2020*, (May 2020), 53-56 at [208]-[218].

<sup>11</sup> Richardson Review, *Unclassified Report: Volume 3*, (December 2019), recommendation 139.

17. This approach is strongly preferable to any legislative attempts to carve out areas of 'exclusive jurisdiction' for each integrity agency. The latter approach creates significant risks of fragmenting oversight. It may also have the unintended consequence that some agency activities could fall outside the functions of all of the relevant oversight agencies. This is consistent with the observations of the *Comprehensive Review of the Legal Framework of the National Intelligence Community (Richardson Review)*.<sup>12</sup>
18. Accordingly, the Law Council supports the enactment of proposed Part IIIA of the IGIS Act, and equivalent consequential amendments to the legislation governing ACLEI, AHRC, Ombudsman and OAIC.<sup>13</sup> These provisions will allow these agencies to share information with each other, and transfer complaints by agreement, in relation to matters within their concurrent jurisdiction. In effect, these measures will integrate the IGIS into the existing framework for information-sharing and complaints transfer that is already in place for the other Commonwealth integrity agencies listed above.<sup>14</sup>
19. The Law Council welcomes the indication in the submission of the IGIS that the office is working with ACLEI, AHRC, Ombudsman and OAIC to develop administrative arrangements for their cooperation, to be supported by an overarching Statement of Cooperation, in the nature of an inter-agency memorandum of understanding.<sup>15</sup>
20. The Law Council anticipates that such a document would also provide guiding principles to ensure that each oversight agency is cognisant of the need to avoid causing oppression to the persons subject to inquiry, as well as avoiding inefficiencies arising from duplication. The risk of oppression may arise if a person is subject to inquiry by multiple oversight agencies, in relation to matters within those agencies' concurrent oversight jurisdiction. In such instances, the person could be exposed to multiple coercive information-gathering powers, and abrogation of self-incrimination privilege in relation to information given under compulsion (generally with only a direct use immunity, and no derivative use immunity).
21. The Law Council would also welcome the publication of the Statement of Cooperation when it is finalised. This document could assist the agencies subject to oversight, prospective complainants, and their legal advisors to directly give information or complaints to the most appropriate agency, and to understand the manner and circumstances in which matters may be transferred or information shared.
22. The Law Council is also supportive of the following aspects of the information-sharing and cooperative arrangements proposed in the Bill:
  - the obligations on the IGIS in relation to the management of classified information, in the context of information-sharing with other integrity agencies do not require the IGIS to obtain the agreement or consent of the intelligence agencies to which the information relates. Rather, the IGIS must consider any advice provided by the heads of intelligence agencies about the protection of classified information, but ultimate discretion rests with the IGIS to determine whether the information should be shared, in accordance with their obligations under the *Commonwealth Protective Security Policy Framework* and as a

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<sup>12</sup> Richardson Review, *Unclassified Report: Volume 3*, (December 2019), 264-270 at [40.109]-[40.139] and recommendations 170 and 171.

<sup>13</sup> Bill, Schedule 2, item 73 (inserting new Part IIIA of the IGIS Act); and Bill, Schedule 1, Parts 2 and Schedule 2, Part 3 (amendments to the *Australian Human Rights Commission Act 1986* (Cth) (**AHRC Act**); *Australian Information Commissioner Act 2010* (Cth) (**AIC Act**), *Law Enforcement Integrity Commissioner Act 2006* (Cth) (**LEIC Act**); *Ombudsman Act 1976* (Cth) (**Ombudsman Act**); and *Privacy Act 1988* (Cth) (**Privacy Act**).

<sup>14</sup> See, for example, Ombudsman Act, sections 6A-6E; LEIC Act, subsection 208(3); Privacy Act, section 50; and AHRC Act, subsection 20(4A) which variously deal with complaints transfer and information-sharing.

<sup>15</sup> IGIS, *Submission to the PJCIS Review of the Integrity Measures Bill*, (February 2021), 3 at [6] & 13 at [45].



Commonwealth agency head.<sup>16</sup> This is an important safeguard to the independence of the IGIS, as it means they are not dependent on the 'permission' of the agencies subject to oversight to perform their functions.

This approach is also preferable to the approach taken to managing sensitive information in the legislation governing other integrity agencies, including the Ombudsman and ACLEI. These Acts contain provisions that empower the Attorney-General to issue a certificate to the head of the oversight agency, which prevents the agency from obtaining, using or disclosing specified information. Such certificates may be issued on the basis of the Attorney-General's assessment of various public interest matters, including on the grounds of national security;<sup>17</sup> and

- the Ombudsman and ACLEI will not be prevented from sharing information with the IGIS merely because it is the subject of an information certificate issued by the Attorney-General under the Ombudsman Act or LEIC Act.<sup>18</sup>

## Other measures supported by the Law Council

23. The Law Council supports the following measures relevant to IGIS oversight:

- the proposed exceptions to secrecy offences in the various pieces of legislation conferring functions and powers on the ACIC and AUSTRAC, which will make explicit that a person does not commit an offence for disclosing information to the IGIS or their staff.<sup>19</sup> This will ensure that it is clear, on the face of the legislation, that it is lawful and proper for current and former members of the ACIC and AUSTRAC to come forward with any concerns, and to cooperate with the IGIS in conducting inspections and inquiries.

As the Committee previously commented in its report on major amendments to official secrecy offences in the National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017, full and free access to relevant information is crucial to the effectiveness of independent operational oversight. For this reason, it is essential that there is complete certainty about officials' ability to make such disclosures, and that the legislation speaks clearly and directly to those persons;<sup>20</sup>

- the proposal to expand the functions of the IGIS under the *Public Interest Disclosure Act 2013* (Cth) (**PID Act**) to enable the IGIS to receive, allocate and investigate disclosures about conduct of ACIC and AUSTRAC staff members that was carried out in the course of performing those agencies' intelligence functions. Importantly, a person making a PID to the IGIS about ACIC or AUSTRAC officials need only have reasonable grounds to believe that the 'disclosable conduct' related to the performance by the ACIC or AUSTRAC of an intelligence function.<sup>21</sup> This means that a discloser will be covered by the immunities and protections against reprisals under the PID Act, even if it is

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<sup>16</sup> Bill, Schedule 2, item 73 (inserting proposed subsections 32AD(2) 32AF(3) and of the IGIS Act).

<sup>17</sup> Ombudsman Act, subsection 9(3) and LEIC Act, section 149.

<sup>18</sup> Bill, Schedule 2, items 84 and 84 (amending subsection 208(7) and inserting new subsection 208(8) of the LEIC Act); and item 91 (inserting new paragraph 35(6)(d) of the Ombudsman Act).

<sup>19</sup> See generally: Bill, Schedule 1, Part 2 (consequential amendments); and Schedule 2, Part 1 (amendments to the AML/CTF Act).

<sup>20</sup> PJCIS, *Report on the Review of the National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017*, (June 2018), recommendations 25 and 26.

<sup>21</sup> Bill, Schedule 2, item 100 (amending section 34 of the PID Act to insert new paragraph (ca) in table item 2, column 2 – permitted disclosures to IGIS).

determined that the disclosure was, in fact, outside the jurisdiction of the IGIS, as it did not relate to an 'intelligence function' of the ACIC or AUSTRAC; and

- the application provisions for the proposed amendments to the IGIS Act will enable the IGIS to perform oversight of actions of the ACIC and AUSTRAC, which were carried out before the amendments to the IGIS Act commenced.<sup>22</sup>

This is important to avoid artificial limitations on the scope of IGIS oversight, especially if:

- some activities of an agency were carried out before the commencement of the amendments to the IGIS Act, and were repeated after commencement, including as part of an ongoing operation; or
- the IGIS identifies a systemic compliance or propriety issue, which dated back to activities and practices that were undertaken before the commencement of the IGIS Act amendments, and continued after the commencement of those amendments; or
- a complainant wishes to latently make a complaint about an agency's actions that were carried out before the commencement of the amendments to the IGIS Act. For example, it is conceivable that some complainants may only feel able to come forward after ceasing their employment or engagement with an agency, and potentially after dealing with health or other personal issues arising from their experience.

## Extension of the oversight functions of the Committee

24. The Law Council has not identified any major issues of concern in the technical drafting of the proposed amendments to the *Intelligence Services Act 2001* (Cth) (**ISA**) to expand the functions of the Committee to cover AUSTRAC.<sup>23</sup> However, it emphasises that the Committee itself is best placed to judge this issue.
25. On the policy question of whether the Committee's functions should also include reviewing and monitoring the performance by the ACIC of its intelligence functions, the Law Council notes the justification provided in the Explanatory Memorandum that the Parliamentary Joint Committee on Law Enforcement (**PJCLE**) already has oversight responsibilities in relation to the performance by the ACIC of its functions.<sup>24</sup>
26. However, the Law Council submits that the risk of fragmentation of Parliamentary oversight of intelligence agencies requires that both the PJCIS and the PJCLE should have oversight functions in relation to the ACIC, with the ability to cooperate to manage overlap. In other words, the proposed amendments to Parliamentary oversight arrangements should follow the same approach as for the IGIS Act.
27. Just as NIC agencies themselves are increasingly interacting and cooperating with each other, the arrangements for independent and Parliamentary oversight should similarly reflect this interoperability.

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<sup>22</sup> Bill, Schedule 3, paragraph 1(1)(a) (this provides expressly that the amendments to the IGIS Act will enable oversight of agency actions that were done before or after the commencement of those amendments).

<sup>23</sup> Bill, Schedule 1, item 134-149 (amendments to Part 4 and Schedule 1 to the ISA).

<sup>24</sup> Explanatory Memorandum, 4-5 at [4]-[8].

### **Recommendation 2—Committee oversight of the ACIC**

- **The Bill should be amended to confer functions on the Committee to monitor and review the performance by ACIC of its intelligence functions.**
- **If considered necessary, this function could be supported by provisions which:**
  - **require the Committee to have regard to the functions of the PJCLE before performing its oversight functions in relation to the ACIC; and**
  - **enable the Committee to cooperate with the PJCLE to manage any overlap in their respective jurisdiction.**

## Oversight arrangements for the Department and AFP

28. The Law Council acknowledges that the Government has accepted a recommendation of the Richardson Review that the functions of the IGIS and Committee should not extend to the Department or the AFP, contrary to the previous recommendations of the IIR. This was largely on the basis that the Richardson Review considered there was no discernible gap in existing oversight arrangements for the Department and AFP.<sup>25</sup>
29. The Richardson Review also considered that the intelligence functions of the Department, whose primary functions are those of policy and administration (as well as the role of the Australian Border Force), are too limited to justify the insertion of a new oversight body into its existing integrity framework. It also considered that the intelligence functions of the AFP were secondary to its primary policing functions, and were too difficult to separate for oversight purposes. (For example, its 'intelligence functions' tend to involve making secondary use of evidence obtained under investigatory warrants, or other forms of authorisation, for criminal offences, for the broader purpose of also building an understanding of the nature, intentions and *modus operandi* of criminal networks. This is separate and additional to attempting to arrest and charge individuals who are suspected of committing offences.)<sup>26</sup>
30. However, the Law Council is concerned that the proposed exclusion of the Department and AFP from oversight by the IGIS and Committee will create gaps or inconsistencies in the nature and focus of oversight of these agencies, in relation to their intelligence functions. In particular, the Ombudsman does not have:
- functions to examine the propriety of intelligence agencies' conduct (which, in practice, the IGIS has used as the basis for its oversight of the analytical integrity of agencies' use of intelligence to support their applications for authorisations for intrusive powers, or to provide advice to Ministers and other agencies);<sup>27</sup> or

<sup>25</sup> Attorney-General's Department, *Commonwealth Government Response to the Comprehensive Review of the Legal Framework of the National Intelligence Community*, (December 2020), 43.

<sup>26</sup> Richardson Review, *Unclassified Report: Volume 3*, (December 2019), 261-262 at [40.93]-[40.104] and recommendation 168. See especially at [40.100]-[40.101].

<sup>27</sup> Ombudsman Act, Part II, Division 1 (functions of Ombudsman). See also: See also: IGIS, 'What we do: inspections', <[www.igis.gov.au](http://www.igis.gov.au)>. The IGIS website notes, for example, that the IGIS conducts routine inspections of ASIO's analytic tradecraft, as well as that agency's submissions to the Attorney-General and Minister for Home Affairs providing information on current operations.

- a standing inspection function under the Ombudsman Act in relation to all acts and practices of the Department or AFP. Rather, the Ombudsman's inspection functions are conferred under individual statutes that set down law enforcement agencies' warrant or authorisation-based intrusive investigative powers, and focus more narrowly on matters of compliance with legislative requirements.<sup>28</sup> As the Law Council has noted in its recent submission to the Committee on the Security Legislation Amendment (Critical Infrastructure) Bill 2020, it is also a matter of concern that major proposed amendments to the powers of the Department and AFP are not routinely accompanied by amendments to confer inspection functions on the Ombudsman.<sup>29</sup>

31. The Law Council is also concerned that the reasoning for rejecting the IIR recommendation did not appear to engage substantively with the reasoning underlying that recommendation. That is, the IIR sought to establish the NIC as a single, common 'enterprise' that is constituted by a 'federation' of 10 Commonwealth agencies. The IIR regarded a comprehensive and specialised oversight mechanism as an important component of that objective. The IIR considered that concentrating intelligence oversight functions in the IGIS, as the existing specialist body responsible for overseeing six of the 10 agencies, was the most effective and efficient means of achieving that outcome.<sup>30</sup>

32. The Law Council also notes that further advantages of the approach recommended by the IIR for the concentration of specialised intelligence oversight include:

- more readily enabling the identification and development of consistent 'best practice' approaches to matters of legal compliance, propriety and risk management across multiple agencies performing intelligence functions;
- improving the efficiency of operational oversight, by avoiding the need for multiple oversight agencies to conduct concurrent or consecutive inquiries into discrete aspects of a single operation, within the limits of their respective jurisdiction; and
- better facilitating oversight of activities involving cooperation between several of the agencies subject to review, such as:
  - joint security operations between the AFP and the intelligence agencies within the remit of the IGIS (as is the case for Joint Counter-Terrorism Teams, and the Counter Foreign Interference Taskforce) or cooperation in relation to the conduct of separate and concurrent investigations (as has occurred between the ACIC and AFP, where ACIC established a special investigation relating to offences also under investigation by the AFP);<sup>31</sup> and
  - cooperation between the Department and intelligence agencies. (For example, the proposed cooperative regime between the Department and the Australian Signals Directorate in the cyber security-related

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<sup>28</sup> See, for example: *Telecommunications (Interception and Access) Act 1979* (Cth); Chapter 4A; *Surveillance Devices Act 2004* (Cth), Part 6, Division 3; *Telecommunications Act 1997* (Cth), section 317ZRB; and *Crimes Act 1914* (Cth), section 15HS.

<sup>29</sup> Law Council of Australia, *Submission to the PJCS Review of the Security Legislation Amendment (Critical Infrastructure) Bill 2020*, (February 2021), 79-82 at [287]-[300].

<sup>30</sup> IIR Report, 115-116 at [7.19] and [7.22]-[7.23].

<sup>31</sup> See, for example the decision of the High Court in *Strickland v CDPP* (2018) 266 CLR 325, which raised issues in relation to the purported exercise by the ACIC of compulsory examination powers against people who had also been charged by the AFP, where the examination was directed to the subject-matter of the charges. That case also raised issues about the presence of AFP officers in ACIC examinations.

intervention powers in the Security Legislation Amendment (Critical Infrastructure) Bill 2020, currently under review by the Committee.)<sup>32</sup>

33. The Law Council also acknowledges that a separate Bill presently under review by the Committee, the Surveillance Legislation Amendment (Identify and Disrupt) Bill 2020 (**SLAID Bill**), proposes to confer oversight functions on the IGIS in relation to the activities of the AFP under a new type of computer access warrant for intelligence collection purposes ('network activity warrants').<sup>33</sup>
34. The Law Council welcomes this proposed extension of IGIS oversight to the first specific statutory intelligence-collection power to be conferred on the AFP. However, the SLAID Bill does not propose to expand the functions of the Committee to monitor and review the performance by the AFP of functions in relation to network activity warrants. This anomaly should be corrected, both in the amendments in Part 3 of Schedule 2 to the present Bill (containing amendments contingent on the prior commencement of the SLAID Act) and in the SLAID Bill itself.
35. The Law Council also cautions that the conferral of inspection functions on the IGIS in relation to network activity warrants alone, to the exclusion of other AFP powers, may result in the fragmentation of oversight responsibilities for intelligence operations of the AFP, which are supported by multiple sources of authority. For example, a single operation might use a combination of one or more of the following: network activity warrants; computer access warrants; surveillance device warrants; search warrants; data disruption warrants; and orders to compel people to render assistance in accessing computers under those warrants, or in making intelligible data obtained by the AFP under those warrants.
36. The Law Council also considers that the need for specialised and holistic oversight of the NIC extends equally to Parliamentary oversight. As noted above, it would be preferable for the Committee and PJCLE to have the ability to cooperate to manage overlap and avoid duplication of their respective review functions in relation to the ACIC and AFP. Attempts to establish discrete areas of 'exclusive oversight jurisdiction' run contrary to the increasingly close collaboration and cooperation between the agencies subject to oversight, and the fusion of their intelligence and law enforcement activities.
37. Accordingly, for all of the above reasons, the Law Council considers that the rejection of the IIR recommendation should be reconsidered. If there is no intention to empower the IGIS and Committee to oversee the intelligence functions of the Department and AFP, then the following alternatives should be considered:
  - expanding the oversight functions of the Ombudsman to better align them with those of the IGIS (especially with respect to oversight of matters of propriety including analytical integrity; and matching the breadth and flexibility of the IGIS's inspection functions); and
  - expanding the Committee's functions to cover specific activities of the Department and AFP (rather than their 'intelligence functions' at large), potentially in the manner suggested in the recommendation below.

### **Recommendation 3—oversight of the Department and AFP**

<sup>32</sup> Security Legislation Amendment (Critical Infrastructure) Bill 2020, Schedule 1, item 45 (inserting proposed Part 3A of the *Security of Critical Infrastructure Act 2018* (Cth)).

<sup>33</sup> SLAID Bill, Schedule 1, items 55 and 56 (amendments to the IGIS Act to confer functions to conduct oversight of the AFP's activities in collecting, correlating, analysing, producing and disseminating intelligence obtained from a data disruption warrant, and the performance of functions and exercise of powers in executing those warrants).

**Preferred option**

- **The Bill should be amended to confer functions on the IGIS and Committee to conduct oversight of the performance by the Department and AFP of their ‘intelligence functions’ as recommended by the IIR.**

**Alternative (non-preferred) option**

- **If there is no intention to expand the oversight jurisdiction of the IGIS to cover the ‘intelligence functions’ of the Department and the AFP, then consideration should be given to expanding the functions and resourcing of the Ombudsman, so that there is equivalence in the nature and scope of oversight of the intelligence functions of all agencies forming part of the NIC. This should include:**
  - **oversight of the propriety of the Department and AFP’s activities, in addition to legal compliance and administrative best practice;**
  - **an overarching inspection function in relation to all activities of the Department and AFP that involve the performance of an ‘intelligence function’, equivalent to the inspection function of the IGIS in section 9A of the IGIS Act.**
- **If there is no intention to expand the functions of the Committee to cover monitoring and reviewing the performance by the AFP and Department of their intelligence functions, then consideration should be given to:**
  - **amending section 29 of the ISA to confer functions on the Committee to monitor and review individually prescribed activities of the ACIC, AFP and Department that involve the collection, correlation, analysis, production or dissemination of intelligence. This could include the following:**
    - **the activities of the AFP in relation to network activity warrants (contingent on the passage of the SLAID Bill);**
    - **activities carried out in cooperation with one or more of the intelligence agencies within the remit of the Committee;**
    - **the performance of functions and exercise of powers by the AFP in relation to the entirety of Chapter 5 of the Criminal Code (the security of the Commonwealth) and related provisions of other legislation (such as investigatory powers); and**
    - **the performance of functions and exercise of powers under any legislation that has previously been the subject of review by the Committee (covering both its reviews of Bills, and its post-enactment reviews of legislation); and**
  - **amending Part 4 of the ISA and Part 2 of the PJCLE Act to make provision for the Committee and the PJCLE to have regard to the functions of each other, and the need to avoid duplication, before commencing an own-motion review into a matter.**
- **The question of oversight of the intelligence functions of the**

**Department and AFP should also be revisited in the next periodic review of the national intelligence community.**

## ‘Modernisation reforms’ to the IGIS Act

38. The Law Council supports the proposed modernisation reforms to the IGIS Act, which are largely technical or otherwise non-controversial.<sup>34</sup> The IGIS Act was passed in 1986 and commenced in 1987. Since that time, it has only been amended in an incremental manner to deal with specific matters, generally by way of consequential amendments following changes to intelligence agencies’ governing legislation, and the enactment of the PID Act.
39. The proposal to expand the remit of the IGIS to cover two additional agencies therefore creates a timely opportunity for a more comprehensive and holistic review of the IGIS Act, to ensure that it remains fit-for-purpose in contemporary circumstances. Such review is also timely in view of the following developments:
- numerous, significant expansions to the powers of the six intelligence agencies within the IGIS’s present oversight remit; and
  - increases in the scale and tempo of these agencies’ operations (reflecting budgetary increases, developments in the global security environment, and the utilisation of new or expanded powers).

## The need for reviews of other oversight legislation

40. The Law Council considers that the legislation governing the Committee and Commonwealth integrity agencies other than the IGIS also requires review, to determine whether similar ‘modernisation-type reforms’ are needed for that legislation to remain fit-for-purpose.
41. The extrinsic materials to the Bill do not appear to indicate whether such a review was undertaken as part of the legislative development process for the present Bill, or whether there is an intention to conduct it separately and introduce further legislation in the future. If such a review has not been conducted, and is not currently planned, the Law Council recommends that it should be undertaken as a matter of priority. The Committee and the relevant Commonwealth integrity agencies should be involved closely in the review and any subsequent development of legislative amendments.

## Attorney-General’s information certificate regimes

42. As an example of a matter that could be examined in such a review, the Law Council has recently raised concerns about the continued appropriateness of provisions of integrity agency legislation authorising the Attorney-General to issue certificates on various public interest grounds (including national security), which prevent those integrity agencies from obtaining specified information.<sup>35</sup>
43. Such certificates override agencies’ information-gathering powers, and have the potential to frustrate independent oversight. This risk is particularly significant in relation to the oversight of agencies’ performance of national security functions, since

<sup>34</sup> See generally, the proposed amendments to the IGIS Act in Schedule 1 to the Bill. For a summary, see: IGIS, *Submission to the PJCIS Review of the Integrity Measures Bill*, (February 2021), 17-18 at [57].

<sup>35</sup> See, for example: Law Council of Australia, *Submission to the PJCIS on the Security Legislation Amendment (Security of Critical Infrastructure) Bill 2020*, (February 2021), 83-84 at [312]-[314].

most information will be highly classified and is liable to the issuance of an Attorney-General's certificate at that Minister's discretion.<sup>36</sup>

### Possible improvements to the Committee's governing legislation

44. The Law Council also notes that the Bill does not propose to confer an express function on the Committee to review proposed legislation, as the IIR recommended in 2017.<sup>37</sup> Given the Committee's heavy legislative scrutiny workload in relation to Bills referred by the Government (now totalling around 20 major tranches of legislation), the statutory functions of the Committee in section 29 of the ISA do not accurately reflect its work. The Bill provides an opportunity to address this anomaly.
45. Moreover, the Law Council queries whether various procedural provisions governing the work of the Committee in Schedule 1 to the ISA are appropriately adapted to its contemporary workload (for example, the level of prescription in provisions governing the procedural requirements for the establishment and operation of subcommittees, Committee meetings and quorums).
46. To ensure that the Committee is in the best possible position to discharge its expanded functions and existing, heavy workload efficiently and effectively, the Committee may also wish to consider whether the Bill could usefully include some 'modernisation reforms' to Part 4 and Schedule 1 to the ISA. The present Bill could at least address the most pressing issues, with the opportunity for further measures to be developed separately over a more flexible timeframe.

#### **Recommendation 4—modernisation reforms to further oversight legislation**

- **The Government, in consultation with integrity agencies, should review the legislation governing other integrity agencies with oversight responsibilities for NIC agencies, with a view to ensuring it is fit-for-purpose (similar to the modernisation reforms proposed to the IGIS Act in the present Bill).**
- **The Government, in consultation with the Committee, should review Part 4 and Schedule 1 to the ISA to determine whether any modernisation reforms are needed to the provisions governing the formation, functions and operation of the Committee.**
- **If any priority amendments are identified in the course of the Committee's review of the present Bill, every effort should be made to incorporate them in amendments to the Bill so that they are passed and will commence concurrently with the proposed amendments to the IGIS Act and ISA. Other amendments should be developed and introduced promptly, within six to 12 months of the commencement of the amendments in the present Bill.**

## Resourcing of Commonwealth integrity agencies

47. The Law Council emphasises that, while legislative amendments are clearly important, they are only part of the necessary requirements for the robust and effective independent oversight of the NIC. It is equally important that the resourcing

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<sup>36</sup> See, eg, the certification provisions in the Ombudsman Act, subsection 9(3); and LEIC Act, section 149.

<sup>37</sup> IIR Report, recommendation 23(b).



of integrity agencies keeps pace with expansions of their own functions, and expansions of the functions, powers and budgets of the agencies subject to oversight.

48. The Law Council notes that the IGIS has received additional funding over a four-year period (from the 2017-18 Budget) to sustain a full-time staff of around 55 persons.
49. However, there remains a question about the adequacy of this level of funding and staffing in light of subsequent, major expansions to the functions and powers of the intelligence agencies presently subject to IGIS oversight. There is also an open policy question as to whether the output that could reasonably be delivered by an oversight agency comprising only 55 staff is proportionate to the size and scale of activities of the intelligence agencies subject to oversight.
50. The former IGIS gave evidence to the Committee that, in the absence of legislation to expand its functions to implement the recommendation of the IIR, the office had temporarily directed its additional funding into conducting oversight of the agencies within its existing jurisdiction. This included using the additional funding to conduct oversight of the various, recent expansions to the powers of ASIO under the *Telecommunications and Other Legislation Amendment (Assistance and Access) Act 2018* (Cth).<sup>38</sup> Accordingly, there may be a reduction in existing levels of oversight of the six agencies currently within the remit of the IGIS, as resources are re-deployed after the passage of the Bill.
51. The budget of the IGIS should be further increased as necessary to ensure that there is no diminution in the current levels of oversight. If there is a view within any parts of government that the present levels of IGIS oversight should be sustained from existing resources, the feasibility of that position requires careful scrutiny, in direct consultation with the IGIS.
52. More generally, the Law Council emphasises that the process for developing legislation to expand security agencies' functions and powers should routinely consider and address oversight implications, including resource impacts on oversight agencies. The same approach should be adopted in relation to any increases to the budgets of security agencies, as the resultant increase in the scale and pace of their activities will necessarily have flow-on effects for the oversight of those activities. Consideration could also be given to developing budgetary rules to mandate a minimum ratio of staff in an oversight agency, relative to the size of the agencies subject to oversight.

**Recommendation 5—arrangements for monitoring oversight agency resources**

- **Further consideration should be given to the following administrative and policy matters, to support the overall objective of the Bill to enhance independent operational oversight of the NIC:**
  - **the adequacy of the current budget of the IGIS, to ensure that there will be no diminution in current levels of oversight of the six intelligence agencies presently within its remit, once the Bill is passed;**
  - **the appropriateness, as a matter of policy, of the size of the Office of the IGIS relative to the size of the intelligence agencies subject to oversight, and the implications of this ratio for the breadth and depth of independent operational**

<sup>38</sup> IGIS, *Submission to the PJCS Review of the TOLA Act*, (October 2019), 4 at [3.1].

- oversight; and**
- **the development and publication of transparent policy and administrative arrangements to ensure that the oversight-related resourcing implications of the following activities are routinely assessed, and are given due weight in budgetary decisions:**
  - **increases to the budgets of intelligence agencies; and**
  - **legislative proposals to expand intelligence agencies' functions and powers (via both primary and subordinate legislation).**

## Other matters

53. Finally, the Law Council welcomes recommendations of the Richardson Review to better integrate oversight considerations into the process of developing amendments to national security and intelligence legislation.<sup>39</sup>
54. The Richardson Review endorsed submissions of the IGIS calling for a consistent approach of 'oversight by design' to ensure that proposals to extend the functions and powers of intelligence agencies were designed, from the outset, in a way that is amenable to effective and efficient independent operational oversight. In other words, oversight should be embedded into the design of agencies' powers, not considered later as a secondary issue (or overlooked entirely). The Richardson Review recommended that the key design principles proposed by the IGIS in its submissions to that Review should be formalised in Commonwealth legislation policy.<sup>40</sup>
55. The Law Council supports this recommendation and welcomed its acceptance by the Government in December 2020.<sup>41</sup> In addition, the Law Council supports the public release of that policy, and prior consultation with civil society, including the national legal profession, in its development and any subsequent amendment. Requirements for consultation outside of the Government should be written into the policy itself.
56. Noting that this issue is relevant to the broader context in which the proposed amendments in the Bill will operate, and the overall effectiveness of independent operational oversight, the Committee may wish to seek an update from the Government about progress towards implementing this recommendation. This could include seeking information about arrangements for consultation with the Parliament, civil society and the wider community.

<sup>39</sup> Richardson Review, *Unclassified Report: Volume 3*, (December 2019), 265-267 at [40.114]-[40.123] and recommendations 170 and 171.

<sup>40</sup> *Ibid*, 265 at [40.114]. See also: 264-265 at [40.109]-[40.113].

<sup>41</sup> Attorney-General's Department, *Commonwealth Government Response to the Comprehensive Review of the Legal Framework of the National Intelligence Community*, (December 2020), 44.