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Senator Trish Crossin
Chair
Senate Legal and Constitutional Affairs Committee
PO Box 6100
CANBERRA ACT 2600

Dear Senator

Inquiry into the Inspector-General of Intelligence and Security Amendment Bill 2011

Thank you for the opportunity to make a submission to the above mentioned inquiry. The provisions of the Inspector-General of Intelligence and Security Amendment Bill 2011 relate directly to scope and conduct of the activities of my office and, as such, I am pleased to have the opportunity to outline my views on this matter.

I have been consulted in the drafting of the Bill and fully support the proposed amendments. As noted in the Explanatory Memorandum to the Bill, the amendments are primarily targeted at updating and modernising the operation of the *Inspector-General of Intelligence and Security Act 1986* (IGIS Act), including addressing issues which have arisen or become evident since the legislation was originally enacted.

Background

The Inspector-General of Intelligence and Security (IGIS) is an independent statutory office holder who, with the assistance of his or her Office, reviews the activities of the six agencies which collectively comprise the Australian Intelligence Community (AIC), namely the:

- (a) Australian Security Intelligence Organisation (ASIO)
- (b) Australian Secret Intelligence Service (ASIS)
- (c) Defence Intelligence Organisation (DIO)
- (d) Defence Imagery and Geospatial Organisation (DIGO)
- (d) Defence Signals Directorate (DSD)
- (e) Office of National Assessments (ONA).

My jurisdiction can also be extended on a case-by-case basis, at the request of the Prime Minister, to include other Commonwealth agencies in regard to an intelligence or security matter.

The purpose of a review is to hold the AIC agencies accountable in respect of their compliance with Australian law and with ministerial directions, the propriety of their actions, and their respect for human rights. It is done by:

- (a) undertaking a range of inspections of selected AIC activities (akin to compliance audits)
- (b) handling complaints about the actions of AIC agencies
- (c) undertaking inquiries either in response to a complaint, a ministerial referral, or of my own motion.

Inquiries conducted by the IGIS are of two types. The first type is known as a ‘preliminary inquiry’ which provides the IGIS with an avenue to explore a complaint to determine if further action is required. The second type is known as a ‘full inquiry’ or simply an ‘inquiry’. Inquiries are more formal in nature, with Ministers being directly advised of any conclusions or recommendations that I may make.

When conducting a full inquiry, I have a range of statutory powers (broadly similar to those of a Royal Commission) encompassing the capacity to enter agency premises, to require the production of documents and to question a person under oath or affirmation. It is an offence for a person to fail to produce a document or not to answer a question that I put to them, and it is also an offence to give me false or misleading information.

In instances when I have used these coercive powers, the IGIS Act provides protections to a person who has given me information. That is, the person will not be subject to any penalty under the provisions of any law of the Commonwealth or a Territory by reason only of giving information to me or answering a question put my me, where I have required them to do so.

Provisions concerning the conduct of full inquiries (Schedule 1, Clauses 7, 8 and 9 and Schedule 2, Clause 1)

I believe that the functions, powers and staffing currently available to me are sufficient to ensure that I can effectively oversight the activities of the AIC, in all but the most unusual circumstances. Notwithstanding this, the provisions in Clauses 8 and 9 of Schedule 1 to the Bill seek to provide me with a ‘surge capacity’ to progress multiple inquiries, within a short space of time, should that be required.

Clause 8 would allow me to engage a suitably qualified person to lead an inquiry with the agreement of the responsible minister and under my general direction. Clause 9 would allow me to delegate my coercive powers to that person for the purposes of the particular inquiry only. This would add some flexibility to the current arrangements, in which I must personally be in attendance at all interviews where the subject of the interview wishes to be protected by the immunities in the Act.

I believe that arrangements for the short-term engagement of a suitable person to assist me in this way are more appropriate than, for example, the appointment of a permanent Deputy IGIS. I do not consider the regular workload of the office would justify such an appointment at this time.

Consequential amendments to Clauses 8 and 9 are contained in Schedule 1, Clause 7 and Schedule 2 of the Bill.

Provisions concerning the conduct of preliminary inquiries (Schedule 1, Clause 5)

As described above, the IGIS Act currently provides me with a mechanism to make initial queries about a complaint and to receive sufficient material from the agency concerned to inform a decision about whether I should look into a matter in more detail. This can be an efficient and cost effective way to decide whether a full inquiry is warranted. It can also assist me to forecast whether additional resources, such as extra staff, might be required by my office to conduct any particular inquiry.

The provisions in Clause 5 would give me the capacity to undertake preliminary inquiries of my own volition, rather than needing to wait for a complaint to be made. I have in mind that this would be a good way to approach an agency, for example, if there was press reporting about possible impropriety. In such a case, I would prefer to be proactive in seeking information from the agency concerned (without immediately moving to commence a full inquiry on the basis of limited knowledge).

A capacity to undertake own-motion preliminary inquiries could also allow me to take a more targeted and progressive approach in following up feedback from my office's inspection and compliance auditing activities. If a series of errors appeared to be caused by a systemic issue in an agency, I could use this mechanism to escalate the matter and undertake a more detailed assessment of the necessity for a full inquiry.

Provisions concerning reports of inquiries (Schedule 1, Clause 6)

The IGIS Act provides that when I complete an inquiry, I must prepare a report detailing my conclusions and recommendations and provide a copy of that report to the relevant agency head and the relevant minister. There is no explicit provision allowing me to provide a copy of the report to the Prime Minister unless the report concerns the ONA or the inquiry has been conducted as a direct result of a request made by the Prime Minister.

The provisions in Clause 6 of the Bill would expressly allow the IGIS to give the Prime Minister a copy of a final report prepared in relation to any inquiry conducted under the IGIS Act.

Provisions relating to the functions of the IGIS (Schedule 1, Clauses 1 and 2)

The objects of the IGIS Act are currently described as being to assist ministers in the oversight of AIC agencies and to allow for the review of any ministerial directions given by the Attorney-General to ASIO. This description does not fully reflect:

- (a) the complaint handling role that the IGIS fulfils for members of the public
- (b) the reassurance provided to the Parliament and the public through:
 - (i) publication of an IGIS annual report
 - (ii) IGIS's regular appearance before various Parliamentary committees.

The provisions at Schedule 1, Clause 1 of the Bill seek to provide a more accurate description of the current roles and functions of the IGIS.

The provisions in Schedule 1, Clause 2 seek to expand the functions of the IGIS to include an own-motion capacity to inquire into the effectiveness and appropriateness of the procedures of ASIS, DIGO or DSD (where the procedures relate to the legality or propriety of the agency's

activities). The IGIS already has these functions in respect of ASIO, DIO and ONA and I can see no reason why a distinction should be made between the AIC agencies in this respect. It is not clear that such a distinction was ever intentional.

Provisions to simplify the IGIS Act (Schedule 1, Clause 3)

Complainants and interested members of the public have often found subsections 8(5), 8(6) and 8(7) of the IGIS Act difficult to read and comprehend, yet they are the key to the IGIS' jurisdiction (or absence of it) in respect of employment related matters.

The provisions in Schedule 1, Clause 3 simplify, but do not change, the role of the IGIS in relation to employment related complaints about AIC agencies.

Other amendments

The provisions in Schedule 1, Clauses 4, 10, 11, 12 and 13 are included to clarify operation of the IGIS Act.

The provisions in Schedule 1, Clauses 14 and 15 will serve to provide a mechanism for the IGIS to assist any Royal Commission which is prescribed by the Parliament for that purpose, while maintaining appropriate protections and limitations on the release of sensitive or classified material. This replaces outdated references to two specific Royal Commissions.

Conclusion

The proposed amendments have no financial impact.

I hope these comments are of assistance to the Committee. I would also be happy to provide evidence in person during the Committee's inquiry hearings.

Yours sincerely

Vivienne Thom
Inspector-General

14 June 2011