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Senator Nita Green
Chair
Legal and Constitutional Affairs Legislation Committee
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Dear Senator Green

Review of the Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2022

Thank you for the invitation to make this submission to the Legal and Constitutional Affairs Legislation Committee's inquiry into the Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2022 (the Bill). This submission addresses how the Bill operates in relation to the agencies within the jurisdiction of the IGIS¹, and IGIS' oversight of the compliance by those agencies with the positive duty proposed to be introduced by the Bill. Consistent with established practices, I make no comment on the policy underlying the Bill, and note that my Office was consulted by the Attorney-General's Department during the development of the Bill on issues relevant to my Office.

Schedule 2 of the Bill inserts new Part IIA into the *Sex Discrimination Act 1984* which imposes a positive duty on employers (or persons conducting a business or undertaking) to take reasonable and proportionate measures to eliminate, as far as possible, specified forms of unlawful sex discrimination ("the positive duty"). That Schedule also amends the *Australian Human Rights Commission Act 1986* (AHRC Act) to confer certain functions on the Australian Human Rights Commission (AHRC) in relation to the positive duty, with the inquiry function proposed to commence 12 months after Royal Assent (see cl 23 of Schedule 2 to the Bill).

Proposed subsection 11(3A) of the AHRC Act would operate to exclude intelligence agencies from the AHRC's inquiry jurisdiction in relation to the positive duty, with subsection 11(3B) providing a mandatory referral pathway to the IGIS if the President of the AHRC reasonably suspects that an intelligence agency is not complying with the positive duty in relation to sex discrimination. I note that 'intelligence agency' for the purposes of the functions of the AHRC is a reference to the Australian Secret Intelligence Service (ASIS), the Australian Security Intelligence Organisation (ASIO), the Office of National Intelligence (ONI), the Australian Signals Directorate (ASD), the

¹ The Australian Secret Intelligence Service (ASIS), the Australian Security Intelligence Organisation (ASIO), the Office of National Intelligence (ONI), the Australian Signals Directorate (ASD), the Australian Geospatial-Intelligence Organisation (AGO) and the Defence Intelligence Organisation (DIO).

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Australian Geospatial-Intelligence Organisation (AGO) (including any part of the Defence Force that performs functions on behalf of AGO) and the Defence Intelligence Organisation (DIO) (see current s 11(4) of the AHRC Act and cl 7 of Schedule 2 to the Bill amending that subsection).

Schedule 2 also proposes to amend subsections 8(1) to (4) of the *Inspector-General of Intelligence and Security Act 1986* (the IGIS Act) to expand the IGIS' human rights jurisdiction to include a function to inquire into intelligence agencies' compliance with the positive duty. I note that the IGIS' ability to inquire into an intelligence agency's compliance with the positive duty will not be dependent on such matters being referred to the Office by the AHRC (although as noted above, this is a pathway by which matters may be brought to the attention of the IGIS). Further, inquiries into intelligence agencies' compliance with the positive duty can only be initiated at the request of the Attorney-General, the responsible Minister or of the IGIS' own motion. That is, an inquiry into the positive duty cannot be initiated in response to a complaint made to the Office. I note that this is consistent with the position in relation to the AHRC.

Schedule 3 of the Bill also amends the AHRC Act to confer an inquiry function on the AHRC in relation to systemic unlawful discrimination (SUD) (as defined in proposed subsection 35L(2) – see cl 8 of Schedule 3 to the Bill) or suspected SUD. Proposed s 11(3C) would operate to exclude intelligence agencies from the AHRC's inquiry jurisdiction in relation to SUD (see cl 6 of Schedule 3 to the Bill). Currently under the IGIS Act, the IGIS is able to inquire into an act or practice of an intelligence agency that is or may be unlawful under, inter alia, the *Sex Discrimination Act 1984* being an act or practice referred to the IGIS by the AHRC², and any relevant systemic issues could form part of such an inquiry and be the subject of recommendations as a result of the inquiry.

When conducting inquiries under the IGIS Act, the IGIS is able to utilise coercive statutory powers, such as the power to compel the production of information and documents, enter premises occupied by a Commonwealth agency and issue notices to compel persons to appear before the IGIS for questioning³. At the conclusion of an inquiry the IGIS must prepare a report that contains any conclusions and recommendations, and provide that report to the responsible Minister and the head of the Commonwealth agency⁴.

I trust this information is of assistance to the Committee.

The Hon Dr Christopher Jessup KC
Inspector-General

 October 2022

² See ss 8(1)(a)(v), 8(2)(a)(iv) and 8(3)(b)(i) of the IGIS Act and s 11(3) of the AHRC Act.

³ See ss 18 and 19 of the IGIS Act.

⁴ See s 22 of the IGIS Act.