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

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**Submission to the  
Parliamentary Joint Committee on Intelligence and Security**

The Hon Dr Christopher Jessup QC  
Inspector-General of Intelligence and Security

12 February 2021

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## **1. INTRODUCTION**

1. The Inspector-General of Intelligence and Security (IGIS) welcomes the opportunity to make this submission to the Parliamentary Joint Committee on Intelligence and Security (the Committee)'s review of the Intelligence Oversight and Other Legislation Amendment (Integrity Measures) Bill 2020.
2. Consistent with established practices, IGIS does not make any comment on the policy underlying the Bill. In particular, IGIS does not offer a view on which agencies should be subject to IGIS oversight. Rather, this submission discusses the key features of the Bill that relate to IGIS and the implications for IGIS's role providing oversight of Australia's intelligence agencies and agencies with intelligence functions. The submission also does not comment on aspects of the Bill concerning the jurisdiction of the Committee.
3. IGIS has been extensively consulted by the Attorney-General's Department (and until late 2018, the Department of the Prime Minister and Cabinet) and has engaged closely with relevant departments and agencies throughout development of the Bill.<sup>1</sup> The Bill's development was influenced by both the 2017 Independent Intelligence Review (IIR) and the 2019 Comprehensive Review of the Legal Framework of the National Intelligence Community (the Comprehensive Review, the report of which was publicly released on 4 December 2020).
4. In addition to expanding IGIS's oversight jurisdiction to the intelligence functions of the Australian Criminal Intelligence Commission (ACIC) and the Australian Transaction Reports and Analysis Centre (AUSTRAC), the Bill contains important provisions to assist IGIS to manage its concurrent jurisdiction with other integrity bodies and to clarify IGIS's inspection and information-gathering powers. These provisions will be essential for IGIS to perform effective, efficient and rigorous oversight of the two additional agencies. The Bill also includes provisions to modernise, clarify and adapt IGIS's enabling legislation to contemporary circumstances.
5. Consistent with a recommendation of the IIR, resourcing for IGIS was increased in 2018 both to enable IGIS to effectively oversee agencies within its expanded jurisdiction and to bolster its ability to maintain oversight of the additional powers granted in recent years to agencies within IGIS's existing jurisdiction. IGIS has been steadily growing in size and capacity since that time.
6. In preparation for the expansion of jurisdiction proposed by the Bill, IGIS has:
  - engaged with other Commonwealth integrity bodies, including with the drafting of a Statement of Cooperation with the Australian Commission for Law Enforcement Integrity (ACLEI), the Australian Human Rights Commission, the Commonwealth Ombudsman, the Inspector-General of the Australian Defence Force and the Office of the Australian Information Commissioner (to be reviewed and finalised on passage of the Bill);
  - engaged with various agencies through outreach activities, including the temporary placement of IGIS staff at ACIC and AUSTRAC (as well as at the Office of the Commonwealth Ombudsman and ACLEI); and
  - observed Commonwealth Ombudsman inspections (with the agreement of the Commonwealth Ombudsman and the agencies involved).

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<sup>1</sup> The Department of the Prime Minister and Cabinet initially commenced development of the Bill in late 2017. In late 2018, responsibility for the Bill was transferred to the Attorney-General's Department.

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## 2. BACKGROUND

### ABOUT IGIS

7. IGIS is an independent statutory agency within the Attorney-General's portfolio. As at 8 February 2021, IGIS had 34 staff employed under the *Public Service Act 1999*, in addition to the Inspector-General. The Inspector-General is an independent statutory officer appointed under the *Inspector-General of Intelligence and Security Act 1986* (IGIS Act). The Hon Dr Christopher Jessup QC commenced as the Inspector-General on 8 February 2021 (having been Acting Inspector-General since 18 January 2021).
8. Under its existing jurisdiction, IGIS reviews the activities of the following six intelligence agencies:
  - Office of National Intelligence (ONI)
  - Australian Security Intelligence Organisation (ASIO)
  - Australian Secret Intelligence Service (ASIS)
  - Australian Signals Directorate (ASD)
  - Australian Geospatial-Intelligence Organisation (AGO)
  - Defence Intelligence Organisation (DIO).
9. The overarching purpose of IGIS's activities is to provide assurance that each intelligence agency acts legally and with propriety, complies with ministerial guidelines and directives, and respects human rights.
10. As the IGIS Corporate Plan sets out, the approach IGIS takes to its role is:
  - independent and impartial ('we select what to look at and how to look at it');
  - astute and informed ('we know what agencies are doing and why');
  - measured ('we focus on serious and systemic issues');
  - open ('we are open about our approach to oversight'); and
  - influential ('we assist agencies to improve their compliance').<sup>2</sup>
11. A significant proportion of the resources of IGIS are directed towards ongoing inspection and monitoring activities, so as to identify issues, including about the governance and control frameworks within agencies, before there is a need for major remedial action. IGIS has a risk based approach to its inspection program, targeting high risk activities and activities with the potential to affect the lives or rights of Australian citizens detrimentally. Accordingly, the IGIS inspection program mainly focuses on the activities of agencies with intrusive powers and investigative techniques. IGIS also takes into account an agency's internal control mechanisms as well as its history of compliance and reporting. Section 35 of the IGIS Act requires the Inspector-General to report annually on inspections conducted during the year.
12. The inspection role of IGIS is complemented by an inquiry function. The IGIS Act provides that the Inspector-General may conduct an independent inquiry into the activities of an intelligence agency either on the Inspector-General's own motion, at the request of a Minister, or in response to a complaint. The Prime Minister can request the Inspector-General to conduct an inquiry into an intelligence or security matter relating to any Commonwealth agency.
13. In undertaking inquiries, the Inspector-General has strong investigative powers, including the power to require any person to answer questions and produce relevant documents, take sworn

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<sup>2</sup> IGIS, *2020–2021 Corporate Plan*, p. 5.

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evidence, and enter agency premises. IGIS inquiries are conducted in private because they almost invariably involve classified or sensitive information, and the methods by which it is collected. Conducting an inquiry is resource intensive but provides a rigorous way of examining a complaint, serious incident or systemic matter within an agency. At the conclusion of an inquiry, the Inspector-General provides a report with findings and recommendations to the responsible Minister. Where an inquiry is in response to a complaint, a written response is given to the complainant. Where possible, an unclassified report or summary is published on the IGIS website.

14. Finally, the Inspector-General receives and investigates complaints about the six intelligence agencies within the Inspector-General's jurisdiction. Complaints can be made by a member of the public, or by a current or former employee of an intelligence agency, about the activities of an intelligence agency. IGIS also receives and, where appropriate, investigates public interest disclosures about suspected wrongdoing within the intelligence agencies. With IGIS's access to the records of intelligence agencies and ability to examine the full set of circumstances of any complaint, complaints and other matters can often be quickly resolved. Where there are issues requiring further investigation, the Inspector-General can conduct a formal inquiry into the complaint. Details about individual complaints and their resolution are not made public. However the complainant is always provided with as much information about the outcome as possible, within security restrictions.

## THE 2017 INDEPENDENT INTELLIGENCE REVIEW

15. The report of the IIR, which was conducted by Michael L'Estrange AO and Stephen Merchant PSM, was finalised in June 2017 and made publicly available in July 2017. The IIR made two key recommendations directly related to IGIS. Of most relevance to the current Bill, Recommendation 21 of the IIR recommended:

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 [NIC], 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.<sup>3</sup>

16. The IIR also recommended that IGIS be 'allocated additional resources to enable it to sustain a full-time staff of around 50',<sup>4</sup> in order to 'enable the IGIS to effectively oversee the ten agencies of the NIC and enhance its ability to maintain oversight of the additional powers granted to the [Australian Intelligence Community] agencies in recent years'.<sup>5</sup> The recommendation was agreed to by the Government, and IGIS was allocated an additional \$52.1 million over five years in the 2018-19 Budget.<sup>6</sup> This included funding to expand the office from 17 to 55 full-time equivalent staff, and to cover commercial rent, IT systems and secure fit-out costs of new premises.<sup>7</sup>

## THE 2019 COMPREHENSIVE REVIEW OF INTELLIGENCE LEGISLATION

17. The Comprehensive Review, conducted by Mr Dennis Richardson AC, considered further the question of whether IGIS jurisdiction should be expanded to cover all NIC agencies. Its report was finalised in December 2019, with an unclassified version released in December 2020.

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<sup>3</sup> Independent Intelligence Review (IIR), June 2017, p. 21 (Recommendation 21).

<sup>4</sup> IIR, June 2017 p. 22 (Recommendation 22).

<sup>5</sup> IIR, June 2017, p. 118 (paragraph 7.25).

<sup>6</sup> Budget Paper No. 2, *Budget Measures 2018-19*, 8 May 2018, p. 163.

<sup>7</sup> Prime Minister and Cabinet Portfolio, *Portfolio Additional Estimates Statements 2017-18*, p. 33.

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18. The Comprehensive Review concluded that the IGIS should not have oversight of the Department of Home Affairs or the Australian Federal Police as was recommended in the IIR.<sup>8</sup> However, the Comprehensive Review considered that there was a ‘stronger case for IGIS oversight of the ACIC and AUSTRAC’s intelligence activities given their respective, central, criminal and financial intelligence functions’ and that ‘the specialised intelligence oversight of the IGIS would more readily add value and assurance in respect of those functions’.<sup>9</sup>
19. In making this recommendation, the Comprehensive Review considered that ‘IGIS should continue to be resourced to sustain a staff of around 50’, noting the growing demands on IGIS and that ‘its rigorous oversight can only continue to provide assurance if adequately resourced’.<sup>10</sup>

## THE INTEGRITY MEASURES BILL

20. The Department of the Prime Minister and Cabinet initially commenced development of the Integrity Measures Bill in late 2017. In late 2018, responsibility for the Bill was transferred to the Attorney-General’s Department. IGIS engaged closely with both portfolio departments throughout the drafting process including, among other things, by seconding an officer to the Department of the Prime Minister and Cabinet during 2017-18 and by providing extensive comments and suggestions on multiple iterations of the Bill.
21. The Bill includes:
- amendments to give effect to IGIS’s expanded jurisdiction in relation to the intelligence functions of ACIC and AUSTRAC;
  - amendments to enhance IGIS’s ability to manage its concurrent jurisdiction with other integrity bodies;
  - amendments to the IGIS Act and consequential amendments other Acts to ensure that effectiveness of IGIS’s oversight of ACIC and AUSTRAC’s, and the ongoing effectiveness of oversight of agencies within IGIS’ existing jurisdiction; and
  - amendments to adapt the IGIS Act to contemporary circumstances, including amendments to streamline and strengthen inquiry processes, and technical amendments to clarify the operation of the Act, modernise drafting expressions and remove redundant provisions.
22. These amendments are discussed in further detail below.

## Interaction with the Surveillance Legislation Amendment (Identify and Disrupt) Bill 2020

23. IGIS was also consulted during development of the Surveillance Legislation Amendment (Identify and Disrupt) Bill, which was developed by the Department of Home Affairs in 2020 and introduced into the House of Representatives on 3 December 2020. The Identify and Disrupt Bill includes provisions to expand IGIS’s oversight to ACIC’s and the Australian Federal Police’s functions in relation to network activity warrants. This expansion of IGIS jurisdiction required the Identify and Disrupt Bill to include many similar provisions to the Integrity Measures Bill (for example, the information sharing provisions discussed below) in order to ensure that IGIS oversight would be effective and to address the concurrent oversight jurisdiction between integrity bodies. IGIS worked closely with the Attorney-General’s Department and the Department of Home Affairs to ensure that the amendments in the Identify and Disrupt Bill were consistent with the draft provisions of the Integrity Measures Bill.

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<sup>8</sup> Comprehensive Review of the Legal Framework of the National Intelligence Community (Comprehensive Review), Volume 3, December 2019, p. 262 (Recommendation 168). This recommendation was agreed to in the Government’s response to the Comprehensive Review in December 2020.

<sup>9</sup> Comprehensive Review, Volume 3, December 2019, p. 262 (paragraph 40.102).

<sup>10</sup> Comprehensive Review, Volume 3, December 2019, p. 262 (paragraph 40.104).

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## Structure of the Integrity Measures Bill

24. The Bill's interaction with the Identify and Disrupt Bill means that the final construct of many of the Bill's key provisions will be contingent on the passage of both bills, and the initial construct will be contingent on which of the two bills commences first. This has required the Integrity Measures Bill to include multiple versions of certain amendments. However, IGIS understands that, in the event that both Bill's pass, the final construct of each of the provisions is intended to be the same regardless of the order of their passage.
25. To assist the Committee, an overview of the structure of the Bill is presented below. The Bill's key amendments to expand IGIS's oversight jurisdiction are contained in Part 3 of Schedule 2.

### INTELLIGENCE OVERSIGHT AND OTHER LEGISLATION AMENDMENT (INTEGRITY MEASURES) BILL 2020

#### Schedule 1—Amendments

**Part 1—'Main amendments'**. This includes the Bill's provisions to modernise, clarify and adapt IGIS Act to contemporary circumstances. It also includes amendments to expand the functions of the Committee in relation to the intelligence functions of AUSTRAC (on which this submission does not comment). The amendments commence the day after the Integrity Measures Act receives Royal Assent.

**Part 2—'Consequential amendments'**. This includes amendments to a range of Acts that are consequential to the expansion of IGIS's jurisdiction to the intelligence functions of ACIC and AUSTRAC.

#### Schedule 2—Contingent amendments

##### **Part 1—'Amendments contingent on the AML CTF Amendments Act'**

- Division 1—'Amendments contingent on the AML CTF Amendment Act that might not commence'. This includes amendments to the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (the AML/CTF Act) that will only commence if Part 4 of Schedule 1 to the AML/CTF Amendment Act 2020 has not yet commenced.<sup>11</sup>
- Division 2—'Amendments that commence after the AML CTF Amendment Act'. This includes amendments to the AML/CTF Act that will commence on the later of the day after the Integrity Measures Act receives Royal Assent, or the day that Part 4 of Schedule 1 to the AML/CTF Amendment Act 2020 commences.

##### **Part 2—'Amendments contingent on the ASIO Amendment Act'**

- Division 1—'Amendments that commence before ASIO Amendment Act'. This Division will not commence, as the relevant provisions of the ASIO Amendment Act already commenced on 17 December 2020.
- Division 2—'Amendments that commence after ASIO Amendment Act'. This includes amendments to sections 9B and 19A of the IGIS Act that will commence the day after the Integrity Measures Act receives Royal Assent.

##### **Part 3—'Amendments contingent on the Surveillance Legislation Amendment (Identify and Disrupt) Act 2020'**

- Division 1—'Amendments that commence if this Act commences first'. This includes the Bill's provisions to expand IGIS's jurisdiction to include oversight of the intelligence

<sup>11</sup> The AML/CTF Amendment Act 2020 received Royal Assent on 17 December 2020, and the relevant provisions will commence no later than six months from that date.

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functions of ACIC and AUSTRAC. It also includes provisions to address the concurrent oversight of the IGIS and other integrity bodies, and facilitate information-sharing and complaints transfer between the IGIS and other integrity bodies. These amendments will commence the day after the Integrity Measures Act receives Royal Assent, but only if the Identify and Disrupt Bill has not yet commenced.

- Division 2—‘Repeal of items from the Surveillance Act if this Act commences first’. This repeals consequential amendments from the Identify and Disrupt Act that are similar or identical to items in Divisions 1 and 3. Those items will only be repealed if the Identify and Disrupt Act has not yet commenced at the time that the Integrity Measures Bill commences. The repeal of these items is necessary to avoid duplicating or conflicting with items in the Integrity Measures Bill.
- Division 3—‘Amendments commencing after the Surveillance Act commences if this Act commences first’. Includes changes to the amendments in Division 1 to account for the additional jurisdiction conferred on IGIS by the Identify and Disrupt Bill in relation to the oversight of the network activity warrant functions of ACIC and the Australian Federal Police. These amendments will commence the day after the Identify and Disrupt Act commences, but only if the Integrity Measures Act commences first.
- Division 4—‘Amendments required if Surveillance Act commences first’. Includes changes to the amendments that are made by the Identify and Disrupt Bill to account for the additional jurisdiction conferred on IGIS by the Integrity Measures Bill in relation to the intelligence functions of ACIC and AUSTRAC. These amendments will commence the day after the Integrity Measures Act receives Royal Assent, but only if the Identify and Disrupt Bill commences first.



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### 3. EXPANSION OF IGIS JURISDICTION TO ACIC AND AUSTRAC

#### KEY PROVISIONS

26. The Bill includes amendments to expand IGIS's jurisdiction to the intelligence functions of ACIC and AUSTRAC. As noted above, due to the Bill's interaction with the Identify and Disrupt Bill the majority of these amendments are contained in the contingent amendments in Part 3 of Schedule 2 to the Bill, with the precise initial form depending on the order in which the two bills commence. For simplicity, this section refers to items in Division 1 of Part 3, which will commence in the event that the Integrity Measures Act commences before the Identify and Disrupt Act.

#### INQUIRY FUNCTIONS

27. Item 61 of Schedule 2 inserts new subsection 8(3A) into the IGIS Act, setting out IGIS's proposed inquiry jurisdiction in relation to ACIC and AUSTRAC as follows:

(3A) Subject to this section, the functions of the Inspector-General in relation to ACIC or AUSTRAC are:

- (a) at the request of the Attorney-General or the responsible Minister; or
- (b) of the Inspector-General's own motion; or
- (c) in response to a complaint made to the Inspector-General by a person who is an Australian citizen or a permanent resident (within the meaning of the *Intelligence Services Act 2001*);

to inquire into any of the following matters, to the extent that the matter relates to an intelligence function of the relevant agency:

- (d) the compliance by that agency with the laws of the Commonwealth and of the States and Territories;
- (e) the compliance by that agency with directions or guidelines given to that agency by the responsible Minister;
- (f) the propriety of particular activities of that agency;
- (g) the effectiveness and appropriateness of the procedures of that agency relating to the legality or propriety of the activities of that agency;
- (h) any matter that relates to an act or practice of that agency, referred to the Inspector-General by the Australian Human Rights Commission:
  - (i) that is or may be inconsistent with or contrary to any human right; or
  - (ii) that constitutes or may constitute discrimination; or
  - (iii) that is or may be unlawful under the *Age Discrimination Act 2004*, the *Disability Discrimination Act 1992*, the *Racial Discrimination Act 1975* or the *Sex Discrimination Act 1984*;
- (i) in relation to ACIC—the compliance by that agency with:
  - (i) directions or guidelines given to that agency; or
  - (ii) policies or other decisions made;by the Board of ACIC or the Inter-Governmental Committee established under the *Australian Crime Commission Act 2002*.

28. These functions are intended to align, as closely as possible, with the Inspector-General's inquiry functions in relation to intelligence agencies within IGIS's existing jurisdiction, and proposed subsection 8(3A) is therefore drafted similarly to the existing subsections 8(1), 8(2) and 8(3) of the IGIS Act. While there are some variances to account for the particular agencies involved and to reflect modern drafting practices, in substance subsection 8(3A) is most similar to existing subsection 8(2) of the IGIS Act, which outlines the Inspector-General's inquiry functions in relation to ASIS, AGO and ASD.

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29. However, unlike agencies within current jurisdiction,<sup>12</sup> the Inspector-General will not have a function to inquire into ACIC's or AUSTRAC's procedures relating to the redress of employee grievances. This avoids the potential for arbitrary differences in grievance redress mechanisms available to staff of those agencies, depending on whether they were performing 'intelligence' or 'non-intelligence' functions. The Bill also excludes inquiries into complaints made by employees of ACIC and AUSTRAC that are directly employment-related matters.<sup>13</sup> This is consistent with the IGIS Act's existing exclusion of complaints from agency staff who are employed under the *Public Service Act 1999*.<sup>14</sup>
30. The Inspector-General's complaints jurisdiction in relation to ACIC and AUSTRAC is limited to complaints from Australian citizens and permanent residents (consistent with existing limitations in relation to ASIS, AGO, ASD, ONI and DIO).<sup>15</sup> However, the Inspector-General retains the ability to commence an own-motion inquiry into a matter which was the subject of a complaint from a non-citizen or non-permanent resident.<sup>16</sup>
31. Proposed new subsection 8(3B) of the IGIS Act provides that the functions under subsection (3A) do not include inquiring into any action taken by an examiner of ACIC in performing functions or exercising powers as an examiner. This reflects a policy decision that IGIS oversight of examiners is not necessary, given IGIS's limited jurisdiction in relation to matters that could be heard in a court or tribunal; and the ability for the conduct of examiners to be overseen by the Commonwealth Ombudsman and the Integrity Commissioner, and (ultimately) reviewed by a court of law.<sup>17</sup>
32. Consistent with existing jurisdiction, the Inspector-General will not be able to inquire into the action taken by a Minister in relation to ACIC or AUSTRAC, except to the extent necessary to inquire into the relevant agency's compliance with directions or guidelines given to that agency by the Minister.<sup>18</sup> Similarly, the Inspector-General will not be able to inquire into action taken by the Board of the ACIC or the Inter-Governmental Committee except to the extent necessary to inquire into ACIC's compliance with directions, guidelines, policies or other directions given by the Board or Inter-Governmental Committee.<sup>19</sup>

**DEFINITION OF 'INTELLIGENCE FUNCTION'**

33. As cited above, the Inspector-General's inquiry functions in relation to ACIC and AUSTRAC will be limited to the extent that a matter 'relates to an intelligence function of the relevant agency'. 'Intelligence function' is defined in item 60 of Schedule 2 as follows:

***intelligence function*** means:

- (a) for ACIC—the collection, correlation, analysis, production and dissemination of intelligence by ACIC for the purpose of performing its functions under section 7A of the *Australian Crime Commission Act 2002* (except in relation to Indigenous violence or child abuse within the meaning of that Act); or
- (b) for AUSTRAC:

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<sup>12</sup> IGIS Act, paragraphs 8(1)(b), 8(2)b) and subparagraph 8(3)(b)(ii).

<sup>13</sup> Item 63 of Schedule 2, amendments to subsection 8(5) of the IGIS Act. This item also limits the existing exclusion of employment-related complaints made by ONI staff to ONI staff who are employed under the *Public Service Act 1999*. This is consistent with Recommendation 174 of the Comprehensive Review. See also item 21 of Schedule 1.

<sup>14</sup> IGIS Act, subsection 8(5).

<sup>15</sup> See proposed paragraph 8(3A)(c), existing IGIS Act paragraphs 8(2)(a), and paragraph 8(3)(a) as amended by item 18 of Schedule 1 to the Bill.

<sup>16</sup> Explanatory Memorandum, paragraph 619.

<sup>17</sup> Explanatory Memorandum, paragraph 620.

<sup>18</sup> Item 65 of Schedule 2, amendments to paragraph 9AA(b).

<sup>19</sup> Item 66 of Schedule 2, new paragraph 9AA(ba).

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- (i) the collection, correlation, analysis, production and dissemination of intelligence by AUSTRAC for the purposes of the AUSTRAC CEO performing the CEO's financial intelligence functions under the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006*; or
  - (ii) a function performed by AUSTRAC, the AUSTRAC CEO or any other official of AUSTRAC referred to in paragraph 209(4)(c) of that Act that is incidental to the CEO's financial intelligence functions.
34. The terminology 'collection, correlation, analysis, production and dissemination' of intelligence is consistent with terminology used in the definition of 'agency with an intelligence role or function' in the *Office of National Intelligence Act 2018* (ONI Act). However, unlike the ONI Act, the Bill's definition of intelligence function is not limited to intelligence 'that relates, or may relate, to national intelligence priorities, requirements or capabilities'.<sup>20</sup> This reflects the differences in the roles of ONI and IGIS, as it would not be appropriate for IGIS's oversight to be limited to intelligence activities linked to particular purposes that are not set out in legislation.<sup>21</sup>
35. Consistent with a recommendation of the Comprehensive Review,<sup>22</sup> the Bill's definition of intelligence function reflects a functional approach rather than a structural approach to IGIS's oversight jurisdiction. That is, IGIS's jurisdiction is defined by reference to ACIC's and AUSTRAC's functions, rather than by reference to a particular administrative structure (for example, a specific branch or division of each agency) which could change from time to time. The broad nature of the definition (the term 'intelligence' is undefined by the Bill) will ensure that IGIS has 'flexibility to deliver substantive oversight when and where required, including as agencies' activities, functions or powers evolve' and will ensure that IGIS can 'inquire into agencies' activities regardless of who undertakes them, and cannot be undermined by administrative changes'.<sup>23</sup>
36. The exclusion of the ACIC's functions in relation to Indigenous violence or child abuse (defined by the ACC Act as 'serious violence or child abuse committed against an Indigenous person') from the definition of intelligence function reflects a policy position that IGIS is not the appropriate body to conduct oversight of these matters. As the Explanatory Memorandum notes, 'oversight of these matters would require specialist subject-matter expertise, including cultural competencies that the IGIS could not be expected to possess, or to obtain readily'.<sup>24</sup>
37. In addition to its financial intelligence functions, AUSTRAC has regulatory functions that include ensuring the compliance of reporting entities with their transaction and suspicious matter reporting obligations. The Bill's definition of intelligence function in relation to AUSTRAC is intended to cover activities for the purpose of any of the AUSTRAC CEO's functions under section 212 of the AML/CTF Act '... to the extent that they involve intelligence'.<sup>25</sup> While functions that are 'incidental to' the CEO's financial intelligence functions will also be subject to IGIS review, the Explanatory Memorandum makes clear that AUSTRAC's regulatory functions are not intended to be covered by the definition of intelligence function.<sup>26</sup>

**CONCURRENT JURISDICTION**

38. The Bill contains a range of measures to address the concurrent oversight jurisdiction of IGIS and other Commonwealth integrity bodies, including the Commonwealth Ombudsman, the Australian Human Rights Commission, the Australian Information Commissioner, the Australian

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<sup>20</sup> ONI Act, subsection 4(1), paragraph (e) of definition of 'agency with an intelligence role or function'.

<sup>21</sup> See Explanatory Memorandum, paragraph 600.

<sup>22</sup> Comprehensive Review, Volume 3, December 2019, p. 263 (Recommendation 169).

<sup>23</sup> Comprehensive Review, Volume 3, December 2019, p. 263 (paragraph 40.108).

<sup>24</sup> Explanatory Memorandum, paragraph 605.

<sup>25</sup> Explanatory Memorandum, paragraph 608.

<sup>26</sup> Explanatory Memorandum, paragraph 609.

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Commission for Law Enforcement Integrity, and the Inspector-General of the Australian Defence Force.<sup>27</sup> These agencies have limited jurisdiction (if any) in relation to the activities of agencies within IGIS's existing jurisdiction; however, in relation to ACIC and AUSTRAC there are likely to be certain matters that could fall within the jurisdiction of both IGIS and another integrity body. It is also likely that, over time, matters will be brought to IGIS's attention (for example, through complaints or the conduct of inspections) that do not relate to the intelligence functions of these agencies (or are otherwise excluded from IGIS jurisdiction). As such, the Bill includes measures aimed at avoiding duplication of oversight activities, and facilitating information-sharing and complaints transfer between IGIS and other integrity bodies.

**Avoiding duplication of oversight activities**

39. Item 70 of Schedule 2 inserts new subsection 11(4A) into the IGIS Act, providing that the Inspector-General may decide not to inquire into (or inquire further into) a complaint, or part of a complaint, into action taken by an intelligence agency if a complaint 'has been, or could have been' made to another integrity body; and the Inspector-General is satisfied that the subject matter of the complaint could be 'more effectively or conveniently dealt with' by the other integrity body.
40. This provision is complemented by:
- proposed section 32AG of the IGIS Act (inserted by item 73 of Schedule 2), which provides that the Inspector-General may transfer a complaint or part of a complaint to another integrity body if he or she decides, under section 11(4A), not to inquire into, or not to inquire further into, a complaint or part of a complaint in relation to action taken by an intelligence agency;
  - corresponding provisions in the legislation governing other integrity bodies that enable the transfer of complaints to IGIS, where a matter could be more effectively or conveniently dealt with by IGIS (see consequential amendments, discussed below); and
  - proposed section 32AH of the IGIS Act (inserted by item 73 of Schedule 2), which provides that, for the purposes of the IGIS Act, a complaint is taken to have been made to the Inspector-General under the IGIS Act if all or part of the complaint is transferred to the Inspector-General by another integrity body. As the Explanatory Memorandum notes, this 'will ensure that the complainant does not need to re-submit the original complaint to the IGIS, and that the IGIS has a legal basis to handle transferred complaints'.<sup>28</sup>
41. The decision of whether or not to transfer a complaint to another integrity body remains at the discretion of the Inspector-General. However, in relation to all of IGIS's activities, proposed section 32AB of the IGIS Act (inserted by item 73 of Schedule 2) requires the Inspector-General to 'have regard to' the functions of other integrity bodies and the Auditor-General 'for the purpose of avoiding duplicating oversight of matters'. The section also expressly permits the Inspector-General to consult another integrity body, or the Auditor-General, in relation to a particular matter if the Inspector-General considers it appropriate to do so for the purpose of avoiding more than one inquiry being conducted into the matter. As the Explanatory Memorandum notes, this section (based on existing section 16 of the IGIS Act) places a 'general

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<sup>27</sup> The inclusion of Inspector-General of the Australian Defence Force (Inspector-General ADF) as an integrity body reflects that the Defence portfolio agencies within IGIS's existing jurisdiction (AGO, ASD and DIO) engage ADF personnel in addition to their Australian Public Service staff. Where ADF personnel engage in conduct on behalf of Defence intelligence agencies (including in relation to any assistance provided to other agencies within IGIS jurisdiction under s7(1)(e) of the *Intelligence Services Act 2001*), that conduct could potentially fall within the Inspector-General ADF's jurisdiction, as well as IGIS jurisdiction.

<sup>28</sup> Explanatory Memorandum, paragraph 688.

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obligation’ on the Inspector-General and ‘is not intended to require the IGIS to undertake formal consultation with the Auditor-General and each integrity body before each discrete activity’.<sup>29</sup>

**Information sharing with other integrity bodies**

42. In addition to the ability to transfer complaints, proposed section 32AF of the IGIS Act (inserted by item 73 of Schedule 2) expressly authorises the Inspector-General to share with other integrity bodies information or documents that are obtained by an IGIS official in the course of exercising powers, or performing functions or duties as an IGIS official, where that information or those documents are relevant to the receiving body’s functions.
43. This proposed section should be read with reference to the secrecy offences in section 34 of the IGIS Act,<sup>30</sup> which prohibit IGIS officials from disclosing any information or documents acquired under the IGIS Act (regardless of its classification) ‘except in the performance of his or her functions or duties or in the exercise of his or her powers’ under the IGIS Act or the *Public Interest Disclosure Act 2013*. Although information sharing with other integrity bodies is, arguably, already implicitly permitted by the IGIS Act, proposed section 32AF provides clearer statutory authority for the Inspector-General to share information or documents with other integrity bodies in accordance with the requirements of the section. This proposed section makes clear that such sharing is not subject to the prohibition in section 34.
44. As the Explanatory Memorandum notes:
- It is intended that the provision would reduce the potential for duplication of individual oversight activities by integrity bodies through the sharing of information and cooperation. For example, if the IGIS were to share information with another integrity body it may enable that integrity body to satisfy itself that there are no further issues arising in respect of its specific statutory functions that would require it to undertake separate oversight activity in relation to that matter. For example, in relation to AUSTRAC where both the IGIS and Ombudsman could have jurisdiction over a matter, allowing the IGIS to share contextual information with the Ombudsman could assist that body to determine that the IGIS is the appropriate oversight agency. Sharing information to avoid duplication reduces administrative burdens on both overseen agencies and integrity bodies.
- The provision would also support cooperation and coordination across integrity bodies, by allowing the IGIS to share information about its investigative processes and methodologies, as well as trends the IGIS has identified through its oversight.<sup>31</sup>
45. IGIS’s intention is that this statutory provision will be supported by more detailed administrative arrangements under the auspices of an overarching Statement of Cooperation with integrity bodies (as referred to earlier in this submission).
46. The ability for the Inspector-General to share information with other integrity bodies under proposed section 32AF is not, however, unfettered. In accordance with current practice, IGIS will give careful consideration to the particular information that is shared with other integrity bodies. In addition to the requirement for any sharing of information or documents to be relevant to the receiving body’s functions, the Bill contains several provisions which will ensure that the security of information and documents is carefully considered:
- Proposed paragraph 32AF(1)(c) requires the Inspector-General to be ‘satisfied on reasonable grounds that the receiving body has satisfactory arrangements in place for protecting the information or documents’.

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<sup>29</sup> Explanatory Memorandum, paragraph 653.

<sup>30</sup> As amendment by Schedule 1 to the Bill.

<sup>31</sup> Explanatory Memorandum, paragraphs 678–679.

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- Proposed subsection 32AF(3) provides that the Inspector-General may make administrative arrangements with the head of an intelligence agency in relation to protecting information or documents provided to the Inspector-General by the agency.
  - Proposed section 32AD (which is based on existing section 20 of the IGIS Act) requires the Inspector-General to ‘make arrangements to protect from unauthorised disclosure’ any security classified information, documents, copies or extracts (and any other information obtained from such documents, copies or extracts) obtained from an agency for the purposes of an inspection, preliminary inquiry or inquiry. In making such arrangements, the Inspector-General must take into account any advice provided by the head of the relevant agency.
47. More generally, IGIS officials and integrity body staff are obliged to comply with the Australian Government’s Protective Security Policy Framework in any handling, storage, disclosure and disposal of information, and are subject to offences that govern unauthorised communication or dealing with classified information in Part 5.6 of the *Criminal Code*. As noted earlier, IGIS officials are also subject to specific offences in section 34 of the IGIS Act that prohibit unlawful disclosure of information.

**INSPECTION AND INFORMATION GATHERING POWERS**

48. In addition to the Inspector-General’s inquiry functions (which are accompanied by powers for obtaining information and entering premises),<sup>32</sup> existing section 9A of the IGIS Act confers functions on the Inspector-General to conduct ‘such other inspections of the agency as the Inspector-General considers appropriate for the purpose of giving effect to the objects of this Act’. IGIS regularly conducts inspections to determine if each agency is acting in accordance with its statutory functions, and is complying with any guidance provided by the responsible Minister and with its own internal policies and procedures. Inspections enable IGIS to monitor the activities of agencies and to identify concerns before they develop into systemic problems that could require major remedial action. Agencies within IGIS’s existing jurisdiction provide IGIS staff with a high level of assistance and cooperation in support of inspections.
49. However, section 9A of the IGIS Act is not currently accompanied by express powers for IGIS staff to enter premises and access records for the purpose of performing the inspection function, nor does it currently impose express duties on agency heads and staff to provide reasonable assistance and facilities to IGIS staff. This contrasts with legislation conferring inspection functions on other integrity bodies.<sup>33</sup>
50. While powers and duties of this kind are arguably implicit in section 9A, the Bill includes amendments to make those powers explicit in view of the expansion of IGIS’s oversight jurisdiction to ACIC and AUSTRAC (who are accustomed to explicit statutory provisions regarding inspections). This is appropriate given the importance of the inspection function to the level of assurance that the Inspector-General is tasked to provide about the legality and propriety of agencies’ actions.
51. Specifically, item 68 of Schedule 2 to the Bill inserts a new subsection 9A(2) into the IGIS Act clarifying that, for the purposes of conducting an inspection of an intelligence agency, the Inspector-General or a member of staff assisting the Inspector-General who is employed under the *Public Service Act 1999*:

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<sup>32</sup> See sections 18 and 19 of the IGIS Act.

<sup>33</sup> For example, the Commonwealth Ombudsman’s inspection powers under sections 86-92 and 186B-186H of the *Telecommunications (Interception and Access) Act 1979*, which contain express statutory rights of access and compulsive powers in support of those inspection functions.

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- may, at all reasonable times, enter and remain in any premises (including any land or place),<sup>34</sup>
- is entitled to all reasonable facilities and assistance that the agency head is capable of providing;
- is entitled to full and free access at all reasonable times to any information, documents or other property of the agency; and
- may examine, make copies of or take extracts from any information or documents.

52. Items 74 to 77 of Schedule 2 also includes amendments to:

- expand existing section 32A of the IGIS Act to enable the Inspector-General to request copies of the annual reports of ACIC and AUSTRAC; other periodic reports provided by ACIC or AUSTRAC to their responsible Minister that are related to the performance of the agency's intelligence functions; and reports provided by ACIC to the Board of ACIC or to its Inter-Governmental Committee that are related to the performance of the agency's intelligence functions; and
- expand existing section 32B of the IGIS Act to require the Inspector-General, as soon as practicable, to be given copies of any guidelines or directions that relate to the performance of intelligence functions that are given to ACIC or AUSTRAC by their responsible Minister or (in ACIC's case) the Board of ACIC or the Inter-Governmental Committee.

53. These amendments will be important to ensuring that IGIS's oversight jurisdiction in relation to ACIC and AUSTRAC's intelligence functions is as effective as possible.

## CONSEQUENTIAL AMENDMENTS TO OTHER LEGISLATION

54. Apart from its amendments to the IGIS Act (and in relation to the Committee, on which this submission does not comment, the *Intelligence Services Act 2001*), the Bill contains a range of amendments to other Acts that are consequential to the expansion of IGIS's jurisdiction to the intelligence functions of ACIC and AUSTRAC. These amendments, contained in Part 2 of Schedule 1 and Parts 1 and 3 of Schedule 2, are necessary to ensure that IGIS's oversight of ACIC and AUSTRAC is as effective as possible.

55. In summary, these amendments include:

- **inserting exceptions to secrecy offences in legislation governing ACIC and AUSTRAC to specifically cover disclosures to IGIS officials** for the purpose of IGIS officials performing functions or duties or exercising powers as IGIS officials.<sup>35</sup> For example, item 155 of Schedule 1 creates a new exception to section 21C of the *Australian Crime Commission Act 2002* to ensure that it is not an offence for a person to disclose information about a notice served upon the person by an ACIC examiner where that disclosure is to an IGIS official 'for the purpose of the IGIS official exercising a power, or performing a function or duty, as an IGIS official'.

While there are existing immunities in the IGIS Act for people who give information to IGIS officials (either voluntarily or under compulsion),<sup>36</sup> these exceptions will make it explicit on the face of the legislation governing ACIC and AUSTRAC that it is lawful and proper to give information to IGIS. This will also avoid potential legal complexities about the interaction of

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<sup>34</sup> For premises occupied in another country by ASIS, the Director-General of ASIS and the IGIS must have made arrangements relating to entry of the premises. See proposed paragraph 9A(2)(b).

<sup>35</sup> Where the relevant offences in agencies' governing legislation apply to all persons (i.e. not just agency officials), the exceptions also cover disclosures and dealings by IGIS officials in that capacity.

<sup>36</sup> See existing sections 18(6) and (9) and 34B of the IGIS Act, and proposed section 32AC (inserted by item 73 of Schedule 2 to the Bill).

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offence provisions with the immunities in the IGIS Act. The approach to these exceptions replicates the approach taken in Part 5.6 of the *Criminal Code* and other legislation governing agencies within IGIS's existing jurisdiction.<sup>37</sup>

- **amendments to the legislation governing other integrity bodies to facilitate sharing of information with and transfer of complaints concerning the intelligence functions of ACIC and AUSTRAC to IGIS.** For example, item 47 of Schedule 2 amends the *Australian Human Rights Commission Act 1986* (AHRC Act) to provide that the Commission may decide not to inquire, or continue to inquire, into an act or practice of ACIC or AUSTRAC following a complaint, if the Commission is of the opinion that the subject matter of the complaint could be more effectively or conveniently dealt with by IGIS. The provisions require the Commission to consult with the Inspector-General and, if the Inspector-General agrees, transfer the complaint and any related information or documents to the Inspector-General as soon as is reasonably practicable. Items 51 and 52 of Schedule 2 create exceptions to the non-disclosure offence in section 49 of the AHRC Act to ensure that such information and documents can be disclosed to IGIS officials without penalty.
- **amendments to the *Public Interest Disclosure Act 2013* (PID Act) to support IGIS investigation of public interest disclosures concerning ACIC and AUSTRAC's intelligence functions.** For example, item 100 of Schedule 2 amends the PID Act to provide that an authorised officer of IGIS is an 'authorised internal recipient' for a public interest disclosure, where the discloser believes on reasonable grounds that the disclosure relates to action taken by ACIC or AUSTRAC in relation to its intelligence functions, and it would be appropriate for the disclosure to be investigated by IGIS.
- **amendments to the legislation governing ACIC, AUSTRAC and integrity bodies to clarify their interaction with the IGIS Act.** For example, item 154 of Schedule 1 clarifies that the secrecy provisions of the IGIS Act are not displaced by the power for an ACIC examiner to request information from officials of Commonwealth or State agencies that was acquired by the person 'in the ordinary course of performing its functions' or 'in that person's capacity as a member, officer or employee' of the agency.
- **minor amendments to the legislation governing agencies within IGIS's existing jurisdiction to standardise language with that used elsewhere in the Bill.** For example, item 164 of Schedule 1 amends the language used in the definition of 'IGIS official' in the ASIO Act, and items 165 to 169 of Schedule 1 amend the language used in exceptions to secrecy offences in the ASIO Act, to align with the language used elsewhere in the Bill.

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<sup>37</sup> For example, see paragraph 317ZF(3)(f) of the *Telecommunications Act 1997* and section 63AC of the *Telecommunications (Interception and Access) Act 1979*.



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#### **4. ADAPTING THE IGIS ACT TO CONTEMPORARY CIRCUMSTANCES**

56. In addition to amendments that directly concern the expansion of IGIS jurisdiction to the intelligence functions of ACIC and AUSTRAC, the Bill includes a range of amendments aimed at ensuring that the IGIS Act is properly adapted to contemporary circumstances. This includes ‘technical amendments to improve clarity, modernise drafting expressions and remove redundant provisions, as well as amendments to address certain limitations in the IGIS’s oversight functions and powers in order to improve the flexibility and strengthen the integrity of inquiry processes’.<sup>38</sup>
57. These amendments are primarily found in Part 1 of Schedule 1 to the Bill. In summary, the amendments are directed at:
- modernising and standardising language, and inserting headings for structure throughout the Bill;
  - resolving ambiguities and improving the practical workability of notification and reporting requirements;<sup>39</sup>
  - removing a historical limitation on the Inspector-General’s ability to self-initiate inquiries or inquire in response to a complaint into actions taken by ASIS, AGO or ASD except to the extent that Australian citizens or permanent residents are affected, or a law of the Commonwealth, state or territory may be violated;<sup>40</sup>
  - removing a historical requirement for the Inspector-General to obtain ministerial approval before inquiring into a matter that occurred outside Australia, or occurred before the commencement of the Act;<sup>41</sup>
  - clarifying the Inspector-General’s notification requirements where there is evidence of a breach of duty or misconduct by a Commonwealth agency official;<sup>42</sup>
  - clarifying the relationship between the Inspector-General’s powers to obtain information and documents and legal professional privilege,<sup>43</sup> and extending the exceptions to the use immunity related to those powers to evidence concerning a small number of additional offences;<sup>44</sup>
  - relocating and updating existing protections for persons who voluntarily provide, or make available, information or documents to the Inspector-General to ensure that those protections are consistent with the protections for persons who are compelled to provide information under the powers in section 18 of the IGIS Act;<sup>45</sup>
  - clarifying that for the purposes of the *Privacy Act 1988*, a person is expressly authorised to give or make available personal information to an IGIS official, for the purpose of the IGIS official performing a function or exercising a power as an IGIS official;<sup>46</sup>
  - modernising drafting and clarifying the existing power for the Governor-General to terminate the appointment of the Inspector-General, to provide greater discretion and to

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<sup>38</sup> Explanatory Memorandum, p. 5.

<sup>39</sup> For example, items 5, 40, 51, 56, 81, 84 of Schedule 1.

<sup>40</sup> Item 19 of Schedule 1.

<sup>41</sup> Item 29 of Schedule 1.

<sup>42</sup> Item 59 of Schedule 1.

<sup>43</sup> Items 71 and 74 of Schedule 1.

<sup>44</sup> Items 72-73 of Schedule 1.

<sup>45</sup> Proposed section 32AC in item 73 of Schedule 2. Existing section 34B of the IGIS Act is repealed and replaced by this section.

<sup>46</sup> Proposed section 32AE in item 73 of Schedule 2.

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clarify that the appointment may only be terminated on the basis of physical or mental incapacity if the Inspector-General is unable to perform his or her duties;<sup>47</sup>

- addressing historical inconsistencies in the Inspector-General’s inquiry functions in relation to DIO and ONI compared to other intelligence agencies by providing that the Inspector-General may inquire into matters in response to complaints;<sup>48</sup>
- enabling the Inspector-General to inquire into complaints arising from decisions about Positive Vetting security clearances of ONI staff (whether those staff are employed under the ONI Act or the *Public Service Act 1999*);<sup>49</sup>
- ensuring that the full range of persons who may perform work for the Inspector-General, including any contractors, consultants or secondees, are captured in the definition of ‘IGIS official’ for the purpose of information sharing and secrecy provisions;<sup>50</sup>
- enabling the Inspector-General to delegate functions to a wider range of staff;<sup>51</sup>
- clarifying and simplifying the language of secrecy offences applying to IGIS officials, including by ensuring they apply to disclosure of both ‘information’ and ‘documents’; ensuring their application to any secondees, consultants or contractors who may assist the IGIS; and ensuring that they are not unintentionally displaced by provisions in other Acts;<sup>52</sup> and
- providing that, despite subsections 13.3(2) and (3) of the *Criminal Code*, in a prosecution for any offence of disclosing, making a record of, or using information or a document, an IGIS official does not bear an evidential burden in relation to whether the disclosure, record or use is for the purposes of, or in connection with, his or her official duties.<sup>53</sup>

58. The amendments also implement two recommendations of the Comprehensive Review:

- providing that a person must not be appointed as Inspector-General if the person is, or the person’s most recent position was, the head or deputy head of an intelligence agency;<sup>54</sup> and
- providing that it is a function of the Inspector-General to inquire into employment-related complaints made by ONI staff who are employed under the ONI Act.<sup>55</sup>

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<sup>47</sup> Items 94, 95, 97 of Schedule 1.

<sup>48</sup> Item 18 of Schedule 1.

<sup>49</sup> Item 18 of Schedule 1.

<sup>50</sup> Items 99 and 101 of Schedule 1.

<sup>51</sup> Item 102 of Schedule 1.

<sup>52</sup> Items 109-124 of Schedule 1.

<sup>53</sup> Proposed new section 34B, inserted by item 78 of Schedule 2. This is necessary because of the strict prohibition, under section 34 of the IGIS Act, on IGIS officials disclosing to a court information or documents acquired under the IGIS Act. That prohibition means that IGIS officials may not be able to meet the evidential burden in any criminal prosecution concerning the disclosure of information, even if that disclosure was entirely within the IGIS official’s duties.

<sup>54</sup> Item 9 of Schedule 1. See Comprehensive Review recommendation 172.

<sup>55</sup> Item 21 of Schedule 1. See Comprehensive Review recommendation 174.