

Supplementary Submission to the Parliamentary Joint Committee of Intelligence and Security

Review of the Intelligence Services Legislation Amendment Bill 2023

Outline and Summary

Thank you for the opportunity to make a supplementary submission to the public consultation on the proposed Review of the Intelligence Services Legislation Amendment Bill 2023 (“the ISLAB”).

This submission has been prepared in my capacity as a Senior Research Fellow of the T.C. Beirne School of Law at the University of Queensland. However, the views expressed below are entirely my own and are not representative of the School of Law, The University of Queensland or any other government, organisation or agency.

This submission addresses certain matters raised by Mr Hill during the public hearing of the PJCIS on 12 December 2023. Mr Hill raised three matters on which he invited further comment:

1. The difference in content of the oversight duties of the Commonwealth Ombudsman versus the Inspector-General of Intelligence and Security (“IGIS”);
2. Paragraphs 27 to 30 of the submission of the Australian Federal Police (“AFP”) to the PJCIS, specifically those dealing with avoidance of doubt provisions; and
3. Whether the staffing support to the PJCIS could be more closely modelled on “US congressional arrangements”, i.e., the attachment of party staff to Committee secretariats.

I propose to comment only on the first two matters raised by Mr Hill. I have no comment to make on the third matter.

Changes to the jurisdiction of the IGIS

At the hearing on 12 December 2023, Mr Hill said:

The IGIS, as I understand it—but I invite you to correct me or add to my understanding—focuses on the legality, the propriety and the compliance with human rights of an agency in the intelligence community. The Ombudsman has a much narrower remit, focusing on administrative decision-making, if you like: was it a correct or lawful decision? But that doesn't go to things like 'was it appropriate,' 'was it necessarily in accordance with standards of propriety that you'd expect' and so on. So I think it's important to at least invite you to comment on that, because that's certainly shaping my thinking that they're really quite distinct functions. And I'm not persuaded at the outset by the Richardson review's conclusion that, somehow, 'The Ombudsman takes care of this'—that, as you bring other intelligence functions into the community, the nature of intelligence oversight is distinct from the nature of oversight of administrative decision-making.

Mr Hill's statements—with respect – somewhat oversimplify the scope of oversight exercised by the Ombudsman (and the National Anti-Corruption Commission, which was not mentioned).

The IGIS is empowered to conduct inquiries into ASIO, ASIS, AGO, ASD, DIO and ONI in the following broad areas:¹

- Compliance with the laws of the Commonwealth and of the States and Territories, and directions or guidelines given to those agencies by the responsible Minister;
- The propriety of particular activities of an agency, or the effectiveness and appropriateness of the procedures relating to the legality or propriety of the activities;
- An act or practice that is or may be inconsistent with or contrary to any human right, or that constitutes or may constitute discrimination;
- Actions taken to protect the rights of an Australian citizen or resident if ASIO has furnished an adverse or qualified security report;
- To inquire into whether Ministerially-endorsed collection by ASIO is justified on that ground or whether that communication would be for that purpose.

The Commonwealth Ombudsman on the other hand has a power to report on the following matters (assuming the Ombudsman has formed the requisite opinion):²

- That an action has been taken that:
 - Appears to have been contrary to law;
 - Was unreasonable, unjust, oppressive or improperly discriminatory;
 - Was in accordance with a rule of law, a provision of an enactment or a practice but the rule, provision or practice is or may be unreasonable, unjust, oppressive or improperly discriminatory;
 - Was based either wholly or partly on a mistake of law or of fact;
 - Was otherwise, in all the circumstances, wrong;
- A discretionary power had been exercised for an improper purpose or on irrelevant grounds; or
- A discretionary power was exercised (or not exercised) because of irrelevant considerations.

The Ombudsman therefore has the power to conduct similar – if not identical – inquiries into the conduct of agencies which fall under its remit (such as the Department of Home Affairs) as the IGIS would if the IGIS were to assume that oversight. Such inquiries by the Ombudsman are obviously not as limited as Mr Hill’s assertion that they must relate only to “administrative decision-making”.³

Both the IGIS and Commonwealth Ombudsman are also already vested with similar powers to obtain information and documents relevant to their inquiries,⁴ such that there can be no real suggestion that the IGIS would be able to obtain access to additional information or documents of relevance which would warrant the IGIS taking on oversight duties from the Ombudsman.

Going further, and as I pointed out in my original submission to the Committee, this issue is compounded by the lack of clarity of where the jurisdiction of the IGIS will sit compared to the National Anti-Corruption Commission (NACC). The NACC retains jurisdiction to investigate “*corrupt conduct*” in

¹ As set out in *Inspector-General of Intelligence and Security Act 1986* (Cth), ss 8(1), (2) and (3).

² *Ombudsman Act 1976* (Cth), s 15(1).

³ I cannot, and do not intend to, make any comment on how the Ombudsman and/or the IGIS may or might exercise their discretion to commence or conduct inquiries which could produce differences in how the scope of their powers is perceived.

⁴ *Inspector-General of Intelligence and Security Act 1986* (Cth), ss 18, 19 and 19A; cf. *Ombudsman Act 1976* (Cth), ss 9, 13 and 14.

respect of Commonwealth agencies, which will include the AGO,⁵ and DIO,⁶ both of which are NIC agencies within the jurisdiction of IGIS. The NACC jurisdiction will also include “Commonwealth entities” such as the AFP, ASIO, ACIC and the Department of Home Affairs.⁷

“Corrupt conduct” can include ‘any conduct of a public official that constitutes or involves a breach of public trust’.⁸ In *Flori v Winter* the Queensland Court of Appeal said:⁹

Those distinctive responsibilities of police officers explain why various forms of serious misconduct by police officers, including serious offences, have been treated by courts in various contexts as a “breach of trust” within the ordinary meaning of that expression...

For present purposes it is sufficient to observe that a serious criminal offence committed by a police officer that is apt to undermine public confidence in the integrity of that police officer is appropriately described as “a breach of the trust placed in” that person as a member of the police force.

It is plainly apparent that, if a member of the above agencies was found to have breached standards regarding the ‘legality, the propriety and the compliance with human rights’ as a result of either an IGIS or Ombudsman investigation, this would more than likely be a breach of trust and constitute “corrupt conduct” falling within the jurisdiction of the NACC. Yet the ISLAB does not appear to contemplate that occurrence, and raises the prospect that the activities of an agency – like the Department of Home Affairs for example – could end up as the subject of oversight by the NACC, the Ombudsman and the IGIS all at the same time.

The Australian Federal Police submission

At the hearing on 12 December 2023, Mr Hill said:

If you could just have a look and give us any supplementary thoughts on paragraphs 27 to 30 of the AFP's submission, because in the bill, through subsections 3A(2)(a) and 3A(2)(b)—catchy titles—there's an avoidance-of-doubt provision which excludes 'the arrest, charging or detention of suspected offenders' from the definition of the AFP's intelligence functions because they're recognised as policing functions and shouldn't be caught up in the nick. So I think, to be fair, the bill's had a crack at trying to deal with this and separate them.

Further, subsection 3A(2)(b)—excluding 'the gathering of evidence, or any activity undertaken to directly support the gathering of evidence'—to provide clarity about which agency has oversight and so on doesn't prevent the IGIS going back to examine something after a prosecution has completed. The bill has tried to deal with that issue. So, given your focus on the issue, if you wanted to have a further look at that—because, if the parliament is of a mind to go down this path, it then goes to the clarity of drafting and expression in the bill if we've got a shared intent to make sure that we're not bringing the IGIS into criminal prosecution issues.

The AFP’s submission to the Committee indicates their support for the avoidance-of-doubt provision in section 3A(2) of the ISLAB, which excludes from the definition of intelligence functions of the AFP

⁵ National Anti-Corruption Commission Act 2022 (Cth), s 11(1), Item 6 of the Table.

⁶ National Anti-Corruption Commission Act 2022 (Cth), s 11(1), Item 7 of the Table.

⁷ National Anti-Corruption Commission Act 2022 (Cth), s 7 picks up the same definition as the *Public Governance, Performance and Accountability Act 2013* (Cth), s 10(1) and the *Public Governance, Performance and Accountability Rule 2014* (Cth), s 7 and Sch 1.

⁸ National Anti-Corruption Commission Act 2022 (Cth), s 8(1)(b).

⁹ *Flori v Winter* (2019) 3 QR 22, [58]-[59] (Fraser JA, Buss AJA and Henry J agreeing).

‘the arrest, charging or detention of suspected offenders’ as well as ‘the gathering of evidence, or any activity undertaken to directly support the gathering of evidence’. The AFP also notes that the amendments would ‘not preclude the IGIS from examining these criminal intelligence activities once an investigation is finalised or otherwise no longer active’.¹⁰

There are two issues I would suggest arise on the AFP’s submission.

Firstly, there is an argument that the avoidance-of-doubt provision which excludes from intelligence functions ‘the gathering of evidence, or any activity undertaken to directly support the gathering of evidence’ does not apply to ancillary or derivative uses to which intelligence may be – and often is – used. In those circumstances (which would occur frequently in practice), the same process would become the jurisdiction of two different oversight agencies.

For example, assume an intelligence product identifies a person of interest as having illegally obtained training materials associated with an extremist group. This intelligence product may inform the obtaining of various investigative warrants and/or the eventual charging of that individual for criminal offences. However, it would also be valuable intelligence for (at least) the intelligence functions of ASIO and could be shared subject to the arrangements between ASIO and the AFP.

In that hypothetical circumstance, the intelligence product resulted in ‘the gathering of evidence, or any activity undertaken to directly support the gathering of evidence’ and falls within the exclusion under section 3A(2)(b) of the ISLAB – the creation and use of that intelligence product is a matter for ‘the Ombudsman, the NACC and the judiciary’.¹¹

However, the point at which that intelligence has been identified as having utility to other agencies and is transmitted to them, the product arguably no longer has the requisite degree of connection to the exclusion under 3A(2)(b) (as it no longer related to the gathering of evidence, or any activity undertaken to directly support the gathering of evidence) and would be the subject of oversight by the IGIS. Such a situation is precisely what the AFP warned about when it said:

*...intelligence analysis and dissemination may occur at multiple stages throughout an active investigation. This may inform where and how AFP obtains and executes warrants, as well as generating other insights and analysis to progress investigations. In these circumstances, **applying oversight to criminal intelligence activity during an ongoing investigation may become disjointed, or otherwise confined to only specific activities at particular times.***¹²
(emphasis added)

Secondly, the AFP’s assertion does not capture the full breadth and depth of the AFP’s activities. If one goes back to the functions of the AFP which would be captured by the term “intelligence function”, i.e., sections 8(1)(b), (baa), (bd), (be), (bf), (bg) and (bh) of the *Australian Federal Police Act 1979* (Cth),¹³ this includes:

- a.) the provision of police services in respect of laws of the Commonwealth;
- b.) the investigation of State offences that have a federal aspect;
- c.) perform functions under the *Proceeds of Crime Act 2002*; and

¹⁰ Australian Federal Police, *Submission No 6 to the Parliamentary Joint Committee on Intelligence and Security Inquiry into the ISLAB 2023* (August 2023).

¹¹ Ibid at [27].

¹² Ibid at [28].

¹³ IGIS Act, s 3A(1) (proposed).
