



Law Council
OF AUSTRALIA

Office of the President

25 May 2021

Senator James Paterson
Chair
Parliamentary Joint Committee on Intelligence and Security
Parliament House
CANBERRA ACT 2600

By email: pjcis@aph.gov.au

Dear Chair

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

1. Thank you for inviting the Law Council to appear at the Committee's public hearing of its inquiry into the above Bill on 6 May 2021. The Law Council wishes to provide a supplementary submission addressing issues arising from the subsequent evidence of government agency officials, and the announcement of oversight-related funding measures in the 2021-22 Budget.

Ombudsman functions in relation to 'propriety matters'

2. The Law Council's primary submission to the inquiry observed that the Commonwealth Ombudsman (**Ombudsman**), unlike the Inspector-General of Intelligence and Security (**IGIS**), did not have a general function to conduct oversight of the propriety of Commonwealth agencies' actions.¹
3. In response to questioning from the Shadow Attorney-General, the Hon Mark Dreyfus QC MP, a representative of the Attorney-General's Department suggested that the reporting requirements for investigations under section 15 of the *Ombudsman Act 1976* (Cth) (**Ombudsman Act**) give the Ombudsman a 'broadly consistent' function with that of the IGIS in relation to the oversight of propriety matters.²
4. The Law Council cautions against the adoption of this view, which appears to take an unduly narrow view of the concept of 'propriety' for the purpose of independent operational oversight functions in relation to the National Intelligence Community.
5. Section 15 of the Ombudsman Act prescribes the matters that the Ombudsman must include in their reports on their investigations. In particular, subsection 15(1) provides that these requirements apply if, as a result of the investigation, the Ombudsman forms the opinion that an action taken by an agency under investigation has (among other matters) been 'unreasonable, unjust, oppressive or improperly discriminatory'

¹ Law Council of Australia, *Submission to the PJCIS Review of the Intelligence Oversight and Other Legislation Amendment (Integrity Measures) Bill 2020*, (March 2021), 11-12 at [30].

² Committee Hansard, Parliamentary Joint Committee on Intelligence and Security, 6 May 2021, 30-31.

or 'was otherwise, in all the circumstances, wrong'; or a discretionary power was 'exercised for an improper purpose'.³

6. If these circumstances exist, then subsections 15(2) and (3) provide that the Ombudsman must document in their report on the investigation any recommendations they may choose make about certain matters (including recommendations for the revocation or variation of an administrative decision, or the taking of other remedial action by the agency concerned).⁴ Subsequent provisions of section 15 establish a process for the relevant agency to provide information to the Ombudsman about action it proposes to take in response to the Ombudsman's recommendations, and to make any other comments on the substance of the investigation report.

Section 15 of the Ombudsman Act does not confer oversight functions

7. Importantly, section 15 of the Ombudsman Act sets out requirements for the documentation of opinions in the Ombudsman's reports on their investigations. It does not confer substantive oversight functions on the Ombudsman (which are found principally in section 5 of the Ombudsman Act and pertain to 'matters of administration'). As such, the provision is more akin to the inquiry reporting requirements imposed on the IGIS in sections 17 and 21-22 of the *Inspector-General of Intelligence and Security Act 1986* (Cth) (**IGIS Act**) rather than the 'intelligence agency inquiry functions' of the IGIS under section 8 of that Act, which explicitly cover matters concerning the legality and propriety of intelligence agencies' activities.

Section 15 of the Ombudsman Act does not apply to inspections

8. Moreover, the requirements of section 15 of the Ombudsman Act, where findings in the nature of those listed in subsection 15(1) are made, are specific to *investigations* undertaken by the Ombudsman. These are formal inquiries commenced under section 8 of that Act, and conducted in accordance with the requirements of Part II. The requirements of section 15 do not apply to the performance by the Ombudsman of their separate statutory inspection functions under other legislation, such as the *Surveillance Devices Act 2004* (Cth), *Telecommunications (Interception and Access) Act 1979* (Cth), and the *Telecommunications Act 1997* (Cth). The statutory inspection functions conferred under this legislation are limited expressly to monitoring agencies' compliance with the applicable requirements of the statutory regimes conferring electronic surveillance and related powers on the agencies in question.
9. Importantly, periodic inspections conducted by the IGIS, under section 9A of the IGIS Act, routinely consider matters of propriety as well as legality. A specific statutory inspection function is directed to a fundamentally different purpose to 'inquiries' (as they are called under the IGIS Act) and 'investigations' (as they are called under the Ombudsman Act).
10. Inquiries and investigations (as they are variously described) are normally undertaken 'for cause'. For example, they may be initiated in response to a complaint about suspected wrongdoing by an agency, or the identification of apparent compliance problems through other means, such as during an inspection, or due to the pro-active notification of the oversight body by the relevant agency or their Minister. This reflects their status, resource impact, and enlivenment of significant coercive powers and statutory obligations in relation to proposed adverse findings (which are additional to the common law requirements of procedural fairness). Consequently, inquiries or investigations are often commenced after the relevant oversight agency has

³ See especially: Ombudsman Act, subparagraphs 15(1)(a)(ii), (iii) and (v) and paragraph 15(1)(b).

⁴ See especially: *Ibid*, paragraphs 15(2)(a)-(f) (proposed recommendations) and subsection 15(3) obligation to document recommendations in investigation report provided to relevant agency head).

undertaken a 'preliminary inquiry', such as under the explicit preliminary inquiry functions under section 14 of the IGIS Act and section 7A of the Ombudsman Act, to determine whether the matter is within jurisdiction, and if so, whether it should proceed to an inquiry or investigation.

11. In sharp contrast to inquiries or investigations (as they are variously described), a statutory 'inspection' function is akin to an ongoing 'health check' of an agency's activities, to determine and report to the agency (and the responsible Minister) about the nature and extent of their compliance, and to identify and provide an opportunity to rectify any issues at an early stage, before major remedial action is needed. The early detection of issues or risks during inspections may avert the need for matters of concern to proceed to a statutory inquiry or investigation. Conversely, the detection of major issues during inspections could prompt the initiation of an inquiry or investigation. The public-facing information released by the Office of the IGIS (with some examples from the agency's 2019-20 annual report discussed below) indicates that matters of propriety are routinely examined in the IGIS's inspections of the six intelligence agencies presently within its remit.
12. It is important that there is a clear statutory basis for oversight of the propriety of agency activities in inspections, not only in inquiries or investigations. Section 15 of the Ombudsman Act does not satisfy this imperative. If the Bill is passed in its present form, there will be no equivalent propriety oversight function to that of the IGIS in relation to the actions of the Australian Federal Police (AFP) and Department of Home Affairs in performing their intelligence functions.

'Propriety' is a broader concept than the matters listed in subsection 15(1) of the Ombudsman Act

13. Further, the matters set out in subsection 15(1) of the Ombudsman Act for the purpose of reports on investigations are limited to specific 'findings' of wrongdoing, in various forms, by the agency under investigation. (For instance, as noted above, the provision encompasses actions that were 'unreasonable, unjust, oppressive or improperly discriminatory' or involved the exercise of a discretionary power for an 'improper purpose'.)
14. The Law Council considers that the concept of the 'propriety' of an agency's actions, in the context of independent operational oversight, is much broader than these matters. As a former IGIS, Dr Vivienne Thom, commented in an article reflecting on her term of appointment:

The IGIS is required to look beyond matters of strict legality and comment on propriety. The IGIS Act does not provide a definition of the term 'propriety'. I found this to be a good thing. While administrative law experts might angst over the difference between judicial and merits review the IGIS has scope to look at almost anything under 'propriety'.

In a recent report the New Zealand IGIS had a good definition. She said:

The standard of propriety encompasses whether the agency acted in a way that a fully informed and objective observer would consider appropriate and justifiable in the circumstances.

The key part here is that the IGIS must be fully informed and objective: this is not the same as the pub test. The IGIS must have a good understanding of the national security environment and of relevant intelligence and risks.⁵

15. Importantly, the concept of 'propriety' is capable of covering assessments directed to facilitating the continuous improvement of agency actions and practices, not merely the making of investigative 'findings' that particular actions were manifestly 'improper'. The matters specified in subsection 15(1) of the Ombudsman Act appear directed to the latter form of 'findings'.
16. By way of practical examples in the public domain, the Law Council notes that the 2019-20 annual report of the Office of the IGIS identified that it had examined matters of propriety during the reporting period, which included the following:
 - the analytical integrity of various intelligence 'products' including:
 - agencies' intelligence reports or assessments;
 - operational and situational briefings provided in ministerial submissions;
 - the substance and recording of the intelligence case provided in support of internal applications to commence investigations, or Ministerial requests for warrants or other authorisations to exercise intrusive collection powers;
 - the timely cancellation by Australian Security Intelligence Organisation (**ASIO**) of authorities to conduct 'special intelligence operations' in the absence of mandatory statutory timeframes, where the Director-General believes that the grounds for issuing the authority have ceased to exist;
 - matters concerning the process by which agencies seek legal advice in relation to their operations, and the process by which that advice is provided; and
 - recommendations that ASIO should establish an internal compliance unit, in addition to its in-house legal department, to further strengthen its internal compliance and assurance capabilities.⁶
17. Accordingly, the Law Council urges the Committee to reject suggestions that the concern raised in the Law Council's submission is simply a matter of 'different language' being used in the Ombudsman Act and IGIS Act.⁷ Rather, the existence of section 15 of the Ombudsman Act will have no effect in ameliorating the sizeable gap that the Bill will create in relation to the independent operational oversight of the 'intelligence functions' of the AFP or the Department of Home Affairs, if it were passed in its current form.
18. Comprehensive oversight of the propriety of the activities of all agencies in the National Intelligence Community is particularly important in respect of covert activities of the agencies subject to oversight, over which the public and the Parliament have no visibility, and therefore cannot engage the usual democratic accountability mechanisms. The inclusion of the AFP and the Department of Home Affairs within the oversight remit of the IGIS, to the extent of their intelligence functions, would ensure that there is consistent and comprehensive oversight over matters of propriety.

⁵ Dr Vivienne Thom, 'Reflections of a Former Inspector-General of Intelligence and Security', (2016) 83 *Australian Institute of Administrative Law Forum*, 11 at 12.

⁶ IGIS, *Annual Report 2019-20*, (September 2020), 25 (inquiry into an ASIO matter) and 26-55 (inspections).

⁷ Cf Committee Hansard, Parliamentary Joint Committee on Intelligence and Security, 6 May 2021, 31.

An explicit oversight function over the retention and destruction of intelligence

19. The Law Council's primary submission to the inquiry observed that the proposed definition of the 'intelligence functions' of the Australian Criminal Intelligence Commission (**ACIC**) and the Australian Transactions and Reports Analysis Centre (**AUSTRAC**) in section 3 of the IGIS Act (item 60 of Schedule 2 to the Bill, at pages 62-63) did not expressly cover the acts or practices of those agencies in retaining or disposing of intelligence in their holdings. Rather, the provision refers to 'the collection, correlation, analysis, production and dissemination of intelligence'. The Law Council recommended that retention and destruction is explicitly included, to ensure there is a clear legal basis for the IGIS performing oversight of those activities.⁸
20. The Law Council notes that the evidence of the IGIS, the Hon Christopher Jessup QC, identified the possibility that the 'intelligence agency inquiry functions' of the IGIS in proposed subsection 8(3A) of the IGIS Act (item 61 of Schedule 2 to the Bill, at page 63) could be interpreted as covering oversight of agencies' acts and practices in relation to the retention and destruction of intelligence. This would be on the basis that retention and destruction is a 'matter [which] relates to an intelligence function of the relevant agency' under proposed subsection 8(3A). That is, it might be argued that the acts of the ACIC and AUSTRAC in retaining or destroying intelligence in their holdings are taken to 'relate to' the prior acts and practices of those agencies in collecting, correlating, analysing, producing and disseminating that intelligence.⁹
21. The Law Council acknowledges the scope for competing technical legal constructions of the relevant provisions, including in view of case law on the interpretation of the ambulatory expression 'relates to' (which, in short, provides that the meaning of this expression can vary greatly according to the particular text, context and purpose of the individual statutory provisions in question).¹⁰ It is for this reason that the Law Council has recommended explicit statutory coverage in the definition of agencies' 'intelligence functions', in section 3 of the IGIS Act to remove any scope for uncertainty, doubt or argument—the very existence of which could impede or limit the ability of the IGIS to conduct such oversight in the future. Explicit statutory coverage as recommended by the Law Council would ensure that the oversight remit of the IGIS is communicated in the clearest and most direct possible terms to the staff of agencies subject to oversight, potential complainants, and IGIS officials themselves.
22. The increasing availability and potential use by intelligence agencies of 'bulk personal data' in the digital environment makes such explicit recognition even more important. This observation applies with particular force in the case of the ACIC because that agency is exempt from the requirements of the *Privacy Act 1988* (Cth) (**Privacy Act**) in relation to its dealings with personal information and therefore the oversight (and enforcement) remit of the Privacy Commissioner.¹¹ The definition of an 'intelligence function' as presently drafted in item 60 of Schedule 2 to the Bill may be open to criticism for arbitrarily singling out for explicit statutory recognition only a subset of the ACIC and AUSTRAC's core dealings with intelligence in the course of performing their functions.
23. The Law Council further considers that explicit statutory recognition of retention and destruction in the definition of 'intelligence functions' of the ACIC and AUSTRAC would provide a valuable means of conveying the Parliament's acknowledgement of the importance of oversight of agencies' acts and practices in retaining and destroying

⁸ Law Council of Australia, *Submission to the PJCIS Review of the Intelligence Oversight and Other Legislation Amendment (Integrity Measures) Bill 2020*, (March 2021), 6-7 at [11]-[15] and recommendation 1.

⁹ Committee Hansard, Parliamentary Joint Committee on Intelligence and Security, (6 May 2021), 17-18.

¹⁰ See, for example, *The Queen v Khazaal* (2012) 246 CLR 601 at [31] (French CJ).

¹¹ *Privacy Act 1988* (Cth), paragraph 7(1)(h).

intelligence. This clear expression of Parliamentary intent could provide an even stronger assurance to the public that the largely covert acts and practices of agencies in retaining or destroying intelligence in their holdings (including sensitive personal information about individuals, not all of whom are the targets of an investigation) are subject to regular oversight. It may have some indirect influence in the setting of oversight priorities by the Office of the IGIS, by providing a clear prompt for the inclusion of this matter in the process of planning and executing inspection programs.

Oversight funding in the 2021-22 Budget

24. The adequacy of funding for independent operational oversight of the National Intelligence Community is a key determinant of whether the legislative framework for that oversight, including the proposed improvements in the Bill, will operate effectively.
25. Accordingly, the Law Council welcomes the allocation of additional funding to the IGIS and the Ombudsman in the 2021-22 Budget. This includes an additional \$4 million over four years (and \$1.1 million ongoing annual funding) to resource oversight of significant, recent and proposed expansions to intelligence and law enforcement agencies' powers. (These expansions are principally the measures in the *Telecommunications and Other Legislation Amendment (Assistance and Access) Act 2018* (Cth), and the proposed warrant-based powers in the Surveillance and Other Legislation Amendment (Identify and Disrupt) Bill 2020.)¹²
26. However, the Law Council is also concerned to ensure that this amount is adequate in view of substantial increases to the resources of the ASIO, the ACIC and AFP announced in the Budget, which will conceivably increase the scale and pace of their operations.¹³ The Committee may also wish to examine whether any funding needs identified by the Ombudsman or IGIS were not covered by the quantum of additional funding announced in the Budget.
27. In addition, the Law Council is concerned that the Office of the Australian Information Commissioner (**OAIC**), and in particular the functions of the Privacy Commissioner, were not included in the increased funding for oversight of national security agencies.
28. This concern is heightened by the fact that the OAIC's total ongoing annual budget is forecast to decrease by approximately \$7.8 million from 2022-23, due to the expiry of additional funding allocated four years ago for the performance of privacy functions, including complaints handling.¹⁴ As the 2021-22 Budget did not contain any announcements for the continuation of these funding arrangements, the Law Council is concerned that this evident 'funding cliff' faced by the OAIC could impede the effectiveness of the oversight framework for the National Intelligence Community (and Commonwealth agencies more broadly). Three of the 10 member agencies are subject to the requirements of the Privacy Act (being the AFP, AUSTRAC and the Department of Home Affairs). The personal information which they are empowered to obtain and use can be highly sensitive, intrusive and voluminous.
29. As a more general point about national security oversight funding measures in the 2021-22 Budget, the Law Council remains concerned by the ongoing practice of omitting the annual operating budget of the Independent National Security Legislation

¹² Australian Government, *Budget Paper No 2, 2021-22 Budget* (11 May 2021), 132.

¹³ For example, additional \$1.3 billion has been allocated to ASIO over 10 years, and an additional \$51.8 million to the ACIC in 2021-22, to support their technical capabilities in relation to security intelligence and transnational, serious and organised crime respectively. The AFP has also been allocated an additional \$35.4 million over four years in relation to the investigation and enforcement of child sexual abuse offences: Australian Government, *Budget Paper No 2, 2021-22 Budget* (11 May 2021), 127, 128 and 174-175.

¹⁴ Australian Government, *Attorney-General's Portfolio Budget Statement: 2021-22*, (11 May 2021), 289.

Monitor (**INSLM**) from the budget papers. As the Office of the INSLM is not an independent Commonwealth entity, the INSLM's salary as a statutory office-holder is set by the Commonwealth Remuneration Tribunal. The Law Council understands that the staff, accommodation and operating budget are provided from the general operating budget of the Attorney-General's Department. However, the listing of the Department's expense measures in the 2021-22 Budget Papers does not appear to provide a breakdown of the funds allocated to support the INSLM.

30. The disclosure of such information may fall to the forthcoming (or subsequent) Senate Estimates hearings, should any Senators be inclined to ask questions about resourcing allocated to support the INSLM. However, the interests of transparency would be served more effectively if this information were pro-actively and routinely included as a line item in the Attorney-General's portfolio budget statements. Until the 2016-17 Budget, this information was usually included in the portfolio budget statements for the Prime Minister and Cabinet portfolio (in which the INSLM was located until machinery of government changes in 2018).¹⁵ The Law Council supports a return to this practice.

Further information

31. Thank you again for the opportunity to participate in this inquiry. The Law Council would be pleased to provide any further assistance the Committee may require. Should you wish to speak with me directly, I am contactable on [REDACTED] or [REDACTED].
32. The responsible officer within the Law Council Secretariat, [REDACTED], Director of Policy, is also available to assist the Committee Secretariat or the Committee members' offices on [REDACTED] or [REDACTED].

Yours sincerely

[REDACTED]

Dr Jacoba Brasch QC
President

¹⁵ See, for example: Australian Government, *Prime Minister's Portfolio Budget Statements*, 2015-16 (May 2015), 26; Australian Government, *Prime Minister's Portfolio Budget Statements*, 2014-15 (May 2014), 23.