



Australian Government

Australian Government response to the
Parliamentary Joint Committee on Intelligence and Security report:

Review of the Inspector-General of Intelligence and Security and Other Legislation Amendment (Modernisation) Bill 2022

JULY 2023

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The Government thanks the Parliamentary Joint Committee on Intelligence and Security ('Committee') for its review of the Inspector-General of Intelligence and Security and Other Legislation Amendment (Modernisation) Bill 2022 (the 'Bill').

The Government provides the following responses to the Committee's recommendations.

Recommendation 1

The Committee recommends that the Australian Government consider amendments to the *Inspector-General of Intelligence and Security Act 1986* ('IGIS Act') and the *Intelligence Services Act 2001* ('IS Act') to provide for greater information sharing between the Inspector-General of Intelligence and Security ('IGIS') and the Parliamentary Joint Committee on Intelligence and Security.

The Committee recommends that the Government report to the Committee within twelve months of the presentation of this report on the outcomes of such consideration.

The Government accepts the Committee's recommendation.

The Government acknowledges the important but different oversight roles performed by the Committee and the IGIS. A robust relationship between both bodies is important and assists each body in performance of its functions.

The Government will consider what changes, if any, are required to provide for potentially greater information sharing between the Committee and the IGIS. The Government will report back to the Committee on the outcomes of these considerations within 12 months.

Recommendation 2

The Committee recommends that item 86 of Schedule 1 of the Inspector-General of Intelligence and Security and Other Legislation Amendment (Modernisation) Bill 2022 be amended to align the provisions relating to abrogation of legal professional privilege with equivalent provisions in the legislation governing other integrity agencies.

The Government notes the Committee's recommendation.

The Government acknowledges the importance of legal professional privilege as it serves the public interest in the administration of justice. The proper administration of justice requires that clients are able to communicate freely and frankly with their lawyer, without fear of disclosing any information relevant to the legal advice they are seeking.

Section 18(6)(b) of the IGIS Act currently provides for the limited abrogation of legal professional privilege that is held by the Commonwealth. The IGIS Act does not operate to abrogate the privilege held by private individuals or entities who may seek legal advice about their rights or liabilities in their dealings with a Commonwealth agency. This reflects the long-standing role of the IGIS to oversee the activities of agencies—rather than individuals—for legality, propriety and compliance with human rights. In reaching its own view on the legality of agencies’ activities, the IGIS can be assisted by understanding how the agency itself considered the activity was lawful.

However, section 18(6)(b) of the IGIS Act applies only to the disclosure of the legal advice itself and not the communications that are made for the dominant purpose of giving legal advice. The amendments contained in the Bill would ensure that the duty to comply with section 18 notices to provide information or documents addresses both the ‘advice’ and ‘litigation’ limbs of legal professional privilege as recognised in sections 118 and 119 of the *Evidence Act 1995*.

As the Explanatory Memorandum provides, if passed, the amendments will avoid the situation where a technical argument about what constitutes ‘advice’ could excuse a person (who provides legal advice to the Commonwealth Government) from giving information to the IGIS as part of an inquiry.

As recognised in submissions made to the Committee, these amendments are consistent with equivalent provisions in the legislation governing other integrity agencies, including section 9(4)(ab) of the *Ombudsman Act 1976* and section 96(5) of the *Law Enforcement Integrity Commissioner Act 2006* (now repealed).¹

Recommendation 3

The Committee recommends that the Office of National Intelligence develop an employment framework governing staff members that may be engaged under subsection 33(1)(b) of the *Office of National Intelligence Act 2018*.

The Office of National Intelligence should report to the Committee in 12 months on progress towards implementing this recommendation.

The Government accepts the Committee’s recommendation.

The Office of National Intelligence (ONI) will commence development of an employment framework governing staff members that may be engaged under the *Office of National Intelligence Act 2018*.

ONI will report back to the Committee on the progress of this work within 12 months.

¹ Law Council of Australia, *Submission 3*, pp. 14-15.

Recommendation 4

The Committee recommends that the Australian Government consider amendments to the Inspector-General of Intelligence and Security and Other Legislation Amendment (Modernisation) Bill 2022 to prescribe that a person would be ineligible for appointment to the role of Inspector-General for an appropriate period of time to be determined by the Government, following employment in an intelligence agency.

The Government notes the Committee's recommendation.

The Bill provides that a person who is, or whose most recent position was, the head of an intelligence agency within IGIS' jurisdiction is not eligible to be appointed as the Inspector-General immediately after they finish their role within an intelligence agency. This amendment addresses the most acute circumstances where actual or perceived conflict of interest are likely to result in an undermining of trust in the IGIS.

However, the Government does not consider that all prior experience with an intelligence agency would necessarily amount to an actual or perceived conflict of interest. It is important that the Government has discretion to consider all of the circumstances and is not arbitrarily prevented from choosing the ideal candidate.

Recommendation 5

The Committee recommends that, following implementation of the recommendations in this report, the Bill be passed by the Parliament.

The Government accepts the Committee's recommendation.