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Review of the Intelligence Services Legislation Amendment Bill 2023

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

4 September 2023

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1. INTRODUCTION

1. The Inspector-General of Intelligence and Security (IGIS) welcomes the opportunity to make this submission to the review by the Parliamentary Joint Committee on Intelligence and Security (the Committee) on the Intelligence Services Legislation Amendment Bill 2023 (the Bill).
2. Consistent with established practices, IGIS does not make any comment on the policy underlying the Bill. 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. This submission also does not comment on aspects of the Bill concerning the jurisdiction of the Committee, which are not immediately applicable to IGIS.
3. IGIS has been extensively consulted by the Attorney-General's Department during the development of the Bill. The Bill's development was influenced by both the 2017 Independent Intelligence Review (IIR), the 2019 Comprehensive Review of the Legal Framework of the National Intelligence Community (the Comprehensive Review), several Committee reports,¹ and the consideration that went into the drafting of the Intelligence Oversight and Other Legislation Amendment (Integrity Measures) Bill 2020 (Integrity Measures Bill), which was introduced into the 46th Parliament, but lapsed at its dissolution. IGIS made a submission to the then Committee in relation to the Integrity Measures Bill, dated 12 February 2021, and appeared at the public hearing on 6 May 2021.
4. The provisions in this Bill also build on the amendments currently before Parliament under the Inspector-General of Intelligence and Security and Other Legislation Amendment (Modernisation) Bill 2022 (Modernisation Bill). The IGIS made a submission to the Committee in relation to the Modernisation Bill dated 17 February 2023, and appeared before the Committee on 3 March 2023.
5. The Bill primarily expands IGIS's jurisdiction to include the Australian Criminal Intelligence Commission (ACIC) in its entirety, and the intelligence functions of the Australian Transaction Reports and Analysis Centre (AUSTRAC), the Australian Federal Police (AFP), and the Department of Home Affairs (Home Affairs). The Bill also expands the jurisdiction of the Committee to oversee ACIC, and the intelligence functions of AUSTRAC, AFP and Home Affairs, to mirror IGIS's new jurisdiction, and provides the Committee with the power to request IGIS to undertake an inquiry in certain circumstances.

2. BACKGROUND

ABOUT IGIS

6. IGIS is an independent statutory agency within the Attorney-General's portfolio. The Inspector-General is an independent statutory officer appointed under the *Inspector-General of Intelligence and Security Act 1986* (IGIS Act).² The Hon Dr Christopher Jessup KC, commenced as the Inspector-General on 8 February 2021 (having been Acting Inspector-General since 18 January 2021).

¹ See PJCS, *Advisory Report on the Intelligence Oversight and Other Legislation Amendment (Integrity Measures) Bill 2020* (February 2022), and PJCS, *Advisory Report on the Surveillance Legislation Amendment (Identify and Disrupt) Bill 2020* (August 2021).

² The purposes of the IGIS include the functions of the Inspector-General referred to in sections 8, 9 and 9A of the IGIS Act (paragraph 6AA(e) IGIS Act).

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7. 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)

and the intelligence functions of the ACIC and AFP, as currently defined in the IGIS Act.³

8. The overarching purpose of IGIS's functions is to assist Ministers in the oversight and review of the activities of each intelligence agency to ensure that they are legal and proper, comply with ministerial guidelines and directives, and respect human rights.
9. IGIS regularly conducts proactive and independent inspections of the legality, propriety and human rights implications of intelligence agency activities and compliance incidents. IGIS has a risk-based approach to its inspection program, targeting high risk activities and activities with the potential to detrimentally affect the lives or rights of Australian persons. Accordingly, the IGIS inspection program mainly focuses on the activities of agencies that involve intrusive powers and investigative capabilities. IGIS also considers 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.
10. The inspection role of IGIS is complemented by an inquiry function, which is the most formal activity the IGIS undertakes to review the operations of the agencies within its jurisdiction. The IGIS Act provides that the IGIS may conduct an independent inquiry into the activities of an intelligence agency either of the Inspector-General's own motion, at the request of the responsible Minister, the Attorney-General, 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 under section 9 of the IGIS Act.
11. In undertaking inquiries, the Inspector-General has a number of powers to draw upon, including the power to require any person to answer questions and produce relevant documents, take sworn evidence, and enter agency premises. At the conclusion of an inquiry, the Inspector-General provides a report with findings and recommendations to the responsible Minister.
12. Finally, the Inspector-General receives and inquires into complaints about the intelligence agencies within IGIS's jurisdiction.⁴ 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 intelligence agencies and their records, and the ability to examine the full set of circumstances of any complaint, complaints 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

³ The intelligence functions of the ACIC and AFP, as defined in section 3 of the IGIS Act, are the collection, correlation, analysis, production and dissemination of intelligence obtained by the ACIC or AFP from the execution of a network activity warrant; or the performance of a function, or the exercise of a power, conferred on a law enforcement officer of ACIC or AFP by the network activity warrant provisions of the *Surveillance Devices Act 2004*.

⁴ These agencies are ASIO, ASIS, ASD and AGO. Where the complaint is in respect of the intelligence functions of ACIC or AFP, as defined in the IGIS Act, IGIS also has jurisdiction.

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is provided a written response with as much information about the outcome as possible, in light of security requirements.

THE 2017 INDEPENDENT INTELLIGENCE REVIEW

13. 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.⁵

THE 2019 COMPREHENSIVE REVIEW OF INTELLIGENCE LEGISLATION

14. 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.
15. The Comprehensive Review concluded that the IGIS should not have oversight of Home Affairs or the AFP as was recommended in the IIR.⁶ 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'.⁷

PREVIOUS COMMITTEE REPORTS

16. The Committee has also made several recommendations regarding the jurisdiction of IGIS in a number of reports. Most notably, in the Committee's *Advisory Report on the Intelligence Oversight and Other Legislation Amendment (Integrity Measures) Bill 2020*, it recommended the jurisdiction of the IGIS be expanded to the intelligence functions of the AFP, noting that the Integrity Measures Bill before it already sought to expand IGIS's jurisdiction over the ACIC.⁸
17. A similar recommendation was also made in the Committee's *Advisory Report on the Surveillance Legislation Amendment (Identify and Disrupt) Bill 2020* that IGIS should have jurisdiction over the AFP and also the ACIC's intelligence functions, including, but not limited to, the use of network activity warrants.⁹

THE INTELLIGENCE SERVICES LEGISLATION AMENDMENT BILL

18. As noted above, this Bill proposes to build on the amendments under the Modernisation Bill, and implement a number of recommendations from the 2017 IIR, Comprehensive Review and previous Committee reports, particularly in relation to the expansion of jurisdiction of the IGIS and the PJCIS to include within jurisdiction, some or all of those agencies that make up the wider National Intelligence Community (NIC).

⁵ Independent Intelligence Review (IIR), June 2017, p. 21 (Recommendation 21).

⁶ 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.

⁷ Comprehensive Review, Volume 3, December 2019, p. 262, [40.102].

⁸ Recommendation 1.

⁹ Recommendations 1 and 2.

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19. Specifically, the Bill includes:

- amendments to give effect to IGIS's expanded jurisdiction in relation to the ACIC and the intelligence functions of the AFP, AUSTRAC and Home Affairs;
- amendments to the IGIS Act and consequential amendments to a range of other Acts to ensure the effectiveness of IGIS's oversight of the ACIC and the intelligence functions of the AFP, AUSTRAC and Home Affairs, and the ongoing effectiveness of oversight of agencies within IGIS's existing jurisdiction;
- amendments to enable the Committee to request the IGIS to conduct an inquiry into the legality and propriety of particular operational activities of the agencies within IGIS's jurisdiction, and if the IGIS undertakes such an inquiry, to provide a report to the Committee, or otherwise notify the Committee of the reasons if a report is not provided;
- amendments which clarify the IGIS's complaints jurisdiction such that the Inspector-General is required to be satisfied that the action complained of is the kind of action that is reasonably likely to have been taken by an intelligence agency;
- amendments which clarify the IGIS's ability to provide information to relevant Ministers; and
- amendments which require the IGIS to provide briefings to the Committee at least once during the calendar year.

20. Schedule 1, Part 1 of the Bill provides the main amendments to the IGIS Act and the *Intelligence Services Act 2001* (IS Act). Schedule 1, Part 2 contains consequential amendments to ensure that where information is protected by secrecy offences under relevant legislation, it can be disclosed to IGIS officials performing duties or functions or exercising powers, as IGIS officials. These amendments also allow for the transfer of complaints regarding AFP, AUSTRAC and Home Affairs between the IGIS and other integrity bodies to facilitate effective consideration of those complaints by the appropriate body. This Part also contains consequential amendments to address concurrent jurisdiction between the IGIS and relevant oversight bodies, such as the Commonwealth Ombudsman (Ombudsman) and the Australian Human Rights Commission (AHRC).

21. Parts 3, 4 and 5 to Schedule 1 of the Bill make consequential amendments based on the commencement of the *National Anti-Corruption Commission Act 2022*, *National Anti-Corruption Commission (Consequential and Transitional Provisions) Act 2022*, and *Public Interest Disclosure Amendment (Review) Act 2023*. Schedule 2 makes consequential amendments contingent on the commencement of the *National Security Legislation Amendment (Comprehensive Review and Other Measures No. 2) Act 2023*. Schedules 3 and 4 seek to amend the review and access of ACIC criminal intelligence assessment records under the *Administrative Appeals Tribunal Act 1975*, and to amend the *Criminal Code Act 1995*, to introduce an exemption from civil and criminal liability for defence officials for certain computer related conduct, respectively. This last amendment addresses recommendation 72 of the Comprehensive Review.

22. Schedule 5 of the Bill contains application and transitional provisions.

3. MAIN AMENDMENTS

EXPANSION OF IGIS JURISDICTION

NEW INQUIRY FUNCTIONS

23. The Bill amends section 8(3A) of the IGIS Act to expand IGIS's jurisdiction to include the 'intelligence functions' of AUSTRAC and Home Affairs, in addition to AFP (see below at [30]-

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[38]).¹⁰ Schedule 1, item 11 of the Bill also inserts new subsection 8(4) into the IGIS Act, setting out IGIS's jurisdiction in relation to all of the ACIC. Notably, the IGIS's jurisdiction is no longer limited to ACIC's 'intelligence functions' as currently defined, and is broader than the jurisdiction proposed under the Integrity Measures Bill.¹¹

24. These amendments are intended to align IGIS's new functions in relation to ACIC, and the intelligence functions of AUSTRAC, AFP and Home Affairs with its current functions for the intelligence agencies within its existing jurisdiction. Proposed subsections 8(3A) and (4) are drafted similarly to existing subsections 8(1), 8(2), 8(3) and 8(3A) of the IGIS Act. There are some variances to account for the particular agencies involved and to reflect modern drafting practices.
25. As with the IGIS's current jurisdiction over ACIC and AFP,¹² IGIS will not have a function to inquire into the procedures of AUSTRAC, AFP or Home Affairs relating to the redress of employee grievances. This avoids the potential for differences in grievance redress mechanisms available to staff of those agencies, depending on whether they were performing 'intelligence' or 'non-intelligence' functions. Under proposed subsection 8(4), the IGIS will, however, have jurisdiction to inquire into ACIC's procedures relating to the redress of employee grievances, as the oversight body for all of ACIC's activities.
26. The Bill excludes inquiries into complaints made by employees of ACIC, AFP, AUSTRAC or Home Affairs that are directly employment-related matters.¹³ This is consistent with the IGIS Act's existing exclusion of complaints from agency staff who are employed under the *Public Service Act 1999*, as they are able to avail themselves of other appropriate avenues to address employment concerns, such as the Merit Protection Commissioner.¹⁴
27. Proposed subsection 8(5A) will also make it clear that IGIS's jurisdiction over ACIC, and the intelligence functions of AFP, AUSTRAC and Home Affairs, excludes inquiries into complaints made by persons who are performing functions or services for these agencies under a contract, agreement or other arrangement, such as contracted service providers. New subparagraph 8(5A)(b)(ii) provides a narrow exception, which would allow the IGIS to inquire into a matter where a person has made a complaint about the legality or propriety of the functions or services they are performing under the contract, agreement or other arrangement. This is similar to, albeit narrower than, existing paragraph 8(8)(b) of the IGIS Act, which enables IGIS to inquire into complaints made by ASIO affiliates relating to performing functions or services for ASIO under a contract, agreement or other arrangement.
28. IGIS's complaints jurisdiction in relation to ACIC, AUSTRAC, AFP and Home Affairs will not be limited to complaints from Australian citizens and permanent residents (in comparison to existing limitations in relation to ASIS, AGO and ASD).¹⁵ This mirrors the IGIS's complaints jurisdiction in relation to ASIO, and recognises that as the focus of these agencies' activities are primarily domestic, their impact could potentially affect any person in Australia, irrespective of nationality.
29. Consistent with existing jurisdiction, IGIS will not be able to inquire into the action taken by a Minister in relation to ACIC, AFP, AUSTRAC or Home Affairs, except to the extent necessary to

¹⁰ Schedule 1, item 8.

¹¹ Under the Integrity Measures Bill, IGIS's jurisdiction over the ACIC did not include ACIC examiners or matters in relation to 'indigenous violence and child sexual abuse', both matters over which the Ombudsman currently has jurisdiction (see Schedule 2, Part 3 items 60 and 61 Integrity Measures Bill).

¹² Subsection 8(3A) IGIS Act.

¹³ Schedule 1, item 13.

¹⁴ See subsection 8(5) IGIS Act, this includes AGO, DIO, ACIC, AFP and ONI (which is to be amended under schedule 1, item 25 of the Modernisation Bill, to 'a Public Service Act ONI employee').

¹⁵ See e.g., paragraph 8(2)(a) IGIS Act.

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inquire into the relevant agency's compliance with directions or guidelines given to that agency by the relevant Minister.¹⁶ IGIS will be able to inquire into the ACIC's compliance with directions, guidelines, policies or other decisions made by the Board of the ACIC or the Inter-Governmental Committee established under the *Australian Crime Commission Act 2002* (ACC Act).¹⁷

DEFINITION OF 'INTELLIGENCE FUNCTION'

30. The Bill provides IGIS's jurisdiction in relation to AFP, AUSTRAC and Home Affairs will include a matter that 'relates to an intelligence function of the relevant agency'. 'Intelligence function' for each of these agencies is defined in Schedule 1, item 6 of the Bill.
31. Consistent with recommendation 169 of the Comprehensive Review,¹⁸ 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 AFP'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 for each agency (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'.¹⁹

Australian Federal Police

32. The definition of 'intelligence function' for AFP as set out in proposed subsection 3A(1), expands the existing IGIS Act definition, which is confined to AFP's use of network activity warrants under the *Surveillance Devices Act 2004*, to the collection, correlation, analysis, production and dissemination of intelligence by AFP to support the performance of its functions under paragraphs 8(1)(b), (baa), (bd), (be), (bf), (bg) and (bh) of the *Australian Federal Police Act 1979* (AFP Act), and to do anything incidental or conducive to the performance of those functions.²⁰ Proposed subsection 3A(2) makes it clear that the intelligence functions of the AFP do not include the arrest, charging or detention of suspected offenders; or the gathering of evidence, or any activity undertaken to directly support the gathering of evidence.
33. This definition of 'intelligence function', explicitly excludes AFP's functions in the provision of policing services to the ACT, Jervis Bay Territory and external Territories under paragraphs 8(1)(a), (aa) and (ba) of the AFP Act. This aligns with IGIS's current functions, which do not include oversight of the police forces of the other States or Territories. The definition also explicitly excludes AFP's functions in respect to witness protection under paragraphs 8(1)(bb) and (bc) of the AFP Act, as they are administrative functions and tied to the National Witness Protection Program under the *Witness Protection Act 1994*.
34. The intelligence functions as defined for the AFP under the Bill are effectively, the collection, correlation, analysis, production and dissemination of intelligence that supports the AFP to perform key Commonwealth policing and law enforcement functions.²¹ Defining in practice intelligence functions for the purposes of IGIS's jurisdiction, as opposed to evidence gathering, will require careful consideration and close cooperation between AFP, IGIS, and the Ombudsman, who, as set out below, will retain jurisdiction over the AFP.

¹⁶ Schedule 1, item 19, amendments to paragraph 9AA(b).

¹⁷ Schedule 1, item 11, new paragraph 8(4)(e).

¹⁸ Comprehensive Review, Volume 3, December 2019, p. 263 (Recommendation 169).

¹⁹ Comprehensive Review, Volume 3, December 2019, p. 263 [40.108].

²⁰ Schedule 1, item 6, paragraphs 3A(1)(a) and (b).

²¹ Explanatory Memorandum, paragraph 48.

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Australian Transaction Reports and Analysis Centre

35. The definition of ‘intelligence function’ for AUSTRAC set out in subsection 3A(3) of the Bill, means 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* (AML/CTF Act); or AUSTRAC, the AUSTRAC CEO or any other official of AUSTRAC performing functions incidental to the financial intelligence functions.
36. This definition places under IGIS’s jurisdiction activities undertaken for the purpose of any of the AUSTRAC CEO’s functions under section 212 of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (AML/CTF Act) ‘... to the extent that they involve intelligence’.²² 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’.²³
37. The extent to which the AUSTRAC CEO’s functions ‘involve intelligence’ and thus fall within IGIS’s jurisdiction, and where they do not, will require careful consideration and close cooperation between AUSTRAC, IGIS, and the Ombudsman, who, as set out below, will retain jurisdiction over AUSTRAC.

Department of Home Affairs

38. The definition of ‘intelligence function’ for Home Affairs as provided in subsection 3A(4) of the Bill, will be set out in regulations. These regulations, once made, will set out the scope of IGIS’s jurisdiction over the activities of Home Affairs.

INQUIRIES AT THE REQUEST OF THE COMMITTEE

39. The Bill will enable the IGIS to undertake inquiries at the request of the Committee.²⁴ The Committee, likewise, will be given a new corresponding function to make such a request to the IGIS, in accordance with proposed subsection 29(2A) of the IS Act.²⁵ This function will be limited to inquiries that the IGIS could only otherwise undertake under subsections 8(1), (2), (3), subsection 8(3A) as amended, and new subsection 8(4) of the IGIS Act, at the request of the Attorney-General, or the responsible Minister, and where the matter relates to the legality and propriety (however described) of the operational activities of the agency. A request cannot be made about matters that relate to an individual complaint about the activities of an agency.
40. The ability of the Committee to review any response to an inquiry conducted by the IGIS, at its request, will be determined by the Committee’s functions under s 29(3) of the IS Act, and schedule 1, clause 1 of the IS Act, which provides that the Committee must not require a person or body to disclose to it operationally sensitive information or information that would or might prejudice Australia’s national security or the conduct of Australia’s foreign relations. This is in line with recommendation 181 of the Comprehensive Review and made clear by the proposed notes at the end of subsection 29(2A) to the IS Act and proposed s 8AA to the IGIS Act.

²² Explanatory Memorandum, paragraph 56. The Explanatory Memorandum sets out a non-exhaustive list of some of the AUSTRAC CEO’s financial intelligence functions including: accessing and collecting information while assessing potential instances of criminal activity; correlation of information to detect transactions and patterns of behavior that may be indicative of criminal activity, including money laundering, terrorism financing and organised crime; analysis of information to identify specific targets, determine links between those targets and possible criminal activity or risks to national security; and the production of intelligence reports and dissemination to relevant law enforcement, regulatory and national security partners.

²³ Explanatory Memorandum, paragraph 57.

²⁴ Schedule 1, item 17.

²⁵ Schedule 1, items 17 and 57.

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41. Whether the IGIS initiates an inquiry in response to a Committee request, is at the IGIS's discretion. However, should the IGIS complete an inquiry at the Committee's request, the IGIS will be required to 'take reasonable steps' to give a written response relating to the inquiry to the Committee, unless satisfied on reasonable grounds that doing so would prejudice security, the defence of Australia or Australia's relations with other countries.²⁶ Proposed subsections 22A(3) and (4) of the Bill, require the IGIS to agree with the head of the intelligence agency/ies to ensure that the response would not prejudice:

- security, the defence of Australia or Australia's relations with other countries; or
- law enforcement operations, including methodologies and investigative techniques; or
- confidential commercial information held by AUSTRAC; or
- operationally sensitive information (within the meaning of Schedule 1 of the IS Act)

or require the IGIS to consult with them on whether the terms of the proposed response would prejudice:

- the privacy of one or more individuals; or
- the fair trial of a person or the impartial adjudication of a matter.

42. A report setting out the IGIS's conclusions and recommendations as a result of an inquiry will also be generated in accordance with Division 4, Part II of the IGIS Act, and provided to the head of the relevant agency, the responsible Minister, and Attorney-General and/or Prime Minister as required.
43. The existing information disclosure and secrecy requirements applicable to the Committee under the IS Act will continue to apply in respect of any response or briefings provided by the IGIS.²⁷

CLARIFICATION OF COMPLAINTS JURISDICTION

44. Schedule 1, item 22 of the Bill clarifies IGIS's complaints jurisdiction under section 11 of the IGIS Act. Proposed paragraph 11(1)(aa) will provide that a complaint will only fall within jurisdiction, where, in addition to paragraphs 11(1)(a) and (b), the IGIS is satisfied that the action complained of, is the kind of action that is reasonably likely to be taken by an intelligence agency.
45. In the 2021-2022 financial year, the IGIS's complaints team received 652 pieces of correspondence from members of the public.²⁸ Much of this correspondence was about activities which were highly implausible or otherwise not credible. If IGIS' complaints jurisdiction expands to include more agencies as anticipated under this Bill and, DIO and ONI under the Modernisation Bill, it is likely that the amount of correspondence received by IGIS will also increase.²⁹
46. This amendment will make it clear on the face of the legislation that correspondence received by the Office about highly implausible or otherwise not credible actions of agencies are not complaints that invoke IGIS's jurisdiction. It will also clarify that the IGIS will not be required to undertake any further action in relation to such correspondence, such as undertaking a preliminary inquiry and assessing whether the correspondence is otherwise exempt under subsections 11(2)-(6) of the IGIS Act. This will ensure that time and resources can be more

²⁶ Schedule 1, item 30.

²⁷ This was also a recommendation of the Comprehensive Review, recommendation 182. See Schedule 1, clauses 12 and 22, IS Act.

²⁸ IGIS, Annual Report 2021-2022, p 103 < [Inspector-General of Intelligence and Security \(IGIS\) 2021-2022 Annual Report](#) >

²⁹ Schedule 1, items 20 and 26 Modernisation Bill, amends section 8(3) of the IGIS Act to expand IGIS's complaints jurisdiction to cover complaints made about the actions of DIO and ONI, and gives IGIS jurisdiction to inquire into ONI Act employee complaints concerning their employment by ONI.

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effectively allocated to inquiring into complaints that raise credible concerns about the actions taken by intelligence agencies.

INFORMATION SHARING AND DISCLOSURE

47. In addition to the information sharing provisions set out in Schedule 1, item 131 of the Modernisation Bill, this Bill introduces further provisions to enhance information sharing. Proposed section 32AEA of the Bill, makes it clear that the IGIS can share information or documents about IGIS's exercise of powers or performance of functions or duties, with:
- the Attorney-General; and
 - a responsible Minister for a Commonwealth agency, if the information or documents relate to the Commonwealth agency.
48. As the Minister responsible for the IGIS, the IGIS has need to regularly communicate with the Attorney-General about the activities of the Office, likewise, from time to time there is a need to communicate certain activities concerning IGIS's functions and duties with other relevant Ministers as required. Noting the strict secrecy provision in section 34 of the IGIS Act, this proposed section provides clarity in relation to IGIS's communications with Ministers.
49. Schedule 1, item 34 of the Bill inserts proposed section 32AFA which regulates the disclosure of ACIC examination material by IGIS and reflects the expansion of IGIS's jurisdiction to include all of the ACIC, including examiners. IGIS notes that IGIS's current jurisdiction over the ACIC, does not include inquiring into any action taken by an examiner in performing functions or exercising powers as an examiner.³⁰ IGIS's jurisdiction over the ACIC, is expanded under this Bill,³¹ and reflects the Ombudsman's current jurisdiction over the ACIC, which includes examiners. This new provision also seeks to ensure appropriate controls are in place to govern the use and disclosure of examination material.
50. New subsection 32AFA(2) provides that before 'examination material' (as defined in subsection 4B(3) of the ACC Act) is shared by the Inspector-General (except to an IGIS official), the Inspector-General must consider and consult with the CEO of ACIC as to, whether that sharing:
- might prejudice a person's safety; or
 - would reasonably be expected to prejudice the fair trial of the examinee for the examination material if the examinee has been charged with a related offence or a charge for a related offence is imminent; or
 - might prejudice the effectiveness of a special ACC operation or special ACC investigation.
51. This provision still enables IGIS to share examination material irrespective of any advice received from the CEO of ACIC or any conclusions reached by the Inspector-General as to those listed matters above. Additionally, the Inspector-General will be able to share examination material irrespective of a direction under subsection 25A(9) of the ACC Act preventing use or disclosure of the examination material, contravention of which would otherwise be an offence (see subsection 25A(14A) of the ACC Act). New subsection 25A(14B) of the ACC Act will provide an exception to that offence for the use or disclosure of examination material for the purpose of an IGIS official exercising a power, or performing a function or duty, as an IGIS official.³²

³⁰ See subsection 8(3B) IGIS Act.

³¹ Schedule 1, item 11, repeals and replaces subsection 8(3B).

³² Schedule 1, item 115.

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52. Note 1 at the end of the subsection makes it clear that the requirements in this new section apply in all circumstances where the IGIS may share examination material, such as to a Minister under proposed section 32AEA or with other integrity bodies under section 32AF, proposed under the Modernisation Bill.
53. Note 2 at the end of the subsection also clarifies that recipients of examination material (except an IGIS official) commit an offence under subsection 25A(14A) of the ACC Act if they use or disclose the examination material, even examination material received by them lawfully from the IGIS, in contravention of a direction about the examination material given under subsection 25A(9) of that Act.

BRIEFING THE COMMITTEE

54. The Bill proposes to insert new section 32C into the IGIS Act, which would require the IGIS to brief the Committee at least once each calendar year.³³ In addition to a standalone briefing, this requirement could also be satisfied by any briefings provided by the IGIS to the Committee, including briefings provided in compliance with statutory requirements, such as in relation to the making or changing of the Privacy Rules under sections 15 and 41C of the IS Act, or in relation to the administration and expenditure of the agencies within IGIS's jurisdiction.

POWER OF ENTRY

55. To facilitate the expansion of IGIS's jurisdiction, the Bill also includes some additional amendments. Schedule 1, items 21 and 26 to the Bill repeals and substitutes sections 9B and 19A of the IGIS Act, respectively. These amendments enable the IGIS to enter places where a person is detained under section 31 or 34D of the ACC Act in addition to current powers to enter places where a person is being questioned or apprehended in relation to a warrant issued under Division 3 of Part III of the ASIO Act, for the purpose of inspections or inquiries. These amendments reflect the expansion of IGIS's jurisdiction to cover the ACIC, and are consistent with IGIS's current oversight of ASIO which has similar powers.

4. CONSEQUENTIAL AMENDMENTS TO OTHER LEGISLATION

ADDRESSING CONCURRENT JURISDICTION

56. The Bill makes a number of consequential amendments to various Commonwealth Acts in order to give effect to IGIS's expanded jurisdiction of the ACIC and the intelligence functions of AFP, AUSTRAC and Home Affairs, and in order to coordinate jurisdiction with other integrity bodies, such as the Ombudsman and the Australian Human Rights Commission (AHRC).

COMMONWEALTH OMBUDSMAN

57. Under the Bill, the Ombudsman will retain its existing jurisdiction over the AFP, AUSTRAC and Home Affairs. Amendments to sections 5B and 6F of the *Ombudsman Act 1976* (Ombudsman Act) will enable the Ombudsman to transfer complaints to the IGIS and vice versa where the complaint relates to AFP, AUSTRAC or Home Affairs and could be more effectively dealt with by the other integrity body.³⁴ Amendments proposed under the Modernisation Bill, will enable IGIS to share information with the Ombudsman where relevant to the Ombudsman's functions.³⁵ This mirrors in part, current section 35AB of the Ombudsman Act, which enables the Ombudsman to share

³³ Schedule 1, item 44.

³⁴ Schedule 1, items 196 and 198.

³⁵ See Schedule 1, item 131, section 32AF Modernisation Bill.

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information with the IGIS where considered relevant to IGIS's functions. As the Ombudsman will retain jurisdiction over the AFP, AUSTRAC and Home Affairs, and as IGIS's jurisdiction will expand to include these agencies' 'intelligence functions', as defined, this will facilitate information sharing under these provisions.

58. The ACIC is currently overseen by the Ombudsman.³⁶ Items 195 to 199 in Schedule 1, of the Bill, amend the Ombudsman Act to remove the ACIC from its jurisdiction.³⁷ Once the Bill is enacted, the Ombudsman will no longer have any oversight role in relation to the ACIC.
59. Amendments are proposed for the ACC Act to align with this change of oversight of the ACIC from the Ombudsman to the IGIS. As noted at paragraph [49], the jurisdiction of the IGIS is intended to cover all of the ACIC, including examiners. Schedule 1, item 114 of the Bill, does place some limitations on IGIS's oversight in relation to examinations. Specifically, the insertion of subsections 25A(4A), (4B) and (4C) to the ACC Act, which enable an ACIC examiner to prevent an IGIS official from attending an examination if considered such attendance reasonably likely to prejudice the life or safety of a person, or the effectiveness of the examination. The IGIS official is to be provided an audio-visual recording of the examination as soon as practicable after the end of the examination.³⁸
60. As noted above, IGIS's use and disclosure of examination material will also be limited by considerations set out in new subsection 32AFA(2) of the Bill.
61. IGIS notes item 6 of the application and transitional provisions in Schedule 5 of the Bill provide for an 18-month period in which the Ombudsman will be able to share information with the IGIS under section 32AF of the IGIS Act (as proposed under the Modernisation Bill) and sections 35 and 35B of the Ombudsman Act, as if the amendments to the Ombudsman Act in Part 2, Schedule 1 and Parts 4 - 6 of Schedule 2 (as applicable), have not been made. This provision is intended to enable the IGIS and Ombudsman to share information concerning the ACIC during this period. This will assist IGIS initially in understanding the oversight environment of the ACIC. Once the 18 months has concluded, the IGIS and Ombudsman will have no legal authority to share information about the ACIC, unless relevant to the Ombudsman's functions.
62. A draft memorandum of understanding between the IGIS and the Ombudsman establishing processes and procedures for the sharing of information and the coordination of oversight, particularly in relation to the agencies the IGIS and the Ombudsman will have concurrent jurisdiction over as a result of this Bill, is currently being progressed.

AUSTRALIAN HUMAN RIGHTS COMMISSION

63. Schedule 1, item 125 of the Bill amends the AHRC Act by removing the AHRC's jurisdiction to inquiry into any act or practice (or complaint made about an act or practice) of the ACIC that is or may be inconsistent with or contrary to any human right, constitutes discrimination, or is unlawful under the *Racial Discrimination Act 1975*, the *Sex Discrimination Act 1984*, the *Disability*

³⁶ Section 3(13A) of the Ombudsman Act, defines the ACIC as a 'prescribed authority' for the purposes of that Act.

³⁷ Schedule 1, item 195 repeals the subsection which identifies the ACIC as a 'prescribed authority' for the purposes of the Ombudsman Act. Part 4, Schedule 2 provides contingent amendments based on the commencement of the *National Security Legislation Amendment (Comprehensive Review and Other Measures No. 2) Act 2023*, including to expressly identify that the Ombudsman is not authorised to investigate actions taken by the ACIC.

³⁸ The current provision does not explicitly enable the Ombudsman to be present for an examination unless directed by an examiner under section 25A(3) of the ACC Act.

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Discrimination Act 1992, or the *Age Discrimination Act 2004*.³⁹ Consequently, in line with new subsection 8(4) to the IGIS Act, the IGIS will be responsible for monitoring the ACIC's consistency with human rights. The IGIS notes that this is consistent with the proposed amendments in the Modernisation Bill, which will make clear that the IGIS has responsibility for ensuring the acts and practices of all the intelligence agencies within jurisdiction, or the activities undertaken in accordance with the intelligence functions of AFP, AUSTRAC and Home Affairs, are consistent with human rights.⁴⁰

64. The IGIS has a new function under the *Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Act 2022* (Respect at Work Act) to, at the request of the Attorney-General, or the responsible Minister or of the Inspector-General's own motion, to inquire into any matter that may relate to compliance by ASIO, ASIS, AGO, ASD, DIO or ONI with the positive duty as defined under section 47C of the *Sex Discrimination Act 1984*.⁴¹ This new function has not been included in IGIS's jurisdiction of the ACIC under proposed subsection 8(4). Item 20 to Division 2, Part 2, Schedule 2 of the Respect at Work Act, makes it clear the AHRC has no jurisdiction to inquire into an intelligence agency's compliance with the positive duty in relation to sex discrimination. The President may, however, where they reasonably suspect non-compliance with this duty, refer the matter to IGIS, including in relation to the ACIC where the IGIS can consider the issue under its broader jurisdiction.
65. The AHRC will continue to have jurisdiction over the AFP, AUSTRAC and Home Affairs. Schedule 1, items 126 and 128 of the Bill, amend the AHRC Act to enable the Commission to refer a complaint concerning the AFP, AUSTRAC or Home Affairs to the IGIS, where of the opinion that the subject matter of the complaint could be more efficiently or conveniently dealt with by the IGIS, and similarly, receive a complaint from the IGIS concerning these agencies. Amendments proposed under the Modernisation Bill,⁴² will also enable the IGIS to share information with the AHRC where relevant to the AHRC's functions concerning the AFP, AUSTRAC or Home Affairs.⁴³

PUBLIC INTEREST DISCLOSURES

66. The Bill makes amendments to the *Public Interest Disclosure Act 2013* (PID Act). In particular, under Schedule 1, item 220, the ACIC is inserted into the definition of 'intelligence agency' in section 8 of the PID Act. This is reflective of IGIS's expanded jurisdiction over all of the ACIC and will enable IGIS to receive, allocate, and/or investigate disclosures relating to the ACIC (including disclosures relating to actions taken by examiners of the ACIC), receive notifications about the steps taken in relation to a PID concerning the ACIC, and be the relevant oversight agency for disclosures relating to the ACIC.⁴⁴
67. Schedule 1, item 222 to the Bill amends section 26(1) of the PID Act which will enable disclosures concerning the conduct of the ACIC to be made as an external disclosure where all the

³⁹ Schedule 1, item 125 includes the ACIC within the definition of 'intelligence agency' under section 11(4) of the AHRC Act. As an intelligence agency, the functions of the AHRC do not cover matters set out in subsections 11(3) and (3C) of the AHRC Act.

⁴⁰ Schedule 1 items 12, 18, 20 and 22 Modernisation Bill. Schedule 1, item 8.

⁴¹ Schedule 2, Part 2, Division 2, items 26 to 29, Respect at Work Act. This new function does not take effect until 12 December 2023.

⁴² See Schedule 1, item 131, section 32AF Modernisation Bill.

⁴³ Subsection 49(4C) AHRC Act, enables the Commission to share information or documents with an IGIS official for the purpose of the IGIS official exercising a power, or performing a function or duty, as an IGIS official.

⁴⁴ See e.g. section 34 PID Act, the IGIS is an authorised internal recipient for conduct relating to an intelligence agency; the relevant consideration under paragraph 43(5)(a)(iii) for an allocating officer thinking of allocating to the IGIS includes, 'some or all of the conduct disclosed relates to an intelligence agency'; and paragraph 44(3)(c) and sections 45A, 50A and 51(4) of the PID Act requires the IGIS to be notified of certain steps in the PID process where the disclosure concerns an intelligence agency.

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requirements are met. This is currently the case with disclosures concerning the ACIC under the PID Act, however, this is inconsistent with how disclosures concerning other intelligence agencies that fall within IGIS's current jurisdiction can be made. Disclosures concerning intelligence agencies can only be made as internal disclosures (see section 26(1) table items 1 and 2 PID Act). Likewise, items 224 to 227, which amend the definition of 'intelligence information' under section 41(1) of the PID Act, makes clear that the definition does not capture information concerning the ACIC (despite it being defined as an 'intelligence agency'), in order to facilitate external disclosures under section 26 of the PID Act.

NATIONAL ANTI-CORRUPTION COMMISSION

68. Schedule 1, item 335 of the Bill amends the *National Anti-Corruption Commission Act 2022* (NACC Act) by including the ACIC in the definition of 'intelligence agency' under section 7 of that Act. As such, the agency head of the ACIC (the CEO), in accordance with their mandatory referral obligations under the NACC Act, will have the ability to refer a corruption issue that concerns the conduct of a current or former staff member, where they suspect the issue could involve serious or systemic corrupt conduct, to either the IGIS or the National Anti-Corruption Commissioner (Commissioner).⁴⁵ Similarly, any PIDs that are suspected to involve corrupt conduct being handled by the ACIC, must also be referred, either to the IGIS or the Commissioner.⁴⁶
69. The AFP, AUSTRAC and Home Affairs, will not be 'intelligence agencies' for the purposes of the NACC Act. However, the NACC can refer a matter involving these agencies to the IGIS for consideration if minded to, such as for example, where the corrupt conduct involves their intelligence functions.⁴⁷

PARLIAMENTARY JOINT COMMITTEE ON LAW ENFORCEMENT

70. The Bill inserts subsection 10(1A) into the *Parliamentary Joint Committee on Law Enforcement Act 2010*, which requires the IGIS to provide at least once per calendar year, a briefing to the Committee about the involvement of the ACIC in controlled operations under Part IAB of the *Crimes Act 1914* during the preceding 12 months.⁴⁸ The Ombudsman is currently required to provide this briefing to the Committee and, under this Bill, will continue to do so in relation to the AFP.

GIVING EFFECT TO IGIS EXPANDED JURISDICTION

EXEMPTIONS TO SECRECY PROVISIONS

71. In addition to the above amendments, Part 2 to Schedule 1 of the Bill also amends various Commonwealth Acts to ensure that where oversight jurisdiction has been transferred to the IGIS, information protected by secrecy offences can, nevertheless, be disclosed to IGIS officials performing duties or functions or exercising powers, as IGIS officials, where it was otherwise able to be disclosed to the Ombudsman. These amendments support IGIS oversight functions by ensuring IGIS officials have full access to information, and that persons are able to voluntarily disclose information to IGIS officials, without breaching secrecy provisions.
72. For example, items 108 and 111 of Schedule 1 to the Bill insert two new exceptions to section 21C of the ACC Act, which provide that it is not an offence for a person to disclose information concerning a notice served by an examiner of the ACIC, where the 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

⁴⁵ See section 34 NACC Act.

⁴⁶ Section 35 NACC Act.

⁴⁷ Section 41(1)(d) NACC Act.

⁴⁸ Schedule 1, item 88.

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official'. Likewise, item 91 of Schedule 1 to the Bill, which amends section 50A of the AML/CTF Act, provides a similar exception to the offence of disclosing certain AUSTRAAC information. These amendments give effect to IGIS's new oversight role over the ACIC and AUSTRAAC's intelligence functions.⁴⁹

73. While there are existing immunities in the IGIS Act for people who give information to IGIS officials (either voluntarily or under compulsion),⁵⁰ these exceptions will make it explicit on the face of the relevant legislation that it is lawful to give information to IGIS. This will also avoid potential legal complexities about the interaction of these 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 the agencies within IGIS's existing jurisdiction.⁵¹

OVERSIGHTING SHARED POWERS

74. The AFP and the ACIC share many of the same powers under the *Crimes Act 1914* (Crimes Act), *Surveillance Devices Act 2004* (SD Act), *Telecommunications Act 1997* (Telecommunications Act), and the *Telecommunications (Interception and Access) Act 1979* (TIA Act). For example, the AFP and the ACIC are both able to obtain and execute data disruption warrants under the SD Act, conduct controlled operations under Part IAB of the Crimes Act, and give a technical assistance request or notice to a designated communications provider under Part 15 of the Telecommunications Act.
75. As IGIS's jurisdiction will cover all of the activities of the ACIC, consequential amendments have been made to relevant Acts to ensure IGIS officials can obtain all necessary information and perform oversight functions as required. However, for the AFP, even where it exercises the same powers as the ACIC, the Ombudsman will retain jurisdiction, as use of these powers by the AFP are not considered part of their 'intelligence functions', as defined under item 6 of the Bill. The effect is that two separate oversight bodies will oversee two agencies' use of the same powers. As a result, it will be necessary for the IGIS and Ombudsman to closely consult each other regarding any common issues that may arise in the exercise of these powers and positions taken by each agency.
76. The Modernisation Bill seeks to improve the IGIS's ability to share information with other integrity bodies, such as the Ombudsman, where information is relevant to their functions.⁵² However, as noted at paragraph [61], the removal of the ACIC entirely from the Ombudsman's jurisdiction, and the definition of 'intelligence function' for AFP, means that the IGIS and Ombudsman will have no legal authority to discuss, in any great detail, common oversight issues with the Ombudsman concerning powers available to both AFP and ACIC. As discussed below, item 6 of Schedule 5 to the Bill, does enable the Ombudsman and IGIS to share relevant information for an initial period of 18 months.

5. APPLICATION AND TRANSITIONAL PROVISIONS

77. There are a number of application and transitional provisions. Of particular relevance is Schedule 5, item 6 of the Bill, which provides that section 32AF of the IGIS Act (as provided for under the Modernisation Bill) and sections 35 and 35AB of the Ombudsman Act apply for a period of 18 months beginning at the commencement of Parts 1 and 2 of Schedule 1 to the Bill, as if the

⁴⁹ See also Schedule 1, items 93, 94, 95, 96 and 97.

⁵⁰ See existing sections 18(6) and (9) and 34B of the IGIS Act, and proposed section 32AC (Schedule 1, item 131 to the Modernisation Bill).

⁵¹ For example, see paragraph 317ZF(3)(f) of the *Telecommunications Act 1997* and section 63AC of the *Telecommunications (Interception and Access) Act 1979*.

⁵² See Schedule 1, item 131, Modernisation Bill.

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amendments to the Ombudsman Act in Part 2 of Schedule 1 and Parts 4, 5 and 6 of Schedule 2 (as applicable), had not been made.

78. This provision will facilitate the transfer of oversight responsibilities over the ACIC, from the Ombudsman to the IGIS over a period of 18 months. After this period, the IGIS will not be able to confer with the Ombudsman on issues concerning the ACIC, unless relevant to the Ombudsman's functions.