



Law Council
OF AUSTRALIA

Office of the President

22 January 2018

Mr Andrew Hastie
Chair
Parliamentary Joint Committee on Intelligence and Security
PO Box 6021
CANBERRA ACT 2600

By email: pjcis@aph.gov.au

Dear Mr Hastie

Home Affairs and Integrity Agencies Legislation Amendment Bill 2017

1. The Law Council welcomes the opportunity to provide this submission to the Parliamentary Joint Committee on Intelligence and Security (**the Committee**) regarding its review of the Home Affairs and Integrity Agencies Legislation Amendment Bill 2017 (**the Bill**).
2. The Law Council acknowledges the assistance of its National Criminal Law Committee, National Human Rights Committee, National Integrity Working Group and the Queensland Law Society in the preparation of this submission.
3. The Bill, if enacted, would amend the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth), *Independent National Security Legislation Monitor Act 2010* (Cth), *Inspector-General of Intelligence and Security Act 1986* (Cth) and *Intelligence Services Act 2001* (Cth) to: give effect to the allocation of certain ministerial powers following the establishment of a new Home Affairs portfolio; and make changes relating to the Attorney-General's oversight of intelligence, security and law enforcement agencies.
4. The Home Affairs portfolio was subsequently established through the machinery of Government changes on 20 December 2017. It must be read in conjunction with the recent administrative arrangements order signed by his Excellency, the Governor-General, on 20 December 2017.¹
5. The Prime Minister, the Hon Malcolm Turnbull, has stated that these reforms are driven by serious threats to Australia's security and the Government's determination to keep Australians safe and secure.² Further, he has noted that evolving and complex threats to Australia's security require more enduring and better integrated intelligence and

¹ General the Honourable Sir Peter Cosgrove, Governor-General of the Commonwealth of Australia, *Administrative Arrangements Order* (20 December 2017), Part 12, 4.

² The Hon Malcolm Turnbull, Prime Minister, 'A Strong and Secure Australia' (Media Release, 18 July 2017) <https://www.pm.gov.au/media/strong-and-secure-australia>.

domestic security arrangements.³ The reforms are intended to create a central department providing strategic planning, coordination and other support to a 'federation' of independent security and law enforcement agencies including the Australian Security Intelligence Organisation, the Australian Federal Police, the Australian Border Force and the Australian Criminal Intelligence Commission.⁴

6. The Bill's introduction followed the 2017 Independent Review of the Australian Intelligence Community (**the Independent Review**). This Independent Review did not recommend the establishment of the Home Affairs Portfolio, nor did it examine the necessity behind the establishment of a Home Affairs portfolio.
7. In 2007 the then Labor Opposition argued for a Department of Homeland Security.⁵ However, this was not progressed after the findings of the former Defence Secretary, Ric Smith, in his *Report of the Review of Homeland and Border Security* (28 June 2008). The report found that:

One response to these changes would be to create new organisations or merge existing ones — some countries have done this. This approach raises several risks. It could disrupt unduly the successful and effective work of the agencies concerned and create significant new costs. Large organisations tend to be inward-looking, siloed and slow to adapt, and thus ill-suited to the dynamic security environment. For a number of the agencies concerned national security considerations are embedded with a broad range of other service delivery, policy, program and regulatory functions which could be jeopardised by restructuring them around their security roles.

The other response would be to recognise and build on the strengths of existing institutions but to identify weaknesses and address them. This is the approach this Review considers is more appropriate for Australia. It has several benefits. It would recognise that our existing arrangements are generally effective and that for the most part our departments and agencies are working well with each other. Above all, the smaller, separate agencies which comprise this model are likely to be more agile and accountable than large agencies.⁶

8. Some national security experts are reported as noting that there is 'no reason' for a super agency with a centralisation of power.⁷ Professor John Blaxland's has written that:

This [current] model includes a high degree of healthy contestability concerning intelligence judgements and operational options. This is thanks in large part to the diffusion of power between ministries, and authority between agencies, departments and ministers. These arrangements mean there are clear lines of accountability and responsibility.

³ Ibid.

⁴ Ibid.

⁵ Hon Arch Bevis MP, Shadow Minister for Homeland Security, 'Speech to Safeguarding Australia Dinner, Canberra', (Canberra, 3 October 2007)

<http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressrel%2F20JO6%22>.

⁶ Ric Smith AO, *Report of the Review of Homeland and Border Security* (4 December 2008), p. 2.

⁷ Rachel Baxendale, 'Australia to get super security Home Affairs ministry', *The Australia* (18 July 2017), <http://www.theaustralian.com.au/national-affairs/australia-to-get-super-security-home-affairs-ministry/news-story/350a35982473f7995021d51f5436bf42>.

Mechanisms for prioritisation and avoiding overlap exist with the Heads of Intelligence Agencies Meetings, the Secretaries Committee on National Security, cabinet's National Security Committee, and the National Intelligence Collection Requirement Priorities mechanisms. It's unclear how the new arrangements will alter the dynamics in these contexts.⁸

9. The Law Council notes that the Committee is required to inquire into and report on the Bill and that considerations of the necessity and likely effectiveness of the new Home Affairs portfolio which has already been established through the machinery of Government may be beyond the Committee's current remit.
10. The Law Council therefore limits its observations and recommendations below to specific aspects of the Bill.

Importance of First Law Officer oversight

11. The Law Council supports the proposed oversight of Australia's First Law Officer, the Attorney-General, in regards to:
 - issuing of warrants under the *Telecommunications (Interception and Access) Act 1979 (TIA Act)*, and the *Australian Security Intelligence Organisation Act 1979 (the ASIO Act)*;
 - authorising special intelligence operations under the ASIO Act; and
 - giving agreement to security-related Ministerial authorisations under the *Intelligence Services Act 2001 (Cth) (IS Act)*.
12. The measures above require decisions which permit agencies to operate outside the usual boundaries of the law. As First Law Officer, the Attorney-General is well-placed to make assessments about the lawfulness of conduct by the AIC and to ensure that the Australian Intelligence Community (**AIC**) operates within the appropriate confines of the rule of law.
13. In addition, the Law Council supports ongoing oversight of AIC agencies and national security laws by the inspector-General of Intelligence and Security (**IGIS**) and the Independent National Security Law Monitor (**INSLM**) respectively.

Amendments to the Inspector-General of Intelligence and Security Act 1986 (Cth) (the IGIS Act)

14. The Bill would amend the IGIS Act to allow the Minister administering the Act (who is currently proposed to be the Attorney-General) to assume responsibility for oversight of the IGIS. The Prime Minister currently has oversight of the IGIS.⁹
15. The Law Council would prefer an explicit reference in the Bill to the Attorney-General rather than the Minister. This would assist in ensuring that the First Law Officer has responsibility for oversight of the IGIS and that this cannot be changed through administrative arrangements alone.

⁸ John Blaxland, 'Home Affairs 'super-ministry' is unnecessary and more about politics than reform', ABC Online (19 July 2017), <http://www.abc.net.au/news/2017-07-19/home-affairs-super-ministry-unnecessary-john-blaxland/8723764>.

⁹ *Inspector-General of Intelligence and Security Act 1986 (Cth)* ss (8)(1)-(3), 9(1), (3).

16. The Committee may wish to consider whether there is a potential or perceived conflict of interest regarding the Attorney-General's ability to issue Australian Security Intelligence Organisation (**ASIO**) and TIA Act warrants and give agreement to security-related Ministerial authorisations under the IS Act, while at the same time, having in his portfolio the body responsible for determining the legality and propriety of those warrants. The Law Council notes, however, that the IGIS will remain an independent statutory agency and be appointed by the Prime Minister in consultation with the Leader of the Opposition.

Amendments to the Independent National Security Legislation Monitor Act 2010 (Cth) (INSLM Act)

17. The Bill amends the INSLM Act so that oversight responsibilities of the INSLM transfer to the Minister administering the Act in addition to the Prime Minister. In particular, section 7 is to be repealed and replaced with a new section 7 that states the Prime Minister or Minister may refer a matter to the INSLM.
18. The Law Council would prefer an explicit reference in the Act to the Attorney-General rather than the Minister. This would assist in ensuring that the First Law Officer has responsibility for oversight of the INSLM and that this cannot be changed through administrative arrangements alone.
19. Where the INSLM has received multiple referrals, proposed subsection 7(3) allows the Prime Minister to give the INSLM directions about the order in which he or she is to deal with references.
20. The Law Council is concerned, however, that the ability of the INSLM to conduct own motion reports may be hindered by a requirement to respond to referrals by both the Prime Minister and Attorney-General. Should this amendment be implemented, the INSLM's office should also be allocated additional resources to fulfil its expanded responsibility and to ensure that the INSLM will be able to conduct own motion reports.

Amendments to the Anti-Money Laundering and Countering Terrorism Financing Act 2006 (Cth) (AML/CTF Act)

21. The Bill would amend section 128 of the AML/CTF Act, to permit:
- an ASIO official to disclose Australian Transaction Reports and Analysis Centre (**AUSTRAC**) information to the Attorney-General if the disclosure is for the purposes of, or in connection with: the performance of the Attorney-General's functions under the ASIO Act or TIA Act; or security (within the meaning of ASIO Act);
 - an official of a defence intelligence agency to disclose AUSTRAC information to the Attorney-General if the disclosure is for the purposes of, or in connection with, the performance of the Attorney-General's functions under the TIA Act;
 - an official of the Office of National Assessments (**ONA**) to disclose AUSTRAC information to the Attorney-General if the disclosure is for the purposes of, or in connection with, the performance of the Attorney-General's functions under the TIA Act.
22. Amendments to section 128 are intended to ensure ASIO and other intelligence agencies can continue to disclose AUSTRAC information to the Attorney-General in

support of his or her functions following the establishment of the Home Affairs portfolio.¹⁰

23. The Law Council notes that these amendments relate to the sharing of personal information between AIC agencies. The Law Council recommends an independent review be conducted to examine the adequacy of safeguards around the secondary use and disclosure of personal information held by the AIC to ensure that the purpose of access to personal information is always to enable the exercise of one of the functions only for which access was granted.¹¹ The Law Council recommends that any sharing of information between AIC agencies be done in accordance with the Australian Privacy Principles, and in consultation with the Australian Privacy Commissioner.

Amendments to the IS Act relating to responsibility for and referral of matters to the Committee

24. The Bill amends section 29(1)(b)(i) of the IS Act so that the Attorney-General, in addition to the responsible Minister or a resolution of either House of Parliament, may refer to the Committee for review any matter in relation to ASIO, Australian Secret Intelligence Service, Australian Geospatial-Intelligence Organisation, Defence Intelligence Organisation, Australian Signals Directorate or ONA.
25. The Law Council supports the enhancement of the Attorney-General's oversight role of the AIC through being able to refer matters to the Committee. However, as the amendment would allow the responsible Minister for Home Affairs or the Attorney-General to refer matters to the Committee, the Committee should be allocated appropriate resources to fulfil its expanded responsibility. Measures should also be put in place to ensure reasonable Committee inquiry and reporting timeframes.

Thank you for the opportunity to provide these comments.

The Law Council would be pleased to elaborate on the above issues, if required.

Please contact Dr Natasha Molt, Deputy Director of Policy, Policy Division [REDACTED] [REDACTED] in the first instance should you require further information or clarification.

Yours sincerely

Morry Bailes
President

¹⁰ Explanatory Memorandum, Home Affairs and Integrity Legislation Amendment Bill 2017 [9].

¹¹ The Law Council of Australia '2017 Independent Intelligence Review' (16 January 2017) <https://www.lawcouncil.asn.au/resources/submissions/2017-independent-intelligence-review>, p. 6.