



Australian Government

Attorney-General's Department

February 2023

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

Parliamentary Joint Committee on Intelligence and Security

Introduction

The Attorney-General's Department welcomes the Parliamentary Joint Committee on Intelligence and Security's (PJCIS) review of the Inspector-General of Intelligence and Security and Other Legislation Amendment (Modernisation) Bill 2022 (Modernisation Bill).

The Modernisation Bill would amend the *Inspector-General of Intelligence and Security Act 1986* (IGIS Act) to ensure that the Inspector-General of Intelligence and Security's (IGIS) enabling legislation is adapted to contemporary circumstances and supports appropriate information sharing. It would make consequential amendments to related Commonwealth Acts as part of this modernisation.

The Modernisation Bill would also implement two recommendations of the Comprehensive Review of the Legal Framework of the National Intelligence Community, being:

- **recommendation 172:** The IGIS Act should be amended to preclude the appointment to the Office of the IGIS of a person whose immediate prior role was as head or deputy head of an agency within the IGIS' oversight remit, and
- **recommendation 174:** The IGIS Act should be amended to give the IGIS an inquiry function for employment related grievances of staff employed under the *Office of National Intelligence Act 2018*.

Most measures in the Modernisation Bill were previously included in the Intelligence and Other Security Legislation Amendment (Integrity Measures) Bill 2020 (Integrity Measures Bill). The Integrity Measures Bill was introduced into the House in December 2020 and referred to PJCIS who reviewed the Integrity Measures Bill and handed down its report (Advisory Report on the Intelligence Oversight and Other Legislation Amendment (Integrity Measures) Bill 2020) (Advisory Report) in February 2022.

The Integrity Measures Bill lapsed with the dissolution of Parliament on 11 April 2022.

Measures from the Integrity Measures Bill

The Modernisation Bill incorporates the following measures from the Integrity Measures Bill:

- support the ability of the IGIS to share information with relevant integrity bodies (the Commonwealth Ombudsman, Australian Human Rights Commission, Information Commissioner, Integrity Commissioner, and the Inspector-General of the Australian Defence Force) in order to facilitate access to information required for oversight purposes and strengthen the IGIS's ability to coordinate with other integrity bodies
- clarify the IGIS's inspection functions, including to clarify the powers available to the IGIS for the purposes of conducting an inspection of an intelligence agency
- enable the IGIS to delegate their functions to assist the day-to-day functioning of the Office of the IGIS
- clarify that the definition of 'IGIS Official' includes staff acting in positions, contractors, and secondees
- remove provisions that are redundant or that impose unreasonable administrative burdens, and
- ensure the IGIS Act is adapted to contemporary circumstances.

The PJCIS did not make any recommendations in its Advisory Report in relation to these measures as they were contained in the Integrity Measures Bill.

The Modernisation Bill does not include measures from the Integrity Measures Bill that would have extended the jurisdiction of the IGIS to the intelligence functions of the Australian Criminal Intelligence Commission and Australian Transaction Reports and Analysis Centre (AUSTRAC), and the jurisdiction of the PJCIS to the intelligence functions of AUSTRAC.

While the Modernisation Bill does not extend the oversight role of either the IGIS or the PJCIS to additional agencies, as the Attorney-General said in his second reading speech on the Modernisation Bill, the Government is giving full consideration to those matters.

Additional measures

The Modernisation Bill also includes the following key additional measures, not previously included in the Integrity Measures Bill:

- The IGIS's human rights jurisdiction under section 8 of the IGIS Act may be exercised without first receiving a referral from the Australian Human Rights Commission (AHRC).
 - Section 11(3) of the *Australian Human Rights Commission Act 1986*, provides that the functions of the AHRC do not include inquiring into an act or practice of an intelligence agency, which is defined to include the agencies wholly within the IGIS's jurisdiction. This renders the current pathway of referral from the AHRC ineffective, as matters relating to intelligence agencies are unlikely to come before the AHRC in the first instance. The amendment clarifies that the IGIS may exercise their human rights jurisdiction without a referral from the AHRC to reflect that the IGIS is better placed to identify human rights related matters in the first instance, and to ensure the IGIS is able to more effectively exercise their human rights jurisdiction.
- The IGIS may make reports on preliminary inquiries undertaken under section 14 of the IGIS Act.
 - As the IGIS Act is currently silent as to whether the IGIS may make reports on preliminary inquiries, this amendment clarifies that the IGIS may prepare a report on the preliminary inquiry for the responsible Minister or head of the relevant agency, and that such reports may include the IGIS's conclusions and recommendations.
- If the IGIS undertakes a preliminary inquiry under section 14(2) of the IGIS Act in relation to an action of an intelligence agency, the IGIS has the discretion to decide not to inquire, or not to inquire further, into the action.
 - The IGIS's preliminary inquiry functions under section 14(2) allow the IGIS to make inquiries of the head of an intelligence agency to assist the IGIS in determining whether the IGIS is authorised to inquire into an action of the intelligence agency, and if so, whether the IGIS should inquire into the

action of the agency. This amendment clarifies that after making a preliminary inquiry into the action of an agency, the IGIS has the discretion to determine that, having regard to all the circumstances of the case, an inquiry or further inquiry into the action is not warranted.

- The IGIS can include in annual reports comments on any other activity of the IGIS during the period to which the reports relate.
 - Section 35 of the IGIS Act currently sets out the matters which must be included in an annual report. This amendment clarifies that the IGIS may also include comments about the IGIS's activities beyond the specific matters mandated by section 35.
- Secrecy provisions in the IGIS Act will continue to apply to persons acting.
 - The secrecy provisions under section 34 of the IGIS Act currently apply to a person who is, or has at any time been, the Inspector-General or a member of the staff of the Inspector-General. The IM Bill would have amended these provisions so that they apply to all categories of current and former IGIS officials (including secondees, contractors and subcontractors). The Modernisation Bill would incorporate this measure with an amendment to ensure the provisions also continue to apply to persons acting, consistent with the current scope of section 34 of the IGIS Act.