



Submission by the
Commonwealth Ombudsman

**Review of the
Intelligence Services Legislation
Amendment Bill 2023**

Submission by the Commonwealth Ombudsman, Iain Anderson

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Introduction and summary

1. The Office of the Commonwealth Ombudsman (OCO) welcomes the opportunity to make a submission to the Parliamentary Joint Committee on Intelligence and Security (PJCIS) on the Intelligence Services Legislation Amendment Bill 2023 (the ISLA Bill).
2. The ISLA Bill contains measures to implement, amongst other government proposals, recommendations from the *Comprehensive Review of the Legislative Framework Governing the National Intelligence Community* by Mr Dennis Richardson AC (the Richardson Review) and the 2017 *Independent Intelligence Review* by Michael L'Estrange AO and Stephen Merchant PSM (the 2017 Review).
3. The following measures in the ISLA Bill directly impact the OCO:
 - The transfer of oversight of the Australian Criminal Intelligence Commission (ACIC) from the OCO to the Inspector-General of Intelligence Services (IGIS).
 - The transfer of oversight of the intelligence functions of the Australian Federal Police (AFP) and the Australian Transaction Reports and Analysis Centre (AUSTRAC) from the OCO to the IGIS
 - The extension of the IGIS's jurisdiction to include the intelligence function of Home Affairs, with the carve out of this function from OCO's oversight to occur later via legislative instrument.
4. The Bill effectively transfers oversight of the ACIC from the OCO to the IGIS.
5. The Bill aims to implement shared oversight of the AFP, AUSTRAC and Home Affairs by defining 'intelligence function' for each agency. The OCO and IGIS would cooperate to clarify jurisdiction over specific matters and minimise overlap wherever possible.
6. The IGIS and the OCO already have a Memorandum of Understanding (MoU) in place which sets out arrangements for information sharing under the current legislative framework. We will work closely with the IGIS on updating our existing arrangements to address the practical issues arising from the IGIS having an expanded jurisdiction.
7. This submission seeks to briefly summarise existing powers of the OCO to oversight integrity and law enforcement bodies, how these will be amended by the ISLA Bill, the effect of the proposed changes and practical challenges for implementation.

Background

The purpose of the OCO is to:

- provide assurance that the agencies and entities we oversee act with integrity and treat people fairly; and
- influence systemic improvement in government administration.

We aim to achieve our purpose by:

- independently and impartially reviewing complaints and disclosures about government administrative action
- influencing government agencies to be accountable, lawful, fair, transparent, and responsive
- assisting people to resolve complaints about government administrative action; and
- providing a level of assurance that law enforcement, integrity and regulatory agencies are complying with legal requirements when using covert, intrusive and coercive powers.

Transferring oversight of ACIC from the OCO to the IGIS

8. Currently, the OCO oversees the ACIC's use of the following covert, intrusive and coercive powers:
 - controlled operations powers under Part IAB of the *Crimes Act 1914* (Crimes Act)
 - account takeover warrants under Part IAAC of the Crimes Act
 - industry technical assistance powers under Part 15 of the *Telecommunications Act 1997* (Telco Act)
 - surveillance powers under the *Surveillance Devices Act 2004* (SD Act)
 - data disruption warrants under the SD Act
 - telecommunications interception powers under Chapter 2 of the *Telecommunications (Interception and Access) Act 1979* (TIA Act)
 - stored communications powers under Chapter 2 of the TIA Act
 - telecommunications data powers under Chapter 3 of the TIA Act, and
 - International production orders under Schedule 1 of the TIA Act.
9. The ACIC is also a prescribed agency for the purposes of section 5 of the Ombudsman Act. This means the Ombudsman may investigate the ACIC's administrative actions on the basis of a complaint or of the Ombudsman's own motion.
10. The OCO supports the amendments that would transfer all of the OCO's oversight of the ACIC – Australia's national criminal intelligence agency – to the IGIS.

Information transfer

11. The OCO has institutional knowledge regarding ACIC's operations and its compliance risk areas. The transfer of the OCO's practical knowledge and experience overseeing the ACIC to the IGIS would be possible under section 35AB of the Ombudsman Act (which provides for the disclosure by the OCO of information and documents to the IGIS).
12. The provisions in item 5 of Schedule 5 of the Bill would enable transfer of open complaints about the ACIC from the OCO to the IGIS for 18 months after commencement of the amendments. The OCO receives very few complaints concerning the ACIC in practice – 47 from 2010 to present – so 18 months would be sufficient for OCO to transfer complaints to the IGIS. Outside of this period, the OCO could continue to disclose

relevant information and documents to the IGIS under section 35AB of the Ombudsman Act.

Transferring oversight of “intelligence functions” to the IGIS

13. Currently, the OCO oversees the AFP, AUSTRAC and Home Affairs in accordance with **Table 1**, below.

Table 1: The scope of the OCO’s oversight of the AFP, AUSTRAC and Home Affairs

Agency	Scope of OCO oversight
AFP	Controlled operations powers under Part IAB of the Crimes Act
	Delayed notification search warrants under Part IAAA of the Crimes Act
	Monitoring of compliance with control and supervision orders under Part IAAB of the Crimes Act
	Account takeover warrants under Part IAAC of the Crimes Act
	Industry technical assistance to agencies powers under Part 15 of the Telco Act
	Surveillance powers under the SD Act
	Data disruption warrants under the SD Act
	Telecommunications interception powers under Chapter 2 of the TIA Act
	Stored communications powers under Chapter 2 of the TIA Act
	Telecommunications data powers under Chapter 4 of the TIA Act
	International production orders under Schedule 1 of the TIA Act
	The AFP is a prescribed agency for the purposes of subsection 3(9) of the Ombudsman Act. This means the Ombudsman may investigate the AFP’s administrative actions on the basis of a complaint or of the Ombudsman’s own motion.
	Review and report on the AFP’s administration of complaint handling under Part V of the <i>Australian Federal Police Act 1979</i> (the AFP Act)
Home Affairs	Telecommunications data powers under Chapter 4 of the TIA Act
	Stored communications powers under Chapter 2 of the TIA Act
	International production orders under Schedule 1 of the TIA Act
	Home Affairs is a Department for the purposes of section 5 of the Ombudsman Act. This means the Ombudsman may investigate Home Affairs’ administrative actions on the basis of a complaint or of the Ombudsman’s own motion.
AUSTRAC	AUSTRAC does not currently use any of the covert, intrusive or coercive powers that the OCO oversees
	AUSTRAC is a prescribed agency for the purposes of section 5 of the Ombudsman Act. This means the Ombudsman may investigate AUSTRAC’s administrative actions on the basis of a complaint or of the Ombudsman’s own motion.

14. The ISLA Bill would:

- transfer oversight of the intelligence functions of the Australian Federal Police (AFP) and the Australian Transaction Reports and Analysis Centre (AUSTRAC) from the OCO to the IGIS, and
- extend IGIS’s jurisdiction to include the intelligence function of Home Affairs, with the carve out of this function from OCO’s oversight to occur later via legislative instrument.

15. The mechanism for enabling IGIS oversight of the intelligence functions of the AFP, AUSTRAC and Home Affairs is the proposed amendment of the *Inspector-General of Intelligence and Security Act 1986* (IGIS Act) at item 6 of Schedule 1 of the Bill to insert a meta-definition of **intelligence function**. That meta-definition then defines **intelligence function** for each of the AFP, AUSTRAC and Home Affairs.

Oversight of the AFP

16. As highlighted in **Table 1** above, the OCO oversees the AFP's use of covert, intrusive and coercive powers and can take complaints about the AFP (including ACT Policing).
17. The Bill would maintain the Ombudsman's existing jurisdiction with respect to the AFP. The Bill provides, for the avoidance of doubt, that the AFP's intelligence functions exclude:
- the arrest, charging or detention of suspected offenders, or
 - the gathering of evidence, or any activity undertaken to directly support the gathering of evidence.
18. These broad exclusions may mean that there is not a significant change to the OCO's oversight of the AFP's use of covert, intrusive and coercive powers. This is because the powers the OCO oversees generally have thresholds for use that relate to policing functions, not intelligence functions. For example, under ss 178, 178A and 179 of the TIA Act telecommunications data can only be accessed for the purposes of:
- enforcement of the criminal law
 - locating missing persons, or
 - the enforcement of a pecuniary penalty or protection of public revenue.
19. The OCO and IGIS will work through these and other matters concerning our shared jurisdiction to determine the best way to provide effective oversight.

Oversight of Home Affairs

20. As described in **Table 1**, above, the OCO oversees Home Affairs' use of telecommunications data powers and stored communications powers under the TIA Act and International production orders under Schedule 1 of the TIA Act.¹
21. Item 6 of Schedule 1 of the Bill provides that the definition of intelligence function for Home Affairs would have the meaning given by regulations made under the IGIS Act. The explanatory memorandum to the ISLA Bill highlights that many of Home Affairs' intelligence functions are not legislated and cannot be directly linked to specific legislated functions, instead being provided for in the Administrative Arrangement Order. This suggests the regulations may provide for a structural approach to defining intelligence function rather than the functional approach adopted in relation to the AFP and AUSTRAC definitions.

¹ International production orders cannot be used until the *Agreement between the Government of Australia and the Government of the United States of America on Access to Electronic Data for the Purpose of Countering Serious Crime* becomes a designated agreement under Schedule 1 of the TIA Act.

22. This 'structural' approach to defining an intelligence function provides clearer delineation of responsibilities between the OCO and the IGIS than the functional approach modelled in the AFP and AUSTRAC definitions. However, it could create gaps in OCO's oversight of Home Affairs' use of covert, intrusive and coercive powers if not designed with the practicalities of oversight in mind.
23. The OCO will seek to work closely with the Attorney-General's Department and the IGIS on the design of the definition of intelligence function to ensure that any gaps in oversight are minimised.
24. The Bill would not alter the OCO's general jurisdiction over Home Affairs' administrative actions.

Oversight of AUSTRAC

25. As highlighted in **Table 1** above, AUSTRAC does not currently use any of the covert, intrusive or coercive powers that the OCO oversees. If this changes in future, the OCO and IGIS would work together to determine whether there would be any jurisdictional overlap in practice and, if so, the best way of managing it. The Bill would not alter the OCO's general jurisdiction over AUSTRAC's administrative actions.
26. If AUSTRAC in future does use any of the covert, intrusive and coercive powers that the OCO oversees, the OCO and IGIS would need to work through similar issues as highlighted above concerning the AFP and Home Affairs to clarify what constitutes an intelligence function in practice.