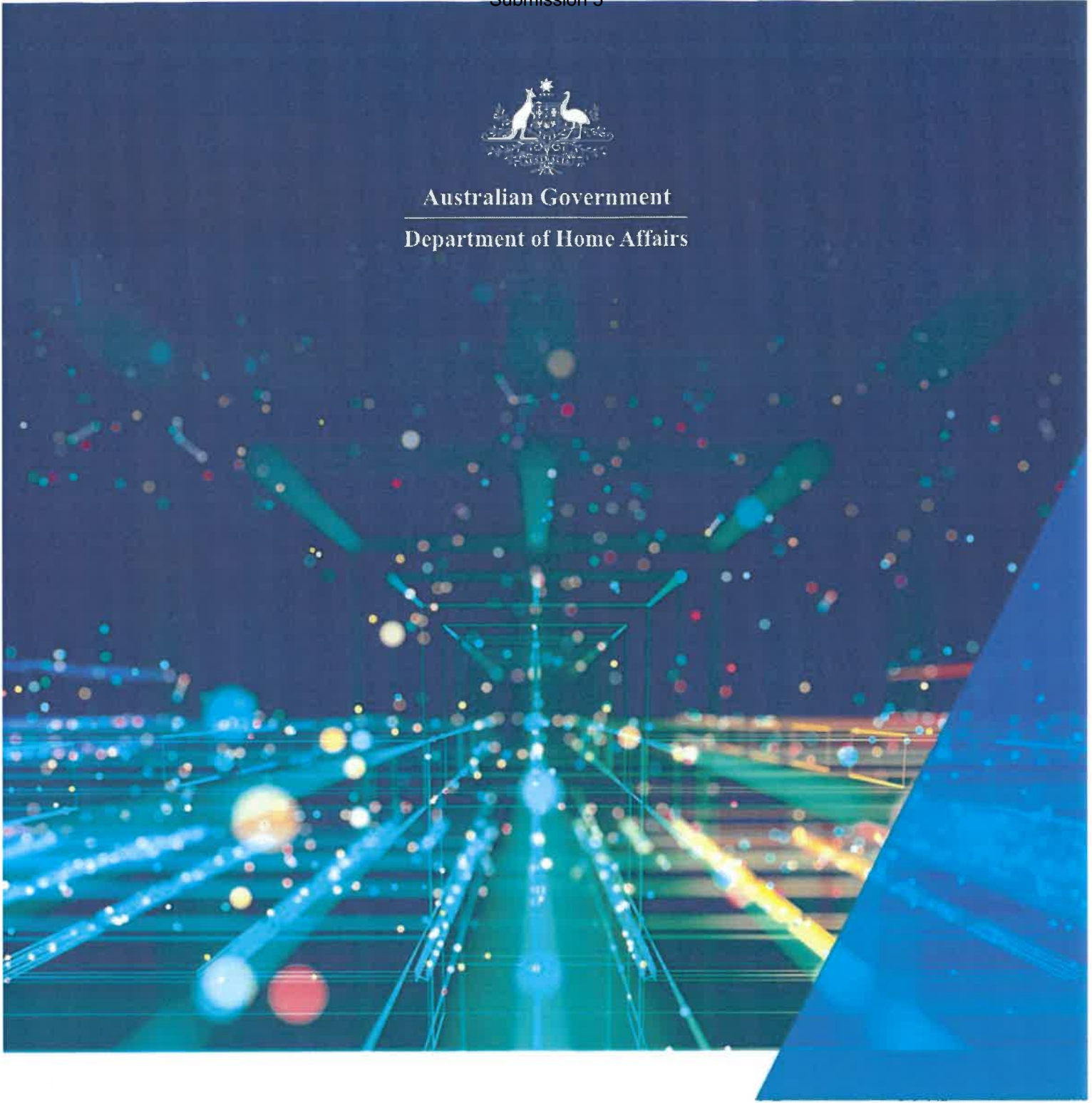




Australian Government
Department of Home Affairs



Department of Home Affairs submission to the review of the Intelligence Services Legislation Amendment Bill 2023

Parliamentary Joint Committee on Intelligence and Security

31 August 2023

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Term	Meaning
ABF	Australian Border Force
ASIO Act	<i>Australian Security Intelligence Organisation Act 1979</i>
The Bill	National Security Legislation Amendment (Comprehensive Review and Other Measures No. 3) Bill 2023
Comprehensive Review	Comprehensive Review of the Legal Framework of the National Intelligence Community
The Department	The Department of Home Affairs
IGIS	Inspector-General of Intelligence and Security
IGIS Act	<i>Inspector-General of Intelligence and Security Act 1986</i>
2017 IIR	<i>2017 Independent Intelligence Review</i>
IS Act	<i>Intelligence Services Act 2001</i>
PJCIS	Parliamentary Joint Committee on Intelligence and Security

1. Introduction

1. The Department of Home Affairs (the **Department**) welcomes the opportunity to provide a submission to the Parliamentary Joint Committee on Intelligence and Security's (**PJCIS**) review of the Intelligence Services Legislation Amendment Bill 2023 (the **Bill**).
2. Australia confronts a complex and challenging security environment. In this context, Australia's national intelligence community (**NIC**) plays a crucial role in maintaining Australia's security and protecting the national interest. To support the effective performance of their functions, NIC agencies have been entrusted with significant powers. Targeted reforms have been made to legislation governing the NIC to address critical challenges they face and to ensure that the legal framework of the NIC keeps pace with an increasingly complex operational environment. These powers are balanced by effective and appropriate oversight to ensure that NIC agencies are acting legally, with propriety and with the appropriate respect for human rights. The Bill supports the maintenance of strong and effective safeguards, independent oversight, and transparency and accountability mechanisms under Australian law.
3. The measures in the Bill will enable the Inspector-General of Intelligence and Security (**IGIS**) and the Parliamentary Joint Committee on Intelligence and Security (**PJCIS**) to strengthen oversight arrangements. Robust oversight is needed to provide assurance of intrusive, covert activities and ensure public confidence in and social license for Australia's intelligence agencies. Strengthening the parliamentary committee system and enhancing parliamentary and statutory oversight of NIC agencies will provide the public with greater assurance that they operate lawfully and with propriety.
4. The Bill contains measures that address recommendations from the *2017 Independent Intelligence Review* (the **2017 IIR**) by Mr Michael L'Estrange AO and Mr Stephen Merchant PSM, the *Comprehensive Review of the Legal Framework of the National Intelligence Community* (the **Comprehensive Review**) by Mr Dennis Richardson AC, and reports of the PJCIS.

2. The Bill

5. This submission focusses on Schedule 1, Part 1 of the Bill which concerns amendments to the *Inspector-General of Intelligence and Security Act 1986* (**IGIS Act**), the *Intelligence Services Act 2001* (**IS Act**) and related consequential amendments to other Commonwealth legislation that would expand oversight of agencies within the NIC, including the Department.

2.1. Expand the jurisdictions of the IGIS and the PJCIS to oversee the 'intelligence functions' of the Department

Previous reviews

6. The expansion of IGIS oversight to the intelligence functions of the Department was recommended by the 2017 IIR. The Department notes, however, the subsequent Comprehensive Review recommended to the contrary (Recommendation 168). The Comprehensive Review concluded the Department's intelligence function should not be subject to oversight as recommended in the 2017 IIR.

7. In reaching this conclusion, the Comprehensive Review noted that the Department has existing and effective oversight mechanisms as a department of state. The Comprehensive Review also distinguished the intelligence function of the Department from that of the Department of Defence's Defence Intelligence Organisation (DIO). The Comprehensive Review characterised DIO as a semi-autonomous agency, unlike the intelligence function of the Department, which it described as simply another division in the wider Department. In December 2020, the then government accepted the Comprehensive Review's recommendation. The government response noted neither the Comprehensive Review or the 2017 IIR had identified a gap in the oversight of the Department that justified including it in the jurisdiction of the IGIS.

Proposed expansion of oversight

8. The Bill would expand the jurisdiction of the IGIS to include the whole of the NIC, including the 'intelligence functions' of the Department. It would also make consequential amendments to facilitate the IGIS's expanded jurisdiction.
9. The Bill would define Home Affairs' 'intelligence functions' under regulations made under the IGIS Act. Unlike other agencies coming within the IGIS's jurisdiction, as a department of state, Home Affairs' functions are defined in administrative arrangement orders. The Department's intelligence functions are governed by several pieces of legislation, including but not limited to, the *Australian Border Force Act 2015*, the *Migration Act 1958*, and the *Customs Act 1901*. The Department notes that Home Affairs' intelligence functions could potentially be defined in either legislation or regulations. The current Bill proposes to define this in regulations on the basis that if future updates to the definition are required, then this would facilitate a timelier and more administratively efficient change.
10. The Bill would also allow the regulations to prescribe consultation requirements, and require the Minister for Home Affairs' agreement to be obtained before any regulations prescribing the intelligence functions or consultation requirements are made or amended. Although the Bill does not impose any new standards or requirements by virtue of extending IGIS and PJCIS oversight, the Department recognises the IGIS and PJCIS will provide oversight of a different kind, commensurate with oversight experienced by other NIC agencies.

The intelligence functions of the Department — Intelligence Division

11. Established in 2015, Intelligence Division provides a centralised, authoritative source of intelligence for the Department (inclusive of the Australian Border Force (ABF)). The intelligence function of Intelligence Division is described as follows:
 - a. Intelligence Division delivers trusted, timely and actionable intelligence to inform operational and policy decisions. This provides the Department and partner agencies with effective and actionable threat intelligence capabilities, ensuring operational and strategic activities are underpinned by an intelligence-informed approach. Through unique data access, tradecraft and knowledge, Intelligence Division provides all-source assessment of threats, vulnerabilities and opportunities across the border continuum to support policy and operational decision making in the Department and the ABF, and the delivery of operational objectives of the NIC and state and territory law enforcement. The Department's intelligence-informed approach to deterrence, detection and intervention capabilities is focused on high-risk, high-priority activities that support a secure border and resilient Australia.
 - b. Intelligence Division works across the strategic, operational and tactical levels for the Department, ABF and partner agencies. Leveraging extensive internal and external data sources, Intelligence Division produces trusted, timely and actionable intelligence to inform operational and policy decisions. This provides the Department, the ABF and partner agencies with actionable threat intelligence, ensuring operational and strategic activities are underpinned by an intelligence-informed approach.

- c. As a member of the NIC, Intelligence Division works closely with its intelligence partners to protect and enhance Australia's security, prosperity and sovereignty. Through collaboration, Intelligence Division is part of an agile and integrated national intelligence enterprise ready to meet the challenges presented by Australia's evolving strategic and security environment.
 - d. Intelligence Division provides intelligence support, and biometrics and identity resolution services, to the Department, ABF and law enforcement partners to support the border integrity mission. Its functions include:
 - i. Providing 24/7 first line analysis in response to emerging and developing border threats.
 - ii. Providing intelligence support to operational planning and execution.
 - iii. Delivering discovery border targeting to identify previously unidentified threat events and entities.
 - iv. Undertaking target development and threat analysis to identify linkages and associations between threat actors, the methodologies used to exploit the border and discover new and emerging border threats.
 - v. Identifying potential national security threats with a nexus to the border to inform policy and operational areas, visa and citizenship decision makers, and other Australian Government partners.
 - vi. Coordinating and supporting security assessment referrals and identifying threats in the non-citizen cohort, to enhance visa and citizenship processing and programmes.
 - vii. Providing threat assessments and advice to the Department and ABF across key border threats, delivering strategic, operational and tactical intelligence support to border and migration functions, strategy and policy settings.
 - viii. Delivering the Department's Border Watch program.
 - ix. Providing specialist identity and biometrics services to visa and citizenship decision makers and the ABF.
 - x. Providing forensic document examination and authenticating services, fingerprint matching and facial image examination to support decision-making across the Home Affairs Portfolio, other Commonwealth law enforcement agencies, and State and Territory authorities.
 - e. Intelligence Division adheres to relevant Departmental and Commonwealth policy and legislation relating to the handling of classified and sensitive information, including the Protective Security Policy Framework.
 - f. Intelligence Division adheres to the highest standards of individual and organisation culture, conducting its work consistent with the Department's Integrity and Professional Standards Frameworks and the Australian Public Service Commission's Professional Standard Framework. This includes obligations under the APS Code of Conduct and the APS Values.
 - g. Independent oversight through the Commonwealth Ombudsman and Office of the Australian Information Commissioner inspections applies to the Department's broader collection and use of information. This provides assurance to the Government and the Australian public that these activities are undertaken lawfully and proportionately. The activities of the Intelligence Division are also subject to the Department's independent internal audit function.
12. The Bill would also make consequential amendments to *the Telecommunications (Interception and Access) Act 1979* and the *Ombudsman Act 1976* to enable the Department's 'intelligence functions' to be carved out from the jurisdiction of the Commonwealth Ombudsman in regulations. Such a carve out would ensure an appropriately streamlined, effective and proportionate oversight framework as applied to the activities of the Intelligence Division.

13. The Department notes establishing IGIS and PJCIS oversight of Intelligence Division will place Intelligence Division on a similar intelligence oversight footing to its fellow NIC agencies. It will be unique, however, in also being subject to other forms of oversight as a constituent part of a department of state. In addition, Intelligence Division will be alone among NIC agencies in not having a discrete basis or status as a standalone agency.
14. The Department will engage closely with the IGIS to ensure the Intelligence Division is prepared for the transition to the oversight regime (should the legislation be passed) and has the necessary administrative arrangements in place to facilitate ongoing oversight from the IGIS.

2.2. Expand the jurisdiction of the PJCIS to include review of counter-terrorism and national security legislation

15. The Bill provides that the jurisdiction of the PJCIS should be expanded to enable it to review, on its own motion, proposed amendments to counter-terrorism and national security legislation, and all such expiring legislation. In practice, the PJCIS already reviews counter-terrorism and national security legislation to ensure that proposed legislation is, or existing legislation continue to be, appropriate and fit for purpose. The Bill would explicitly recognise the role of the PJCIS's in relation to counter-terrorism and national security legislation in the statutory functions of the committee.
16. The Department acknowledges the ability for the PJCIS to be able to self-initiate reviews or inquiries into proposed reforms to legislation relating to counter-terrorism or national security, or when such legislation is expiring, lapsing or ceasing to have effect. However, the Department supports retaining the caveat that the PJCIS only initiate reviews where there is a change in the legislative effect of an instrument noting there are existing mechanisms in place enabling the PJCIS to review and inquire on relevant counter-terrorism and national security legislation through the *Intelligence Services Act 2001* (IS Act).
17. The IS Act identifies relevant legislation and lengths of time between periodic reviews of legislation and operational effectiveness of legislative instruments by the PJCIS. The Department remains open and transparent around the actions and decision making processes relevant to counter-terrorism. In contemplating expanding the scope of the PJCIS' self-initiated inquiries, the Department notes that consideration should also be given to resource implications for departments in supporting inquiries, beyond when legislative effect is being changed, and on increasing reporting demands.

2.3. Expand the jurisdiction of the PJCIS to include review of the administration and expenditure of all NIC agencies

18. The Bill would implement recommendation 23(c) of the *2017 Independent Intelligence Review*, amending the IS Act to allow the PJCIS to initiate its own inquiries into the administration and expenditure of the agencies within the NIC, including the Department.
19. The Department notes that administrative processes will need to be refined to support provision of necessary inputs to the PJCIS.
20. The Department notes it has not been additionally resourced to manage any additional workload arising from the extension of oversight.

2.4. Allow the PJCIS to request that the IGIS undertake inquiries into the operational activities of all NIC agencies.

21. The Bill amends the IGIS Act and IS Act to enable the PJCIS to request the IGIS to undertake inquiries into the legality and propriety of operational activities of agencies within the IGIS's oversight, and to provide a report to the PJCIS, Prime Minister, Attorney-General and the responsible Minister.
22. The Department notes the inclusion of certain protections, including that while the PJCIS may request the IGIS inquire into a matter, the IGIS has ultimate discretion on whether to conduct an inquiry. Furthermore, before a report resulting from inquiry can be provided to the PJCIS, the IGIS and head/s of the relevant agency/ies must agree there is no risk that the contents of the report would prejudice the:
 - a. security, the defence of Australia or Australia's relations with other countries;
 - b. law enforcement operations, including methodologies and investigative techniques;
 - c. confidential commercial information held by Australian Transaction Reports and Analysis Centre; or
 - d. operationally sensitive information (within the meaning of Schedule 1 of the IS Act).