

**Submission to the Senate Standing Committee on
Finance and Public Administration**

**Intelligence and Security Legislation
Amendment (Implementing
Independent Intelligence Review) Bill
2020**

July 2020

1. The Attorney-General's Department, Department of Defence, Department of Foreign Affairs and Trade, Department of the Prime Minister and Cabinet and Department of Home Affairs welcome the opportunity to provide the Senate Finance and Public

Administration Committee with this submission as part of the Committee's examination of the Intelligence and Security Legislation Amendment (Implementing Independent Intelligence Review) Bill 2020 (the Bill).

2. Departments consider that robust and independent oversight of intelligence agencies, and agencies with intelligence functions, is imperative in maintaining public confidence in these agencies and their activities. Oversight takes many forms, including through integrity bodies (such as the Inspector-General of Intelligence and Security [IGIS] or the Commonwealth Ombudsman), judicial and merits review processes, accountability to parliament through parliamentary committees and, ultimately, responsibility to the Ministers.
3. This submission seeks to draw the Committee's attention to recently concluded reviews of Australia's intelligence community, its legislative framework and its oversight arrangements

Independent Intelligence Review

4. The Independent Intelligence Review (Intelligence Review) considered 'measures to further strengthen the state of trust between the intelligence agencies and the Australian community of which they are part' and included a specific term of reference to consider 'the effectiveness of current oversight and evaluation arrangements'. The Intelligence Review noted that growth within the National Intelligence Community (NIC) was a catalyst for increased 'oversight and accountability' as 'many of the traditional distinctions between intelligence and law enforcement ... are less comprehensive and definitive than in the past'. Of particular relevance to the current inquiry are recommendations 21 and 23 of the Intelligence Review.
5. Recommendation 21 recommended that 'the remit of both the IGIS and the Parliamentary Joint Committee on Intelligence and Security (PJCIS) be expanded to cover [all ten NIC] agencies, with oversight of the Australian Federal Police [AFP], the Department of Immigration and Border Protection [whose functions have now been subsumed by the Department of Home Affairs], and the Australian Criminal Intelligence Commission [ACIC] limited to their intelligence functions'. The Intelligence Review considered that 'the IGIS is mandated with the necessary independence and has the appropriate powers to perform effective oversight of the NIC agencies [and that] this oversight would help to reinforce the prevailing culture of compliance across agencies exercising similar powers'.
6. Recommendation 23 recommended expanding the role of the PJCIS to include:
 - a. a provision enabling the PJCIS to request the IGIS conduct an inquiry into the legality and propriety of particular operational activities of the NIC agencies, and to provide a report to the PJCIS, Prime Minister and the responsible Minister
 - b. a provision enabling the PJCIS to review proposed reforms to counter-terrorism and national security legislation, and to review all such expiring legislation
 - c. provisions allowing the PJCIS to initiate its own inquiries into the administration and expenditure of the ten intelligence agencies of the NIC as well as proposed or existing provisions in counter-terrorism and national security law, and to review all such expiring legislation
 - d. provisions enabling the PJCIS to request a briefing from the Independent National Security Legislation Monitor (the Monitor), to ask the Monitor to provide the PJCIS with a report on matters referred by the PJCIS, and for the Monitor to provide the

- PJCIS with the outcome of the Monitor's inquiries into existing legislation at the same time as the Monitor provides such reports to the responsible Minister, and
- e. a requirement for the PJCIS to be regularly briefed by the Director-General of National Intelligence, and separately by the IGIS.

Comprehensive Review

7. The Intelligence Review also recommended that Government undertake "[a] comprehensive review of the Acts governing Australia's intelligence community ... to ensure agencies operate under a legislative framework which is clear, coherent and contains consistent protections for Australians". This recommendation was agreed, and the comprehensive review of the legal framework governing the National Intelligence Community (Comprehensive Review), led by Dennis Richardson AO, was announced in March 2018.
8. The Comprehensive Review's terms of reference required it to consider:
"improvements that could be made to ensure that the legislative framework for the [NIC]...provides for accountability and oversight that is transparent and as consistent across the NIC agencies as is practicably feasible."
9. In particular, the Comprehensive Review was required to consider "oversight-related legislation, such as the *Inspector-General of Intelligence and Security Act 1986* [IGIS Act] and *Independent National Security Legislation Monitor Act 2010*".
10. The Comprehensive Review's classified report was presented to Government in December 2019. Government is currently considering the Comprehensive Review.

Discussion of the Bill

11. Departments provide the following comments on the Bill.

Inclusion of the Department of Defence

12. The Bill would expand the oversight roles of the IGIS and the PJCIS to include all 'agencies with an intelligence role or function' as defined by the *Office of National Intelligence Act 2018* (ONI Act). This definition, found at subsection 4(1) of the ONI Act, includes the Department of Defence (other than the Australian Geospatial-Intelligence Organisation and the Defence Intelligence Organisation) at paragraph 4(1)(d) to the extent that it has an intelligence role or function as stated at sub-paragraphs 4(1)(e) and (f). This approach would extend beyond the recommendations of the Intelligence Review, which did not contemplate the extension of IGIS oversight to the Department of Defence beyond the Australian Geospatial-Intelligence Organisation and the Defence Intelligence Organisation.
13. There are already comprehensive oversight mechanisms for the Department of Defence, including the Defence Force Ombudsman and the Inspector-General of the Australian Defence Force. Further, the Department of Defence reports through both the Senate Standing Committee on Foreign Affairs, Defence and Trade and the Parliamentary Joint Committee on Foreign Affairs, Defence and Trade. Those parts of the Department of Defence with intelligence functions are well-established in law and are already subject to IGIS oversight. Departments are not aware of any concerns with the current oversight arrangements.

IGIS jurisdiction in relation to the Inter-Governmental Committee and the Board of the ACIC

14. The Bill includes the ACIC in the expanded jurisdiction of the PJCIS and the IGIS as outlined above. The ACIC is an inter-jurisdictional body whose activities are directed by and accountable to the Board of the ACIC and the Inter-Governmental Committee (established by sections 7B and 8 of the *Australian Crime Commission Act 2002* respectively). These bodies have functions which are analogous to the role played by a Minister.
15. While subsection 9AA(b) of the IGIS Act provides that the IGIS may not inquire into the actions of Ministers (except as necessary as part of their oversight functions), the Bill does not contain any such limitation on the ability of the IGIS to inquire into the Board or Inter-Governmental Committee. It would not be appropriate to allow the IGIS oversight of these bodies due to their inter-jurisdictional natures.

Creation of concurrent oversight jurisdiction

16. Expanding the IGIS' jurisdiction to include the Department of Home Affairs, AFP, ACIC and AUSTRAC would create concurrent jurisdiction between the IGIS and a number of other integrity bodies who currently oversee these agencies. Departments note that existing oversight for the Department of Home Affairs, AFP, ACIC and AUSTRAC includes the Commonwealth Ombudsman, the Australian Commission for Law Enforcement Integrity, the Australian Human Rights Commission and the Auditor-General, as well as obligations under the *Freedom of Information Act 1982* and the *Privacy Act 1988* (overseen by the Privacy and Information Commissioners under those Acts).

17. The Bill does not include provisions to manage concurrent jurisdiction, such as providing for information-sharing or complaints transfer. This may create inefficiency and complexity for integrity bodies and agencies.

Conclusion

18. Departments note the recently concluded reviews of Australia's intelligence community, its legislative framework and its oversight arrangements, and draw the Committee's attention to the fact that government is currently considering the findings of the Comprehensive Review. In addition, departments also note a number of comments regarding the proposed oversight jurisdiction in the Bill, as outlined above.
19. Departments thank the Committee for the opportunity to comment.