

August 2023

Review of the Intelligence Services Legislation Amendment Bill 2023 - *submission by the Australian Federal Police*

Parliamentary Joint Committee on Intelligence and Security



AFP

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Table of contents

Introduction	2
Role of intelligence in the AFP	2
AFP views on the Bill	5
Conclusion	8

Introduction

1. The Australian Federal Police (AFP) welcomes the opportunity to make a submission to the Parliamentary Joint Committee on Intelligence and Security (PJCIS) review of the Intelligence Services Legislation Amendment Bill 2023 (the Bill).
2. The AFP is the Commonwealth’s national law enforcement and policing agency, with a diverse range of responsibilities across national security, enforcement of Commonwealth criminal law, specialist protectives services, international police assistance and community policing in the Australian Capital Territory (ACT) and Australia’s external territories. The AFP is also a member of the National Intelligence Community (NIC), and supports robust oversight of NIC agencies and associated activities.
3. Criminal intelligence is a vital tool which enables the AFP to fulfil its numerous legislated functions. It informs operational decision-making and assists investigators to gather evidence, as well as anticipate, detect, disrupt and prevent criminal activity, including national security threats and transnational serious and organised crime. The AFP is cognisant that its use of criminal intelligence, how the AFP’s intelligence function contributes to the NIC, and the issue of oversight has been considered by several major reviews of Australia’s intelligence agencies (and their legislative frameworks). The AFP also acknowledges the varied PJCIS recommendations, over the course of the last Parliament, which recommended the extension of IGIS and PJCIS oversight to the AFP’s “intelligence function”.
4. The AFP notes the Attorney-General’s Department (AGD) has made a separate submission to this review, on which the AFP was consulted. This AFP submission focuses on the operational perspective, including the importance of intelligence to the AFP’s work, and AFP’s views on the specific provisions facilitating new oversight of the AFP’s intelligence function by the Inspector-General of Intelligence and Security (IGIS) and the PJCIS.

Role of intelligence in the AFP

5. The AFP has been a member of the NIC since 2018; however, it is not a traditional intelligence agency like others in the NIC. As noted in the *Report of the Comprehensive Review of the Legal Framework of the National Intelligence Community*,¹ the AFP is a law enforcement agency, and its intelligence function is considerably different to other NIC agencies. To the extent the AFP *collects* criminal intelligence, it does so in support of its law enforcement and policing functions. However, as recognised by the *2017 Independent Intelligence Review*,² the contemporary threat environment means the AFP’s intelligence capabilities can make an important, and increasingly significant, contribution to national security. This is reflected by the inclusion of AFP’s intelligence function in the NIC.
6. The AFP’s intelligence function is responsible for providing timely, relevant and actionable criminal intelligence which supports the AFP’s primary functions; specifically, the detection,

¹ Volume 3, paragraph 40.101.

² Final Report of the 2017 Independent Intelligence Review, Chapter 7, paragraph 7.19, page 115.

prevention, investigation, and disruption of criminal offences, as well as the protection of Australian interests. This intelligence function is strategic and operationally driven, and directed towards delivering intelligence to inform tactical, operational and strategic decision-making, across the full remit of AFP's national security and policing responsibilities. This includes, but is not limited to, counter-terrorism, espionage, foreign interference, cybercrime, combating child exploitation and abuse, drugs and firearms trafficking, economic, corporate and financial crime, and money-laundering.

7. The AFP's intelligence function informs operational decision-making through criminal intelligence analysis, and production of intelligence products which support the strategic direction and operational intent of AFP investigations. Subsequently, the AFP's operational activity is intelligence-informed, and investigations are influenced by, and respond to, incoming intelligence. AFP intelligence may be driven from social network analysis, the identification of criminal entities and analysis of broader information, and used to inform avenues of inquiry and operational decision-making. Criminal intelligence also informs, in many cases, the AFP's application for, and use of, more targeted evidence collection powers, such as search warrants and electronic surveillance warrants.
8. Strategically, criminal intelligence can inform the AFP's, and partner agencies', understanding of, and responses to, the criminal threat environment – such as emerging threats, risks to the community, identified operating methodologies of criminal organisations and strategies of disruption and prevention. These assessments inform AFP's strategic decision-making and priority allocation of resources. In this way, the AFP's intelligence functions supports the AFP to deliver maximum and lasting impact on the criminal environment, reducing the capacity of offenders to cause harm to the community.
9. Intelligence also helps the AFP to perform its crucial role in delivering protective security for designated Australian high office holders, Internationally Protected Persons, airports, and Australian government, diplomatic and Defence establishments. Risk-based protective security advice and assessments inform decisions relating to the security overlay provided by the AFP, through the identification, assessment and treatment of security considerations.
10. Where relevant to the AFP's functions, the AFP also shares intelligence on law enforcement and national security matters with key domestic and international law enforcement partners, NIC agencies and other public and private sector agencies, where appropriate. This enables the AFP to participate in national and international taskforces, and contribute to strengthening security for the Australian and international communities.
11. Importantly, even where the AFP is working with NIC partners, the AFP's role will primarily be to gather evidence, and develop investigative and intelligence leads which will help further criminal investigations.
12. With the exception of Network Activity Warrants (discussed from paragraph 13 below), the statutory powers available to the AFP can only be sought for the primary purpose of progressing an investigation or obtaining evidence, not for the purpose of producing intelligence – for example, section 3E warrants under the *Crimes Act 1914* (Cth), or surveillance devices warrants. Primarily, the AFP's intelligence collection is incidental – for

example, as a by-product of the AFP's collection of information during a criminal investigation, pursuant to the lawful execution of powers and capabilities available to the AFP. This intelligence may be collated with information from a range of sources, including information-sharing agreements, to deliver reliable and insightful criminal intelligence assessments that are relevant to AFP activities.

Network Activity Warrants

13. Introduced by the *Surveillance Legislation Amendment (Identify and Disrupt) Act 2021*, Network Activity Warrants (NAWs) are the only statutory power available to the AFP purely for the collection of intelligence. NAWs provide a vital capability for the AFP to address the ever-increasing challenge posed by criminals' use of encryption and anonymising technology, including on the Dark Web or through dedicated encrypted communications platforms, as well as the significant size and scale of modern criminal networks.
14. Contained in Part 2, Division 6 of the *Surveillance Devices Act 2004* (SD Act), NAWs are issued in respect of a criminal network of individuals, all of whom are using, or are likely to use, the same electronic service (or are otherwise communicating using electronic communications). NAWs permit the AFP to access data held in any computers used by members of the criminal network over the life of the warrant (90 days), in order to collect intelligence relevant to the prevention, detection or frustration of a relevant offence (which is an offence with a maximum penalty of at least three years' imprisonment).
15. Information collected using a NAW cannot be used as evidence – it is used as criminal intelligence, to inform AFP's analysis and understanding of the criminal network, and to progress a criminal investigation. This intelligence can, however, be used to support the AFP's application for more targeted warrants to gather evidence, such as search warrants or electronic surveillance warrants under the SD Act or the *Telecommunications (Interception and Access) Act 1979*. NAW data may also be disclosable to the courts, if the investigation leads to a prosecution.
16. Any use of NAWs by the AFP is carefully considered, and a wide variety of factors are weighed by the issuing authority (an eligible judge or nominated Administrative Appeals Tribunal member) before granting the warrant. These include (but are not limited to): the nature and gravity of the offending conduct; the likely intelligence value of any information obtained (and whether the activities authorised by the warrant are proportionate to the likely intelligence value); the existence of any alternative, or less obtrusive, means of obtaining the information, and any privacy implications resulting from access to data. The issuing authority must also explicitly consider any press freedom and/or public interest issues if the NAW data belongs to a professional journalist.
17. Between 1 July 2021 and 30 June 2022, the AFP was issued one NAW, with two extensions. This NAW was used to collect intelligence regarding a variety of offences, including serious drug, firearms, and proceeds of crime offences. The extensions to this NAW were due to the nature of the investigation, which required ongoing access to intelligence relating to the criminal network over a sustained period.

18. Details about the AFP's use of NAWs during the 2022-23 financial year will be published in the next SD Act Annual Report.
19. NAWs are oversighted by the IGIS, recognising them as a dedicated intelligence-collection power. The AFP has developed a productive and cooperative relationship with the IGIS in its current oversight role, which is anticipated to continue to mature in the future, including with any expansion of oversight, as proposed in this Bill.

AFP views on the Bill

Expansion of IGIS and PJCIS oversight to AFP's "intelligence function"

20. The AFP appreciates its role within the NIC and the responsibilities this brings. Accordingly, the AFP supports robust oversight of NIC agencies and associated activities. However, the AFP is unique as the only *policing* agency whose intelligence function is included in the NIC, while also undertaking law enforcement functions, working closely with domestic and international law enforcement partners.
21. As a law enforcement agency, the AFP is subject to a range of oversight mechanisms, including from Parliamentary committees, such as the Parliamentary Joint Committee on Law Enforcement (PJCLE), and the PJCIS (in relation to the AFP's use of certain counter-terrorism powers, including under Part 5.3 of the *Criminal Code 1995* and Division 3A of Part IAA of the *Crimes Act 1914*). The AFP is also oversighted by the Commonwealth Ombudsman and the National Anti-Corruption Commission. For example, the Commonwealth Ombudsman currently oversees the AFP's statutory compliance with legislative powers – including electronic surveillance warrants, controlled operations, delayed notification search warrants and account takeover warrants – as well as the AFP's professional standards framework. The Ombudsman also has a general complaints and 'own motion' investigation jurisdiction.
22. Further, as the AFP's primary law enforcement functions go to the investigation of criminal activities and the gathering of evidence, the AFP is also accountable to the courts and the judiciary during a prosecution. The courts have the ability to determine whether material obtained by the AFP in the course of an investigation was gathered and used according to law (with the power to rule material inadmissible if gathered unlawfully). The majority of AFP powers are also authorised by magistrates, federal court judges or nominated members of the AAT, who determine whether it is appropriate for the AFP to utilise the relevant power to obtain this evidence.
23. While the majority of AFP's intelligence-gathering activities directly support our law enforcement functions to deliver prosecution outcomes, we acknowledge the recommendations for IGIS and PJCIS oversight of AFP intelligence-led activities. Examples of how such oversight may be practically implemented include: the AFP's ongoing use of NAWs (maintained under this Bill), where information is used for purely intelligence purposes (rather than a policing function which results in a charge or prosecution), or where the AFP is working

closely with NIC partners (which corresponds with the 2017 Independent Intelligence Review’s recommendation for holistic oversight of NIC activities).

The definition of AFP’s “intelligence function”

24. The AFP has worked closely with AGD to explain the role and activities of the AFP’s intelligence function, which is reflected in the definition proposed in new section 3A of the *Inspector-General of Intelligence and Security Act 1986* (Cth). From a policy perspective, the AFP understands that the intent in expanding IGIS and PJCIS oversight would not seek to duplicate the AFP’s existing oversight, such that IGIS and PJCIS would not extend over AFP’s non-intelligence activities.
25. By defining AFP’s intelligence function as the *collection, correlation, analysis, production and dissemination of intelligence by the AFP to support the performance of certain AFP functions*, this will focus oversight on how criminal intelligence informs and assists the AFP to perform its law enforcement and policing functions. For example, the AFP understands the IGIS could examine how the analysis and dissemination of criminal intelligence supported the direction and targeting in an investigation, including use of warrants or other investigatory powers (except where this intelligence activity was *directly supporting* the gathering of evidence – as outlined below).
26. However, the new oversight would not attach to activities which involved execution of policing and law enforcement powers, such as a search warrant or surveillance device warrant. This recognises the execution of warranted powers may be *informed* by intelligence, but are not intelligence activities themselves. Rather, these are key law enforcement and policing functions and therefore subject to oversight by other bodies. A key exception is the AFP’s use of NAWs, which remains fully within IGIS’ remit under this Bill.
27. The AFP also supports the avoidance of doubt provision (section 3A(2)(a) of the Bill), which excludes the “*arrest, charging and detention of suspected offenders*” from the definition of the AFP’s “intelligence function”. These activities are widely-recognised as core *policing* functions and responsibilities not exercised by other NIC agencies. These activities remain subject to oversight by the Commonwealth Ombudsman, the NACC and the judiciary.
28. Further, excluding *the gathering of evidence*, as well as *any activity undertaken to directly support the gathering of evidence* (section 3A(2)(b) of the Bill) is critical for providing certainty and clarity for AFP members as to which agency has oversight at any particular time during an active investigation. For example, intelligence analysis and dissemination may occur at multiple stages throughout an active investigation. This may inform where and how AFP obtains and executes warrants, as well as generating other insights and analysis to progress investigations. In these circumstances, applying oversight to criminal intelligence activity during an ongoing investigation may become disjointed, or otherwise confined to only specific activities at particular times.
29. Excluding activities which **directly support** the gathering of evidence also ensures AFP’s use of criminal intelligence to support investigations outside the traditional remit of other NIC

agencies is not unduly impacted – for example, where AFP intelligence analysis may directly support the AFP’s application for warrants and other evidence-gathering powers during a criminal investigation.

30. However, it does not preclude the IGIS from examining these criminal intelligence activities once an investigation is finalised or otherwise no longer active.

AFP functions captured by the definition of “intelligence function”

31. The definition of AFP’s “intelligence function” captures the majority of the statutory functions contained in section 8 of the *Australian Federal Police Act 1979* (AFP Act). This includes AFP’s broad responsibility for providing policing services in relation to the laws and property of the Commonwealth (section 8(1)(b)(i) and (ii) AFP Act), safeguarding of Commonwealth interests (section 8(1)(b)(iii) of the AFP Act), as well as the provision of police services and police support services to assist, or cooperate with, an Australian or foreign law enforcement agency, intelligence or security agency, and/or government regulatory agency (section 8(1)(bf) of the AFP Act).
32. The Bill does not capture AFP functions relating to the ACT, Jervis Bay and External Territories. The AFP supports this exclusion, as these functions primarily encompass community policing, and the enforcement of laws more broadly than just those of the Commonwealth. In this regard, the work of AFP is more similar to that of State/Territory law enforcement partners, who are not overseen by IGIS. It is important to note the AFP’s activities in this space *remain* overlooked by the Commonwealth Ombudsman.
33. Finally, the AFP supports the exclusion of functions conferred by the *Witness Protection Act 1994* (Cth), as well as complementary State/Territory legislation. As noted in AGD’s submission, the AFP’s functions in this regard are tied to the administration and management of the National Witness Protection Program, and are not investigatory in nature.

Implementation challenges

34. The provisions in this Bill help provide clarity as to the proposed scope of new IGIS and PJCIS oversight. However, in practice, the AFP anticipates extending IGIS and PJCIS oversight to the AFP’s intelligence function will be challenging to implement. As noted during the *Comprehensive Review*,³ the AFP’s intelligence function is integrated across the organisation; it is often interwoven within the AFP’s investigative and other law enforcement functions, rather than solely being a stand-alone unit. Without careful implementation, it may be difficult, in many circumstances, to oversight intelligence activity without at least some intersection with the AFP’s investigative activities. This will also be the case in reporting to relevant parliamentary bodies.
35. Therefore, the AFP will need to work closely with the IGIS and Commonwealth Ombudsman, and the PJCIS and other key parliamentary committees, on how this new oversight will be

³ Volume 3, paragraph 40.101.

practically implemented across the AFP, and ensure it meets the Government’s objectives of transparency, accountability and holistic oversight of AFP’s intelligence function.

36. The AFP looks forward to continued engagement with the IGIS and the Commonwealth Ombudsman to manage any identified overlap in oversight, noting the AFP’s ongoing investment of significant resources into various oversight reporting procedures.

Conclusion

37. Criminal intelligence is an important investigative tool for the AFP, enabling the detection, disruption and investigation of a broad range of criminal and national security threats. At the same time, the AFP acknowledges that, as a member of the NIC, robust and holistic oversight of intelligence activities is vital for ensuring transparency and accountability, and for maintaining public confidence in the agencies charged with protecting the Australian community and Australia’s national interests.
38. The AFP welcomes the opportunity to engage further with the Committee to support its review of this Bill.