



Law Council  
OF AUSTRALIA

# 2017 Independent Intelligence Review

The Department of Prime Minister and Cabinet

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# About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2017 Executive as at 1 January 2017 are:

- Ms Fiona McLeod SC, President
- Mr Morry Bailes, President-Elect
- Mr Arthur Moses SC, Treasurer
- Ms Pauline Wright, Executive Member
- Mr Konrad de Kerloy, Executive Member
- Mr Geoff Bowyer, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.

# Acknowledgement

The Law Council is grateful for the assistance of its National Criminal Law Committee, National Human Rights Committee, its Business Law Section's Privacy Law Committee and the Law Society of New South Wales in the preparation of this submission.

# Executive Summary

1. Thank you for the opportunity for the Law Council to provide this submission to the 2017 Independent Intelligence Review (**the Review**).
2. The Law Council commends the Australian Government undertaking the Review consistent with the 2004 Flood Review Recommendation that periodic reviews of the Australian Intelligence Community (**AIC**) occur every five years.<sup>1</sup>
3. The Review will examine: how key aspects of Australia's security environment and the nature of security threats have changed in recent times (including as a result of technological advancements); how they are likely to change further over the coming years; and, how effectively the AIC serves Australian national interests and the needs of Australian policy makers.
4. The Law Council acknowledges that the proper functioning of the AIC is critical in safeguarding Australia's national security and supports measures to protect the community from terrorist acts. Such measures, however, should remain consistent with established principles of the Australian criminal justice system, the rule of law and international human rights standards.
5. On this basis the Law Council's submission focuses on the following issues:
  - Overlap of questioning and detention powers of certain AIC agencies and the broader National Intelligence Community;
  - Changes to the *Intelligence Services Act 2001* (Cth) (**IS Act**) that enable the:
    - Australian Secret Intelligence Service (**ASIS**) to collect intelligence on Australians overseas without first receiving ministerial authorisation; and
    - Minister responsible for ASIS to authorise the production of intelligence on an Australian person who is, or is likely to be, involved in activities that pose a risk to, or are likely to pose a risk to, the 'operational security to ASIS';
  - Oversight arrangements; and
  - The impact of surveillance activities undertaken by intelligence agencies on the right to privacy.
6. Key recommendations of the Law Council include:
  - The Review should have regard to the findings of the former Independent National Security Legislation Monitor's (**INSLM**) forthcoming report into *Questioning and Detention Powers*, particularly where recommendations of that report relate to the interaction between the Australian Security and Intelligence Organisation (**ASIO**), the Australian Federal Police (**AFP**) and the Australian Criminal Intelligence Commission (**ACIC**).
  - Strengthening the safeguards under the *National Security Legislation Amendment Act (No. 1) 2014* (Cth) (**NSLA Act**) regarding ASIS's powers under the IS Act to collect intelligence on Australians overseas by:

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<sup>1</sup> See Phillip Flood, *Report of the Inquiry into the Australian Intelligence Agencies*, Australian Government (2004) <<https://fas.org/irp/world/australia/flood.pdf>>.

- specifying what types of activities could be approved, how long the approval would be for, and on what basis it could be approved or renewed;
  - developing a common standard for approval processes that should apply to all AIC agencies;
  - the Review seeking further information in order to determine the necessity of the new ground of Ministerial authorisation which enables the Minister responsible for ASIS to authorise the production of intelligence on an Australian person who is, or is likely to be, involved in activities that pose a risk to, or are likely to pose a risk to, the 'operational security to ASIS'.<sup>2</sup>
  - the Review consulting with the Inspector-General of Intelligence and Security (IGIS) to determine whether current oversight arrangements are satisfactory over the measures arising as a result of the NSLA Act.
- The Australian Government should be required to provide a public response to the INSLM's recommendations within six months.
  - The Australian Government should appoint a new INSLM without further delay.
  - The Review should identify and consider other reports relating to the procedures, practices and legislation related to communications surveillance, interception and collection of personal data to ensure the full and effective implementation of Australia's obligations under international human rights law. Alternatively, the Review should recommend a referral to the INSLM or the Parliamentary Joint Committee on Human Rights to conduct such an inquiry.
  - In conducting its inquiry, the Review should also have regard to relevant international human rights standards and instruments.
  - The Review should examine the adequacy of safeguards around the secondary use and disclosure of personal information held by the AIC to ensure that the purpose of access to personal information is always to enable the exercise of one of the functions only for which access was granted.
7. The Law Council welcomes the pending Review as part of the AIC scrutiny process and would be pleased to address any questions that the Review may have or expand on the above issues where required.

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<sup>2</sup> *Intelligence Services Act 2001* (Cth) ss 3, 9(1A)(a)(iia).

## Overlap of Questioning and Detention powers

8. The Review will examine the relationship and engagement between AIC agencies, including ASIO and ASIS, and those agencies and members of the broader National Intelligence Community, including the AFP, the Department of Immigration and Border Protection, the ACIC, and the Australian Transaction Reports and Analysis Centre.<sup>3</sup>
9. The Law Council notes that there appears to be a significant overlap in certain questioning and detention powers (CQDPs) of ASIO, the AFP and ACIC, even if the use of the powers can serve different purposes. In particular, the overlap arises for CQDPs relating to:
  - Division 3 of Part III of the *Australian Security Intelligence Organisation Act 1979* (Cth) (questioning warrants and questioning/detention warrants);
  - Part IC of the *Crimes Act 1914* (Cth) (AFP powers of detention, obligations of investigators); and
  - coercive questioning powers of the ACIC under the *Australian Crime Commission Act 2002* (Cth).
10. There may be consequences to the overlap which should be considered and addressed. Some consequences of the overlap which may impact on the necessity and proportionality of the powers include the potential:
  - to create uncertainty about legal rights and obligations;
  - for unnecessary duplication; and
  - that the powers may be used in close succession, thus exacerbating concerns regarding limitations on individual rights.
11. Accordingly, there would be merit in having the greatest possible clarity around the boundaries between ASIO, the AFP and the ACIC to avoid these outcomes.
12. Legislative amendment should be considered, to provide greater distinction between the types of conditions that may trigger each agency exercising their particular powers. Education of agency employees and the community to raise awareness in this area should also be considered.
13. In circumstances where there is an application of multiple CQDPs or other counter-terrorism powers (such as control orders or preventative detention orders) in relation to an individual, consideration should be given to empowering the IGIS or Commonwealth Ombudsman to make a proportionality determination.
14. The Law Council discussed the above matters in further detail in a submission provided to the former INSLM, the Hon Roger Gyles AO QC, on 16 June 2016 (**attached**).
15. The Law Council recommends that the Review have regard to the findings of the former INSLM's forthcoming report into *Questioning and Detention Powers*,

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<sup>3</sup> Department of the Prime Minister and Cabinet, *2017 Independent Intelligence Review – Terms of Reference* (7 November 2016) <<https://www.dpmc.gov.au/national-security/2017-independent-intelligence-review#tor>>.

particularly where recommendations of that report relate to the interaction between ASIO, the AFP and the ACIC.

## Changes to the Intelligence Services Act

16. The Terms of Reference also require the Review to consider whether legislative changes are needed, including to the IS Act.<sup>4</sup>
17. The NSLA Act added a new function to ASIS's powers under the IS Act that allows it to collect intelligence on Australians overseas without first receiving ministerial authorisation, when done at the request of ASIO (when practicable) and in support of ASIO's functions.<sup>5</sup>
18. The amendments may have assisted in rectifying a previous anomaly where the level of protection over the privacy rights of Australians may depend on the particular intelligence agency involved.<sup>6</sup> While the Law Council is supportive of a consistent approach and the safeguards in the NSLA Act, the Law Council recommends that those safeguards would be strengthened by specifying what types of activities could be approved, how long the approval would be for, and on what basis it could be approved or renewed.
19. The Law Council also considers that an appropriate common standard for approval processes should apply to all AIC agencies. This view is supported by the former IGIS, Dr Vivienne Thom, who reiterated her suggestions to the previous Parliamentary Joint Committee on Intelligence and Security (**PJCIS**) as part of its inquiry into the NSLA Act.<sup>7</sup>
20. Further, the Review should seek further information in order to determine the necessity of the new ground of Ministerial authorisation which enables the Minister responsible for ASIS to authorise the production of intelligence on an Australian person who is, or is likely to be, involved in activities that pose a risk to, or are likely to pose a risk to, the 'operational security to ASIS'.<sup>8</sup> It is unclear, for example, why activities which may pose a risk to ASIS's operational security would not fall under the pre-existing authorisation category prior to enactment of the NSLA Act for 'activities that are, or are likely to be, a threat to security'.<sup>9</sup>
21. The former IGIS noted in the context of the NSLA Bill that 'IGIS oversight of the production of intelligence on Australian persons by ASIS to meet ASIO requirements will continue, although it will be more complex'.<sup>10</sup> The Law Council encourages the

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<sup>4</sup> Ibid.

<sup>5</sup> *Intelligence Services Act 2001* (Cth) s 13B.

<sup>6</sup> Inspector General of Intelligence and Security, Submission No 4 to Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Inquiry into the National Security Legislation Amendment Bill (No. 1) 2014*, 21 August 2014, 18 <<http://www.aph.gov.au/DocumentStore.ashx?id=4a6f478f-431d-4edd-8a43-9ff0cf401746&subId=298799>>.

<sup>7</sup> Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Advisory Report on the National Security Legislation Amendment Bill (No.1) 2014* (2014) 69 <[http://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Intelligence\\_and\\_Security/National\\_Security\\_Amendment\\_Bill\\_2014/Report1](http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Intelligence_and_Security/National_Security_Amendment_Bill_2014/Report1)>.

<sup>8</sup> *Intelligence Services Act 2001* (Cth) ss 3, 9(1A)(a)(iia).

<sup>9</sup> Ibid, ss 3, 9(1A)(a)(iii).

<sup>10</sup> Inspector General of Intelligence and Security, Submission No 4 to Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Inquiry into the National Security Legislation Amendment*

Review to consult with the IGIS to determine whether current oversight arrangements are satisfactory over the measures arising as a result of the NSLA Act.

## Oversight arrangements

22. The Law Council considers that the roles of the INSLM, IGIS and PJCIS continue to be a necessary and critical form of scrutiny of Australia's national security legislation and the activities of the AIC.
23. However, the INSLM's oversight arrangements would be strengthened by amendments to the *Independent National Security Legislation Act 2010* (Cth) to require the Government to provide a public response to the INSLM's recommendations within six months. Under the current approach a formal Government response is not required. Government acceptance of particular INSLM recommendations under this approach may appear ad-hoc.
24. Formal Government responses to the INSLM's recommendations are required to ensure that proposals are given robust consideration by government agencies and the community is reassured of the reasons behind the Government's acceptance or otherwise of particular recommendations.
25. The appointment of a new INSLM without further delay is also vital to provide comprehensive, consistent and central oversight across the full range of national security and counter-terrorism legislation.

## Right to Privacy

26. The Law Council and Law Society of New South Wales acknowledge that the Australian intelligence community plays a vital role in safeguarding Australia's security interests. We also acknowledge the challenges that responsible agencies face in balancing competing interests. However, the Law Council and the Law Society of New South Wales consider that some activities and policies undertaken by intelligence agencies impact on fundamental human rights principles, including the right to privacy.
27. Article 17 of the *International Covenant on Civil and Political Rights*, which Australia has ratified, provides that:

*... no one shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation.*<sup>11</sup>
28. It further states that 'everyone has the right to the protection of the law against such interference or attacks'.<sup>12</sup>
29. In December 2013, the United Nations (UN) General Assembly adopted resolution 68/167,<sup>13</sup> which expressed deep concern at the negative impact that surveillance and

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*Bill (No. 1) 2014*, 21 August 2014, 18 < <http://www.aph.gov.au/DocumentStore.ashx?id=4a6f478f-431d-4edd-8a43-9ff0cf401746&subld=298799>>.

<sup>11</sup> *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

<sup>12</sup> *Ibid.*

interception of communications may have on human rights and in particular, the right to privacy. In this resolution, the General Assembly also affirmed that the rights held by people offline must also be protected online, and it called upon all States to respect and protect the right to privacy in digital communication. The resolution also emphasises that:<sup>14</sup>

*... unlawful or arbitrary surveillance and/or interception of communications, as well as unlawful or arbitrary collection of personal data, as highly intrusive acts, violate the rights to privacy and to freedom of expression and may contradict the tenets of a democratic society.*

30. Further, in its June 2014 report on *The Right to Privacy in the Digital Age*, the Office of the UN High Commissioner for Human Rights noted that:<sup>15</sup>

*Other rights also may be affected by mass surveillance, the interception of digital communications and the collection of personal data. These include the rights to freedom of opinion and expression, and to seek, receive and impart information; to freedom of peaceful assembly and association; and to family life - rights all linked closely with the right to privacy and, increasingly, exercised through digital media.*

31. In line with resolution 68/167, the Law Council recommends that the Review should identify and consider other reports relating to the procedures, practices and legislation related to communications surveillance, interception and collection of personal data to ensure the full and effective implementation of Australia's obligations under international human rights law. Alternatively, the Review should recommend a referral to the INSLM or the Parliamentary Joint Committee on Human Rights to conduct such an inquiry.
32. In conducting its inquiry, the Review should also have regard to relevant international human rights standards and instruments.
33. Further, the Review should examine the adequacy of safeguards around the secondary use and disclosure of personal information held by the AIC. While the Law Council acknowledges that there is a need to balance privacy interests with the public interest in maintaining national security interests, it is essential that the purpose of access to personal information is always only to enable the exercise of one of the functions for which access was granted. This is vital to ensure security protections for data collected and to protect against expanded and unintended secondary uses or 'function creep'.

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<sup>13</sup> *The right to privacy in the digital age*, GA Res 68/167, UN GAOR, 3<sup>rd</sup> Comm, 68<sup>th</sup> sess, Agenda Item 69(b), UN Doc A/RES/68/167 (21 January 2014, adopted 18 December 2013).

<sup>14</sup> Ibid.

<sup>15</sup> *The right to privacy in the digital age: Report of the Office of the United Nations High Commissioner for Human Rights*, 27<sup>th</sup> sess, Agenda Items 2 and 3, UN Doc A/HRC/27/37 (30 June 2014), para. 14. See also UN Human Rights Committee, *CCPR General Comment No 16: Article 17 (Right to Privacy), The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation*, 32<sup>nd</sup> sess, UN Doc HRI/GEN/1/Rev 9 (Vol I) (8 April 1988), para 8.