Law Council
OF AUSTRALIA

National Commissioner for Defence and Veteran Suicide Prevention Bill 2020; and

National Commissioner for Defence and Veteran Suicide Prevention (Consequential Amendments) Bill 2020

Senate Standing Committee on Foreign Affairs, Defence and Trade

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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 2020 Executive as at 1 January 2020 are:

- Ms Pauline Wright, President
- Dr Jacoba Brasch QC, President-elect
- Mr Tass Liveris, Treasurer
- Mr Ross Drinnan, Executive Member
- Mr Greg McIntyre SC, Executive Member
- Ms Caroline Counsel, Executive Member

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

Acknowledgement

The Law Council also acknowledges the contributions of members of its National Criminal Law Committee, the Federal Litigation and Dispute Resolution Section's Military Justice Committee and Administrative Law Committee, as well as the Business Law Section's Privacy Law Committee.

Executive summary

1. The Law Council of Australia is pleased to provide this submission to the Senate Standing Committee on Foreign Affairs, Defence and Trade (**Committee**).

2. The Committee is inquiring into the provisions of:

   - the National Commissioner for Defence and Veteran Suicide Prevention Bill 2020 (**Bill**), which proposes to establish the position of the National Commissioner for Defence and Veteran Suicide Prevention (**Commissioner**) as a statutory officer within the Attorney-General's portfolio; and

   - the National Commissioner for Defence and Veteran Suicide Prevention (Consequential Amendments) Bill 2020 (**Consequential Amendments Bill**), which proposes to amend information disclosure provisions in other legislation, with the objective of facilitating the performance by the Commissioner of their functions.

3. The Law Council is supportive of the broad objects in the Bill (clause 3) and the proposed functions of the Commissioner (clauses 11 and 26). However, with the view to improving the Bill, the Law Council has identified the following key issues as set out in this submission. The Law Council considers that these issues should be addressed prior to consideration of enactment.

   - **Independence of the Commissioner's role must be strengthened:** The provisions propose limited independence of the Commissioner from the Executive. This is particularly with respect to funding and staffing, which will come from the Attorney-General's Department at the discretion of the Secretary of that Department. The Commissioner is also given very broad powers to delegate their coercive information-gathering powers in favour of Departmental staff.

   - **Potential for conflict and/or duplication with other integrity bodies that have overlapping jurisdiction:** The proposed legislative framework limits the practical ability of the Commissioner to avoid duplication or conflict with the inquiries of other integrity bodies with overlapping functions. There are some apparent limitations in the powers of the Commissioner to share information, and the powers of other agencies to share information with the Commissioner, which would enable these bodies to cooperate to identify and manage potential conflicts.

   - **Whistleblower protections for those giving information to the Commissioner:** A strengthening of whistleblower protections is required, to address gaps in protections for people who provide information voluntarily; limitations in protections from reprisals (including the absence of rights to statutory remedies for reprisals); and a lack of comprehensive protection from the Commonwealth secrecy offences in Part 5.6 of the *Criminal Code Act 1995* (Cth) (**Criminal Code**).

   - **Legal assistance:** Legal assistance should be available, as of right, to private individuals, such as family members of deceased veterans or members, engaging with inquiries, rather than being left to discretion on a case-by-case basis.

   - **Access to 'intelligence information' and 'operationally sensitive information':** The Bill puts some limitations on the ability of the Commissioner to access and use 'intelligence information' and 'operationally sensitive information'. These terms are defined very broadly, and are not limited to classified or otherwise sensitive information whose disclosure is likely to cause harm to national interests.

   - **Offences for people who fail to give prior written notice of intended disclosures of certain information:** The Bill also proposes to create criminal offences for current or former security clearance holders who fail to give the

Commissioner prior written notice of their intention to give evidence that is 'intelligence information' or 'operationally sensitive information'. These offences apply even if the Commissioner has compelled or specifically requested the information. The Law Council is concerned that the criminalisation of a failure to give prior written notice is not a necessary or proportionate response.

- **Commissioner's power to issue non-disclosure directions, which override the powers of courts, tribunals and other inquiries to compel information**: The Bill proposes to confer an extensive power on the Commissioner (without any statutory criteria for its exercise, or any statutory maximum duration) to prevent people from disclosing or producing information they have given in evidence to the Commissioner to a court, tribunal or other inquiry. No specific justification is given for the proposal to override the powers of courts, tribunals or other executive inquiries. There is no acknowledgement of the potential impacts on this power on the rights of individuals to pursue legal remedies.

- **Legal professional privilege:** Consideration should be given to the need to clarify the powers of the Commissioner to compel information subject to legal professional privilege, particularly if the Commissioner seeks to compel legal advice or other privileged information from the Commonwealth.

- **Warrant-based search and seizure powers (including powers to use force):** There appears to be an absence of reasons for a proposal to confer warrant-based search and seizure powers on the Commissioner, including a power to use force in the execution of warrants. This is in contrast to most other statutory oversight and integrity bodies that do not have these powers, and usual safeguards are absent.

- **Privacy and freedom of information exemptions:** Exemptions from the *Privacy Act 1988* (Cth) (**Privacy Act**) and the *Freedom of Information Act 1982* (Cth) (**FOI Act**) should be reconsidered. Most other statutory integrity bodies do not have such exemptions, and no reasons are given for this differential treatment.

- **Timely public release of reports and government responses:** The Bill proposes that the Attorney-General must table the Commissioner's reports within 15 sitting days of receipt, which may lead to lengthy delays (in the order of several months) before they become available to the public.. The Law Council considers that a shorter tabling timeframe, of four to six sitting days, would be appropriate.

Summary of recommended amendments to the Bills

4. If the Parliament determines that there is merit in establishing the new, statutory role of the Commissioner, the Law Council suggests consideration be given to the following amendments to specific provisions of the Bills.

Managing overlap of inquiry and review functions with other, independent bodies

(a) ensuring that the Commissioner has adequate statutory information-sharing tools to effectively manage any overlap of their inquiry functions with those of other oversight and review bodies, particularly the Inspector-General of the Australian Defence Force (**IGADF**), in a way that avoids duplication or conflict of their respective inquiries, and is also consistent with the independence and effectiveness of all such bodies;

(b) ensuring that the Commissioner's power to direct the non-disclosure of certain evidence obtained in their inquiries does not impinge upon the independence of courts to admit relevant evidence in civil or criminal proceedings (including civil compensation proceedings brought by survivors or families);

(c) expanding the obligations on the Commissioner to have regard to the need to avoid causing prejudice to judicial proceedings, or concurrent executive inquiries, to include an express reference to administrative and disciplinary proceedings against ADF members;

Support and protection for persons participating in inquiries

(d) imposing obligations on the Government to ensure that veterans, ADF members, their families and other persons assisting inquiries are adequately supported during and after the inquiry process, including through conferring rights upon such persons to access the following forms of assistance (not merely at the discretion of the Commissioner or any other official):

(i) the right to have legal representation or a lawyer present with them during a hearing of the Commissioner, if they wish, and the right to legal assistance funding for the reasonable costs of that representation and any associated legal advice;

(ii) the right to have their reasonable witness expenses paid by the Commonwealth, in respect of appearances before the Commissioner; and

(iii) the right to have fully funded access to psychological and other health or social support services, as required, in respect of their engagement with the Commissioner;

(e) ensuring that any person who, in good faith, provides information to the Commissioner, for the purpose of the Commissioner performing their functions, has comprehensive legal protection from exposure to criminal or civil liability under any other Australian law, and from reprisals of all kinds in relation to their disclosures and assistance to the Commissioner. Such persons should also have rights to specific statutory remedies for reprisals;

(f) providing assistance to ADF personnel and other inquiry participants to understand and comply with their obligations in relation to evidence that they intend to give to the Commissioner, which may disclose 'intelligence information' or 'operationally sensitive information' (as defined in the Bill); and not exposing people to criminal liability for actions that do not cause harm, or create any risk of causing harm;

(g) incorporating in the Bill all of the policy principles publicly outlined by the Government about the manner in which it is expected that the Commissioner will perform their functions. Namely, the Commissioner should prioritise the voluntary participation by members of the Defence and veteran communities who have been affected by suicide, in addition to the existing guiding principles set out in clause 12 of the Bill, pertaining to a 'trauma-informed' and consultative approach to dealing with affected people;

Reporting and implementation of recommendations

(h) improving the timeliness of obligations on the Government to table in Parliament unclassified reports of the Commissioner (by reducing the statutory tabling deadline from 15 sitting days after receipt, to four to six sitting days);

(i) requiring the Government to issue a public response to the Commissioner's recommendations in a fixed timeframe (indicatively, three-to-six months of the Commissioner delivering a report) not the open-ended period of 'as soon as is reasonably practicable' as is currently proposed in clause 61 of the Bill;

Matters relevant to the independence of the Commissioner

Appointments and re-appointments

(j) placing a statutory limit on the number of times a person may be re-appointed as Commissioner (namely, only one re-appointment);

(k) strengthening the statutory eligibility criteria for appointments as Commissioner, to ensure that there are no actual, potential or perceived conflicts of interest by reason of a person's immediate or recent past employment, engagement or appointment in other roles;

(l) establishing an open and transparent selection process for the appointment of Commissioners;

Performance of functions

(m) ensuring that the proposed provisions governing the collection and subsequent use of 'intelligence information' by the Commissioner:

(i) do not impinge on the ability of the Commissioner to perform their functions, independently of the agencies whose actions are directly or indirectly under inquiry;

(ii) do not subject the Commissioner to obligations that are inconsistent with, and more onerous than, their obligations under the Commonwealth Protective Security Policy Framework (**PSPF**) in respect of the handling of national security classified and other official information;

(iii) do not extend to benign information which, if disclosed by the Commissioner, **would not** be likely to cause any harm to Australia's national security, defence or international relations (including unclassified information, and information that has already been lawfully released into the public domain);

Staffing

(n) establishing the Office of the Commissioner (being the Commissioner and their staff) as an independent statutory agency, so that the Office is given a separate appropriation in the budget, and the Commissioner has power to employ their own staff. This would amend the following provisions in the Bill:

(i) the present proposal in clause 13, which would deem the Commissioner to be an 'official' of the Attorney-General's Department for public governance and budgetary purposes. Clause 13 would make the Commissioner subject to direction by the Secretary of that Department. This includes a requirement to obtain the approval of Departmental officials for expenditure on goods and services, which the Commissioner has determined are necessary to conduct their inquiries; and

(ii) the proposed staffing requirements in clause 14, which would make the Commissioner reliant on the unguided and unlimited discretion of the Secretary of the Attorney-General's Department to make available the following persons to assist the Commissioner:

I. staff of the Attorney-General's Department (without any statutory obligations to ensure the functional independence of those staff, such as requirements that those staff must report solely to the Commissioner, who is responsible for their management); or

II. contractors engaged by other Commonwealth officials (in the absence of conferring an express statutory power on the Commissioner to directly engage staff as contractors or consultants for an on behalf of the Commonwealth, such as engaging counsel assisting or expert medical advisors);

(o) alternatively, if there is no appetite to establish the Office of the Commissioner as an independent statutory agency with its own staff, then as a minimum:

(i) imposing statutory obligations on the Secretary of the Attorney-General's Department, in making available Departmental staff to the Commissioner. This should include obligations to:

I. ensure that adequate numbers of appropriately skilled and security cleared staff are provided at all times;

II. consult the Commissioner on the number of staff required, and the particular staff who the Secretary proposes to make available, and taking all reasonable steps to ensure that these persons are acceptable to the Commissioner;

III. establish and maintain adequate arrangements to ensure that the Departmental employees assisting the Commissioner will be functionally independent from the Attorney-General's Department, any other Departments or agencies, and Government Ministers; and

IV. provide annual reports on the number of staff the Secretary has available to the Commissioner, so that the Parliament and public have visibility of these matters;

(ii) conferring a power on the Commissioner to directly engage staff as contractors for particular inquiries, acting for an on behalf of the Commonwealth (for example, appointing counsel assisting or expert medical or technical advisers); and

(iii) removing the Commissioner's power in clause 15 of the Bill to delegate core powers of inquiry to staff of the Attorney-General's Department (being staff of any level who have been made available to assist the Commissioner; or otherwise Senior Executive Level employees of that Department). This includes powers to exercise coercive information-gathering powers to obtain evidence from any person; and powers to issue non-disclosure directions about the content of evidence given to the Commissioner, or the fact that a person has given evidence to the Commissioner (which trigger criminal offences for breach);

Resourcing

(p) if there is no appetite to establish the Office of the Commissioner as an independent agency, imposing administrative or legislative requirements for public transparency about the resourcing allocated to office of the Commissioner from the budget of the Attorney-General's Department.

(q) Currently, only the administered funding for a legal assistance scheme for inquiry participants has been reported as an itemised expense in the 2020-21 budget

papers.[1] The public is otherwise reliant on *ad hoc* disclosures from the Government about other operating expenses drawn from the Department's general operating budget, such as the mention in the Explanatory Memorandum to the Bill that $42.7 million over five years has been allocated,[2] without itemisation of the expenses covered by this aggregated amount; and

Application of freedom of information and privacy laws

(r) omitting the proposed exemptions in favour of the Commissioner and Attorney-General's Department from the FOI Act and the Privacy Act. Reliance should instead be placed upon:

(i) the existing range of exceptions available under the FOI Act for the disclosure of information, as is the case for the overwhelming majority of Commonwealth integrity agencies, particularly those within the Attorney-General's portfolio; and

(ii) the application of the crucial protections conferred by the Privacy Act for the acquisition, handling, correction, dissemination, retention and destruction of personal information, including:

I. special protections for particularly sensitive types of information such as health-related information;

II. mandatory breach notifications if there has been unauthorised disclosure or access, or loss of personal information;

III. the statutory oversight, complaints handling and enforcement roles of the Privacy Commissioner (performed by the Australian Information Commissioner); and

IV. statutory remedies for breaches.

Proposed establishment of the Office of the Commissioner

5. The Bill proposes to place on a statutory footing the functions of the current Commissioner who was appointed on 30 September 2020.[3] Until the Bills are passed and commence, the Commissioner will perform functions on a non-statutory basis and will therefore not have powers to compel the provision of information.

6. Clearly, the issue of defence and veteran suicide is of significant national concern. Its incidence, causes, impacts and prevention require sustained and urgent attention by the ADF and the Australian Government.

7. Illustratively, since mid-2017, there have been least five official inquiries into, or addressing, defence and veteran suicide, which have made concerning findings.[4] For example, in 2019, the Productivity Commission found that the suicide rate for all male ex-service personnel is 18 per cent higher than the suicide rate for civilian

[1] Australian Government, *Attorney-General's Portfolio Budget Statements 2020-21*, (October 2020), 25.

[2] Explanatory Memorandum, 4 at [15].

[3] The Hon Christian Porter MP, Attorney-General of Australia, *National Commissioner for Defence and Veteran Suicide Prevention*, Media release, 30 September 2020.

[4] Three notable, recent inquiries are: Productivity Commission, *A Better Way to Support Veterans*, (June 2019); Senate Standing Committee on Foreign Affairs, Defence and Trade, *The Constant Battle: Suicide by Veterans*, (August 2017); and Australian National Audit Office, *Efficiency of Veterans Service Delivery by the Department of Veterans Affairs*, ANAO Report 52 of 2017-18, (June 2018). See also, the list of inquiries at: Productivity Commission, *A Better Way to Support Veterans*, Volume 1, (June 2019), 84.

Australian men; that male ex-service personnel aged under 30 years are twice as likely to die by suicide than civilian men of the same age; and that between 2001 and 2016, more veterans died by suicide than in overseas operational service.[5]

8. Despite these confronting findings and multiple recommendations for reforms, it appears that limited progress has been made.[6] The establishment of a dedicated inquiry and review mechanism has the potential to expedite crucial improvements.

Conditions for the effectiveness of a review-based mechanism

Independence

9. To be effective, any new inquiry or review-based mechanism must be demonstrably independent from the Executive Government—particularly from Ministers, the policy departments advising them, and the entities under inquiry (directly or indirectly).

10. The substantive and perceived independence of an integrity body charged with performing inquiry, oversight or review functions is not limited to the fact that the body is not subject to direction or influence by Government policy in making findings and recommendations about matters under inquiry.

11. Rather, the body must also have independence in making decisions about how its inquiry functions will be performed; and the manner in which those functions are, in fact, performed. This encompasses matters including:

    - independence from Government Ministers, policy departments and entities that may be subject to inquiry (directly or indirectly) in determining:
        - whether to exercise an own-motion power to inquire into a matter;
        - the way in which an inquiry will be conducted; and
        - the direction of resources to implement those decisions, covering both the allocation of financial resources to acquire necessary goods and services, and human resources in appointing and managing staff; and
    - independence from the entities whose actions are under inquiry or review (directly or indirectly), Government Ministers, and their policy departments in:
        - accessing relevant information;
        - making decisions about the inclusion of information in inquiry reports, as the evidence supporting the body's findings and recommendations; and
        - working collaboratively with other, independent integrity agencies with overlapping functions, to avoid duplication or conflict of inquiries.

Adequate resourcing and standing

12. To be fairly characterised as independent, an inquiry or review mechanism must be given appropriate resourcing, and there must be full public transparency about the quantum of resources allocated via its annual budgets. Any such mechanism must

[5] Productivity Commission, *A Better Way to Support Veterans*, Volume 1, (June 2019), 34.

[6] See, for example, Australia Institute of Health and Wellbeing, *National Suicide Monitoring of Serving and Ex-Serving Australian Defence Force Personnel: 2020 Update* (October 2020). This report found that, over 2016-2018, the suicide rates of serving males were lower than the general male population, however, the suicide rates of veterans who were discharged on medical grounds was significantly higher (and the report confirmed previous findings that medical discharge is a suicide risk factor).

also possess a level of 'standing', 'gravitas' or 'influence' that is commensurate with the seriousness and national significance of the issues under inquiry.

Government responsiveness to recommendations

13. Further, the establishment of a new inquiry and review-based role in relation to defence and veteran suicide is only a fraction of a broader, national response that is required to this significant issue.

14. In addition to fully resourcing the Commissioner, and establishing robust legal safeguards to ensure their substantive and perceived independence, it is incumbent on the Government of the day to respond promptly and fully to all of the Commissioner's recommendations, and those of previous reviews and inquiries.

15. Government transparency and accountability for progress in implementing those recommendations is also essential to the ultimate effectiveness of any review mechanism, as part of a national response to defence and veteran suicide.

Office of the Commissioner

16. The Bill proposes to structure the role of the Commissioner in the following way:

- the Commissioner is appointed to a full-time, statutory position by the Governor-General;[7]
- the Commissioner's term of appointment is five years, with no limit on re-appointments;[8]
- the Commissioner provides their reports to the Attorney-General (and Prime Minister in certain circumstances) who must table those reports in Parliament, which is the mechanism by which they become public;[9] and
- the Commissioner and their staff are not established as an agency with a separate legal identity to the Commonwealth, as is the case with other integrity bodies, such as the Commonwealth Ombudsman. Rather:
  - the Commissioner's staff and operating budget will come from the general budget of the Attorney-General's Department;[10] and
  - the Commissioner will be treated as an 'official' of the Attorney-General's Department for the purpose of public sector financial management and governance laws. Significantly, this obliges the Commissioner to comply with certain directions and other requirements set by the Secretary of the Attorney-General's Department concerning the approval by that Department of expenditure on goods and services that the Commissioner has identified as necessary to conduct their inquiries.[11]

[7] Bill, Clause 16.

[8] Ibid, Clause 17.

[9] Ibid, Clauses 60-62.

[10] Ibid, Clauses 13 and 14.

[11] Ibid, Clause 13. See also: *Public Governance, Performance and Accountability Act 2013* (Cth), sections 13, 15, 16 and 21 (definition of 'official' of a Commonwealth entity, and the powers; and the duties and powers of 'accountable authorities' or heads of Commonwealth entities in relation to the 'officials' of those entities).

The absence of a statutory agency

17. The Committee may wish to consider whether the Office of the Commissioner should be established as an independent statutory agency, which has a separate legal identity to the Commonwealth, or at least is a 'listed entity' under the *Public Governance, Performance and Accountability Act 2013* (Cth) (**PGPA Act**) which would provide for its financial independence from Departments of State and other public sector entities.

18. Designating the Office of the Commissioner as a 'listed entity' under the PGPA Act would mean that the Commissioner would be the head of a Commonwealth agency, with direct responsibility and accountability for its governance and management, including employment and staff management. The agency would exercise powers and perform functions in its own name. Its annual operating budget would be appropriated to it directly, rather than being allocated administratively from the ordinary annual budget appropriated to the Attorney-General's Department.

19. These features are important to both the substantive and perceived independence of the Commissioner from the Executive Government of the day. This includes the Commissioner's independence from policy departments, which serve and take their directions from Ministers—both directly from the relevant portfolio Minister, and more broadly in implementing the collective decisions of Cabinet.

20. Several other Commonwealth oversight and integrity agencies, whose heads are also appointed on a full-time basis, have been established as independent statutory agencies, generally as 'listed entities' under the PGPA Act. These include the Commonwealth Ombudsman,[12] the Auditor-General,[13] the IGIS[14] and the Australian Commissioner for Law Enforcement Integrity (**ACLEI**).[15]

21. On the other hand, the IGADF is not established as an independent agency, but rather is appointed under the *Defence Act 1903* (Cth) (**Defence Act**) as an independent statutory office-holder who is supported by personnel made available by the Chief of Defence Force (**CDF**) or the Secretary of the Department of Defence (**Defence Secretary**).[16] However, Part VIIIB of the Defence Act contains two critical differences to the present Bill, namely it:

    - confers direct powers on the IGADF to engage consultants and contractors (and the IGADF is expressly deemed to be acting for, and on behalf of, the Commonwealth in making such engagements);[17] and

    - empowers the IGADF to appoint individuals as Assistant Inspectors-General, Inquiry Officers and Inquiry Assistants, from the among the persons who have been made available by the CDF or Defence Secretary, or directly engaged by the IGADF under contract.[18]

22. These provisions provide for a degree of statutory independence and autonomy from the CDF and the broader Defence organisation, in relation to the staffing arrangements to support the IGADF. As discussed subsequently, the Bill does not propose to confer equivalent powers on the Commissioner. Rather, the Bill proposes to make the Commissioner dependent on the exercise of discretion by the Secretary

[12] *Ombudsman Act 1976* (Cth), section 4A.

[13] *Auditor-General Act 1997* (Cth), subsection 38(3).

[14] *Inspector-General of Intelligence and Security Act 1986* (Cth), section 6AA.

[15] *Law Enforcement Integrity Commissioner Act 2006* (Cth), subsection 195(3).

[16] Defence Act, sections 110E (appointment), 110G (tenure), and 110O (staff).

[17] Ibid, subsections 110O(2) and (3) (IGADF power to engage consultants and contractors for and on behalf of the Commonwealth).

[18] Ibid, section 110P (appointment of staff to particular positions).

of the Attorney-General's Department to make available contracted service providers.[19]

The appointment of a full-time Commissioner

23. The Bill proposes that the Commissioner will be a full-time appointment.[20] The Law Council considers this to be proportionate to the seriousness of the issue of defence and veteran suicide, and the likely volume of work for the Commissioner.

24. A part-time appointment may not enable the Commissioner to give the issues under review an appropriate degree of scrutiny; and may not facilitate the allocation of an appropriate level of resourcing which accurately reflects the workload. A part-time appointment may also encourage reliance on powers of delegation.

25. In addition, limiting appointments of the Commissioner to a full-time basis may help to mitigate the risk of conflicts of interest, which could arise from an appointee's concurrent employment if their appointment were only part-time. The provision of a part-time salary may necessitate the Commissioner holding other paid employment.

Functions of the Commissioner

Objects of the proposed Act and scope of statutory functions

26. The Law Council is supportive of the broad objects in the Bill (clause 3) and the proposed functions of the Commissioner (clauses 11 and 26). These functions cover inquiring into the circumstances, and maintaining statistical and other records, of individual deaths (including in collaboration with coroners); and making recommendations for broader systemic reforms to policies, programs and practices, which are directed to suicide prevention and maintaining the health and wellbeing of ADF members and veterans.

27. Importantly, the Commissioner's functions will cover the circumstances surrounding individual deaths by suicide, and the identification of suicide risks, in relation to veterans and serving ADF members.

28. As noted below, however, this will require the conferral of appropriate statutory information-sharing functions to ensure that the Commissioner can avoid overlap or conflict with the functions of the IGADF, which also include inquiring into the deaths of serving ADF members.

29. The extraterritorial application proposed in clause 8 is also important to ensure that the Commissioner's remit extends to the overseas activities and treatment of ADF members and veterans.

Manner in which Commissioner must perform their functions

Statutory recognition of the principle of voluntary participation

30. Clause 12 of the Bill sets out general principles that the Commissioner must take into account in performing their inquiry functions. It requires the Commissioner to take a 'trauma-informed and restorative approach' and to 'recognise that families and others affected by defence or veteran deaths by suicide have a unique contribution to make', and 'may wish to be consulted' by the Commissioner.

[19] Cf Bill, Clause 14.

[20] Ibid, Subclause 17(2).

31. It is unclear why a further guiding principle, which is contained in a policy statement on the Commissioner's website, is not also included in clause 12. This is a statement of commitment to 'recognise and respect' that families and others affected by defence or veteran deaths by suicide 'may not wish to share their experiences' and 'should have the choice about whether or not to participate'.[21]

32. This principle would be a worthwhile addition to clause 12. It could provide a direct assurance to persons who have been affected by defence and veteran deaths by suicide, particularly families, that they should not feel compelled to participate in inquiries, and are not the intended targets of the coercive information-gathering powers in the Bill, including warrant based powers of search and seizure.

Recommendation 1—manner in which Commissioner must perform functions

- **Clause 12 of the Bill should be amended to include the additional guiding principle published on the Commissioner's website, as at October 2020, requiring the Commissioner to prioritise the voluntary participation of individuals who have been directly affected by defence or veteran deaths by suicide, such as family members.**

Avoiding causing prejudice to proceedings and other inquiries

33. Subclause 11(3) further directs the Commissioner, in performing their functions, to have regard to the need to avoid causing prejudice to current or future criminal or civil proceedings or contemporaneous inquiries. A note to the provision identifies inquiries conducted by the IGADF as an example of a contemporaneous inquiry.

34. While this statutory direction is desirable, consideration should be given to broadening the obligation in subclause 11(3) to refer expressly to ADF administrative or disciplinary action, which may not be covered by the existing references to criminal or civil proceedings, or other contemporaneous inquiries.

35. Irrespective of whether a technical construction of the expression 'contemporaneous inquiry' could encompass administrative or disciplinary action take in relation to an ADF member, an express statutory reference to these matters in subclause 11(3) would ensure that they are drawn explicitly to the attention of the Commissioner, and all those who engage with the Commissioner's inquiries.

36. The Law Council considers that this would maximise the effectiveness of the policy objective of the provision that the Commissioner's inquiries should avoid, to the greatest possible extent, causing prejudice to a wide variety of concurrent proceedings or inquiries.

Recommendation 2—avoidance of prejudice to other proceedings and inquiries

- **Subclause 11(3) of the Bill should be amended to also require the Commissioner to have regard to the need to avoid causing prejudice to administrative and disciplinary proceedings in relation to ADF members and other persons.**

[21] National Commissioner for Defence and Veteran Suicide, *About the National Commissioner*, <https://www.nationalcommissionerdvsp.gov.au/about> (October 2020).

De-confliction with other oversight and review bodies

General approach proposed in the Bill

37. The general design approach in the Bill appears to be the deliberate creation of 'overlapping' or 'concurrent' jurisdiction as between the Commissioner and various other Commonwealth oversight and integrity bodies with related functions, rather than attempting to remove any overlap by carving out areas of 'exclusive' jurisdiction for each entity.

38. By way of example, the functions of the following officeholders or integrity agencies will overlap with those of the Commissioner:

Inspector-General of the Australian Defence Force

39. The functions of the IGADF under the Inspector-General of the Australian Defence Force Regulation 2016 (**IGADF Regulation**) include 'to inquire into the death of a member of the Defence Force, where the relevant death appears to have arisen out of, or in the course of, the member's service in the Defence Force'.[22]

Commonwealth Ombudsman

40. The functions of the Commonwealth Ombudsman under the *Ombudsman Act 1979* (Cth) (**Ombudsman Act**) extend to the actions of officials of the Departments of Veterans Affairs, Defence and Health (among others) with responsibilities for the delivery of services, programs and policy relevant to the issue of defence and veteran suicide prevention, support and wellbeing.

41. In particular, the Commonwealth Ombudsman is appointed as 'Defence Ombudsman' under section 19B of the Ombudsman Act, and performs the additional functions set out in section 19C. These functions cover 'matters of administration' that are 'related to the service of a member of the Defence Force' or that arise 'in consequence of' a person's current or past service.

42. As clause 26 of the Bill identifies, the proposed functions of the Commissioner will include the examination of a veteran's transition from the ADF, the support services available to them, systemic issues contributing to defence and veteran suicide and the wellbeing of ADF members and veterans, and any incidental matters. This will necessarily cover various administrative actions of Commonwealth departments and agencies within the remit of the Ombudsman, acting both as Commonwealth Ombudsman and Defence Ombudsman.

43. Further, the jurisdiction of the Ombudsman under the *Public Interest Disclosure Act 2013* (Cth) (**PID Act**) may also be relevant in some cases, if there are allegations of wrongdoing by officials of those Departments or agencies performing the administrative functions noted above.

Inspector-General of Intelligence and Security

44. The functions of the IGIS under the *Inspector-General of Intelligence and Security Act 1989* (Cth) (**IGIS Act**) to conduct oversight of the legality and propriety of intelligence agencies' activities, (including broader systemic issues in relation to patterns of conduct, policies and procedures) may be relevant in the case of ADF members and veterans whose services are, or were, made available to intelligence agencies to perform functions for, and on behalf of, those intelligence agencies.[23]

[22] IGADF Regulation, regulation 5(a) (made under paragraph 110C(1)(g) of the Defence Act).

[23] IGIS Act, sections 8 and 8A.

45. Examples of concurrent jurisdiction as between the IGIS and the Commissioner may include the following circumstances:

    - the ADF member is made available to an intelligence agency on an, 'employment-like' basis. That is, the ADF member is given a lawful general order to perform ongoing duties for an intelligence agency (such as performing the duties of an intelligence analyst or another professional role in one of the intelligence agencies within the Defence portfolio—namely, the Defence Intelligence Organisation, Australian Geospatial-Intelligence Organisation, or the Australian Signals Directorate); or

    - an ADF member is essentially 'seconded' to an intelligence agency to perform functions in a particular operation for, and on behalf of, the intelligence agency. For example, the services of an ADF member with particular specialist skills may be made available to an intelligence agency to exercise intelligence collection powers, in Australia or overseas, under the authority of a warrant or Ministerial authorisation issued to the relevant intelligence agency.

46. In such instances, the ADF members would be taken to be 'members' of the relevant intelligence agencies for the purpose of the IGIS Act. This means that these ADF members' actions would be directly subject to IGIS oversight, in addition to IGIS oversight of the actions of the intelligence agency in relation to the ADF members.[24] Further, the additional functions of the IGIS under the PID Act, in relation to disclosures about wrongdoing by intelligence agencies, may also be relevant.

47. In all of the above examples, the legislative approach proposed in the Bill will effectively create 'concurrent jurisdiction' between multiple integrity agencies in such circumstances. That is:

    - the Bill does not propose to exclude matters from the Commissioner's jurisdiction, on the basis that those matters are presently within the oversight or review related jurisdiction of other Commonwealth agencies; and

    - similarly, the Consequential Amendments Bill does not propose to make consequential amendments to the governing legislation of other Commonwealth integrity agencies, to exclude matters that are presently within their jurisdiction, on the basis that those matters will be covered by the Commissioner's jurisdiction under the Bill.

Advantages of the 'concurrent jurisdiction' model proposed in the Bill

48. There are many advantages in the general approach proposed in the Bill of creating 'concurrent jurisdiction', which can be managed administratively by the Commissioner, working cooperatively with other integrity agencies. In particular, this legislative design approach will help to:

    - ensure that issues do not 'fall between the cracks' of the individual functions of different agencies or bodies. A key example would be case of the death of an ADF member who has very recently separated from the ADF. The Law Council understands that the IGADF would not normally investigate such a death. The role of the Commissioner may therefore help to provide coverage in such cases, including protections to individuals who may wish to come forward with relevant information;

[24] Ibid, section 3 (paragraph (b) of the definition of 'member' in relation to an intelligence agency).

- enable holistic and comprehensive reviews of individual cases, including the identification and assessment of systemic issues, which are not artificially constrained by jurisdictional limitations of individual agencies; and

- avoid the risk of creating unintended consequences, in that legislative attempts to 'carve out' spheres of 'exclusive jurisdiction' for multiple, individual oversight agencies, bodies or office-holders may result in some issues falling outside the jurisdiction of any of those entities.

The need for effective information-sharing powers to avoid conflict or duplication

49. The 'concurrent jurisdiction model' proposed in the Bill makes it crucial that other integrity agencies, bodies or office-holders whose functions may overlap with those of the Commissioner, have appropriate statutory tools to cooperate with each other, as they deem necessary and appropriate, to avoid duplication or conflict of inquiries.

50. Critically, information-sharing powers provide the legal basis for individual agencies or office-holders to establish what are effectively 'joint' or 'concurrent' inquiries, with each agency or office-holder participating to the extent of their individual statutory jurisdiction. Under such an arrangement, the participating agencies or office-holders would share information with each other to coordinate their inquiry plans, disclose relevant evidence to each other, and coordinate their individual reports, while independently performing their respective statutory functions in making findings and recommendations on the matters under inquiry.

51. If effective statutory information-sharing powers are conferred, then the Commissioner and other Commonwealth integrity agencies or officials will be equipped to work together to avoid duplication or conflict.

52. At a practical level, cooperation could be facilitated by those agencies or officials entering into administrative agreements with each other, such as memoranda of understanding, which could be published. This is already common practice among many Commonwealth integrity agencies.[25]

Potential shortcomings in the information-sharing powers proposed in the Bill

53. The Explanatory Memorandum to the Bill recognises the need for the Commissioner's important work to complement and build upon, rather than duplicate or conflict with, the work of existing oversight or inquiry related bodies or office-holders (including State and Territory Coroners).[26]

54. However, as explained below, this is not given full effect in the provisions of the Bills which purport to enable information-sharing between the Commissioner and others.

Commissioner's ability to share information with other oversight bodies

55. Clauses 56 and 57 of the Bill confer a power on the Commissioner to share information with other Commonwealth agencies, where they have obtained the relevant information in the course of performing their functions, and it is also relevant to the performance by the 'receiving' agencies of their separate functions.

56. The inclusion of express information-sharing powers in the Bill is important, given that clause 55 creates offences for 'entrusted persons' (who include the Commissioner

[25] See, for example: *Memorandum of Understanding Between the Commonwealth Ombudsman and Inspector-General of Intelligence and Security* (December 2005); and *Memorandum of Understanding Between the Commonwealth Ombudsman and Office of the Australian Information Commissioner* (November 2010), published on the Commonwealth Ombudsman website, *Information Publication Scheme*: <https://www.ombudsman.gov.au/Our-responsibilities/seeking-information/information-publication-scheme>.

[26] Explanatory Memorandum, 21-22 at [20].

and staff assisting the Commissioner) who use or disclose 'protected information' (being any information obtained in the course of performing their functions or duties). This prohibition is subject to two limited exception, namely:

- disclosures for the purpose of the Commissioner performing functions or exercising powers; and

- disclosures in accordance with the information-sharing arrangements in clause 56 or clause 57 (as applicable—clause 56 deals with information generally, and clause 57 deals specifically with the sharing of 'intelligence information').

57. This means that any disclosure by the Commissioner that does not comply with the specific conditions and other requirements in clause 56 or 57 will not be authorised and may constitute an offence under clause 55 if the requisite fault elements were established. Such a disclosure may also constitute an offence against the official secrecy provisions of Part 5.6 of the Criminal Code.

58. However, the permitted disclosures under clauses 56 and 57 are narrow. These clauses are limited expressly to very specific types of information, which is identified solely by reference to the means by which the Commissioner has acquired it. Subclauses 56(1) and 57(1) state that, to be covered by the permitted disclosure provisions, the information must have been obtained:

- under compulsion (that is, in compliance with a summons or production notice issued under clause 30 or 32); or

- voluntarily by a Commonwealth, State or Territory official, in accordance with the standing authorisations given under clauses 40 and 41 for those persons. Importantly, this would appear to cover:

  - individual officials who **were not** acting in the course of their official duties in making a disclosure, such as individual ADF members who wished to come forward with relevant information; and

  - individual officials **who were** acting within the course of their official duties in making the disclosure to the Commissioner, in which case the disclosure is taken to be made by the relevant Commonwealth body. (For example, an employee of the Department of Defence whose duties include liaising with the Commissioner and responding to requests for information, could make a voluntary disclosure in that capacity.)

59. These prescribed categories of information do not include information that the Commissioner has acquired in any other way, such as:

- information obtained from private individuals (such as veterans, families, former Commonwealth officials, and professionals such as doctors or psychologists who treated ADF members or veterans) who voluntarily gave that information to the Commissioner, either on an unsolicited basis or in response to a simple request by the Commissioner or persons assisting the Commissioner;

- information obtained from things seized under a search warrant issued under clause 36; and

- information that the Commissioner has created themselves in the course of performing their functions or exercising their powers (for example, findings or recommendations, or proposed findings or recommendations).

60. This means that the Commissioner will be unable to lawfully share information that has been obtained in the ways listed above. They may be liable to prosecution for an offence against clause 55 if they make a disclose to another agency, and would be reliant on executive discretion not to enforce an offence against them. This may be the case **even if**:

    - the information that the Commissioner disclosed was unclassified;
    - the disclosure did not cause any harm, or raise any risk of harm; and
    - the disclosure was, in fact, beneficial because it facilitated an official inquiry or investigation into an issue of public importance by the integrity agency or office-holder that received the information from the Commissioner.

61. Further, the limited coverage of clauses 56 and 57 means that the Commissioner will need to divert their time and resources into keeping detailed records of the precise means by which they have acquired each piece of information in their holdings, so they can ascertain whether it can lawfully be shared.

62. The Law Council is concerned that clauses 56 and 57, as presently drafted, risk placing arbitrary limitations on the Commissioner's ability to share relevant information, on the basis of the specific means by which that information was acquired. Instead, these provisions should be re-drafted to cover all 'protected information' within the meaning of clause 5 (being information obtained the Commissioner has obtained in performing their functions).

Recommendation 3—information-sharing powers (clauses 56 and 57)

- **Clauses 56 and 57 of the Bill should be amended to apply to all information that the Commissioner has obtained, or created, in the performance of their functions or the exercise of their powers.**
- **The information-sharing powers in these clauses should not be limited to information obtained through particular legal mechanisms, such as notices or summonses, to the exclusion of any other mechanisms.**

Ability of the IGIS to share relevant information with the Commissioner

63. In most instances, the authorisations in clauses 40 and 41, and the attendant immunity from liability to secrecy offences in clause 58, will likely operate to enable other Commonwealth, State and Territory integrity agencies or office-holders to share relevant information with the Commissioner.[27] However, as explained below, there is one instance in which this will not be the case. This concerns disclosures to the Commissioner by the IGIS.

64. Clause 43 of the Bill provides that IGIS officials (being the IGIS and their staff) may only disclose information to the Commissioner in accordance with sections 34 and 34A of the IGIS Act.

65. Presently, sections 34 and 34A of the IGIS Act prohibit the IGIS from disclosing (either voluntarily or under compulsion, including under an order of a court) information obtained in the course of performing their functions, except for the purpose of

[27] However, there will still be a question of statutory construction as to whether the general authorisations in Clauses 40 and 41 of Bill would prevail over any specific non-disclosure obligations in those agencies' governing legislation. It may also be open to those agencies to argue that the authorisations in Clauses 40 and 41 of the Bill constitute a defence of lawful authority to any specific disclosure offences in their governing legislation (for Commonwealth offences, this defence is codified in section 10.5 of the Criminal Code).

performing their oversight functions in relation to intelligence agencies. This prohibition is subject to two very limited exceptions, covering:

- disclosures in emergencies involving risks to the safety or wellbeing of another person, if the IGIS has personally approved the disclosure (section 34); and

- disclosures to a royal commission, established under the *Royal Commissions Act 1902* (Cth) which has been prescribed in regulations, and therefore individually 'approved' by the Executive Government as a recipient of information disclosed by the IGIS (section 34A).

Proposed approach in the Consequential Amendments Bill

66. Clauses 3 to 6 of the Consequential Amendments Bill propose to amend section 34A of the IGIS Act to expand the permitted disclosures to the Commissioner, as well as any royal commissions listed in regulations as in force from time-to-time. However, the ability of the IGIS to lawfully disclose information to the Commissioner under section 34 will only have effect if the Attorney-General decides to make, and leave in force, statutory rules to 'trigger' the application of the permission in section 34A. The provision will have no effect unless such rules are in force.

67. This means that the power of the IGIS to share information with the Commissioner is effectively dependent on the Executive Government granting its permission for this to occur, by making rules and not unilaterally repealing them at-will. This means that there is no legal safeguard against the Executive Government effectively frustrating the performance by the Commissioner and IGIS of their functions, by preventing the sharing of information by the IGIS that would allow the Commissioner and IGIS to manage their concurrent jurisdiction and avoid duplication or overlap.

68. Such Ministerial 'permission-based' disclosure arrangements, via the making of legislative instruments, may be acceptable in relation to royal commissions, because their powers of inquiry are limited to an individual, 'one-off' inquiry, whose duration and terms of reference are prescribed in its letters patent. However, the Commissioner's circumstances are readily distinguishable in this respect, given:

    - the ongoing nature of the Commissioner's proposed functions;

    - the Commissioner's ability to conduct own-motion inquiries into matters falling within their broad statutory functions (for example, an inquiry into the circumstances of any death by suicide of an ADF member or veteran); and

    - the overlap of the Commissioner's functions with those of the IGIS is readily identifiable in advance of the establishment of the ongoing role of the Commissioner. That is, whenever an ADF member is made available to an intelligence agency, and that member dies by suicide during their service, the statutory functions of the IGIS and the Commissioner will overlap—as well as further overlap with the functions of the IGADF. In contrast, such overlap cannot be predicted, in the abstract, for royal commissions generally. This makes a regulation-based information-sharing power necessary, to ensure it is available only where there is overlap between the functions of the IGIS and matters within the terms of reference for an individual royal commission.

69. In addition, the prohibition in section 34 of the IGIS Act, and the permission-based disclosure mechanism proposed to be included in section 34A, apply to **all information** the that IGIS has obtained in performing functions or exercising powers under the IGIS Act or the PID Act. There is no exception for unclassified information, or information whose disclosure to the Commissioner alone is unlikely to cause material harm to national security interests.

70. Given the significant overlap between the functions of the IGIS and the Commissioner in relation to ADF members whose services are made available to intelligence agencies, this may be especially problematic in practice. It may mean that the Commissioner is not able to access important information about the context and wider circumstances in which a death of an ADF member or veteran occurred, where that person performed functions for, and on behalf of, an intelligence agency.

71. Amendments are required to clauses 3 to 6 of the Consequential Amendments Bill to preserve the independence of both the IGIS and the Commissioner from Ministerial interference in controlling the exchange of information, where information-sharing is necessary to avoid conflict or duplication and enable effective inquiries.

Recommended amendments to the Consequential Amendments Bill

72. Rather than establishing a Ministerial 'permission-based' model in the IGIS Act, it would be preferable to enact a provision in the IGIS Act which authorises the IGIS to disclose information to the Commissioner, if the IGIS believes, on reasonable grounds, that:

    - the information is relevant to the performance by the Commissioner of their functions; and

    - disclosure to the Commissioner would not be likely to prejudice Australia's national security.

73. There is clearly a need to protect highly classified or otherwise sensitive information in the possession of the IGIS from compromise as a result of indiscriminate disclosure to other entities. However, this need could be met by implementing the suggestion in the second point above, that the IGIS must be **reasonably satisfied** that the disclosure is not likely to be prejudicial to Australia's national security.

74. Importantly, the IGIS is, and the Commissioner would be, subject to the requirements of the PSPF. Those requirements would be central to a determination by the IGIS as to whether a disclosure to the Commissioner would be likely to prejudice national security. This is particularly because the IGIS would be required to form that view on **reasonable grounds**, which would necessarily import consideration of applicable information security obligations. That is, a decision to ignore or contradict the PSPF is unlikely to be made on reasonable grounds.

75. Significantly, the IGIS has existing statutory functions under the FOI Act and *Archives Act 1983* (Cth) to provide expert evidence to the Information Commissioner and Administrative Appeals Tribunal about whether the potential release of a Commonwealth record is likely to prejudice Australia's national security, defence or international relations. These expert evidence functions leverage the independent expertise the IGIS has acquired from performing their oversight functions, which involve dealing regularly with highly classified and sensitive information of intelligence agencies. The conferral of these functions on the IGIS is an existing recognition by the Parliament of the IGIS's independent, sound and trusted judgment in assessing the likely harm arising from the disclosure of information. The recommendation below would simply build on the existing precedent of leveraging the IGIS's expertise and standing in assessing information.

Recommendation 4—information-sharing by the IGIS

- **Clauses 3 to 6 of the Consequential Amendments Bill should be omitted and substituted with amendments to the IGIS Act which permit the IGIS to share information with the Commissioner, if the IGIS believes, on reasonable grounds, that:**
  - **the information is relevant to the performance by the Commissioner of their functions; and**
  - **disclosure to the Commissioner would not be likely to cause to prejudice Australia's national security. (If desired, a further statutory obligation could be imposed, which requires the IGIS to notify, or consult with, the head of the intelligence agency to which the information relates, in considering whether the disclosure is likely to cause prejudice to national security. However, that agency head should not have any effective right of 'veto' over the independent decision of the IGIS.)**

Commissioner's non-disclosure powers in relation to courts, tribunals & inquiries

Non-disclosure orders under clause 53

76. The heading to clause 53 of the Bill describes the powers conferred on the Commissioner under that provision as a power to issue a 'non-publication direction'. However, it appears that clause 53 proposes to confer a broader direction-making power on the Commissioner, which may interfere with the ability of courts and tribunals to conduct proceedings, and the conduct of administrative inquiries.

77. Clause 53 empowers the Commissioner to issue a written direction to any person, stating that oral evidence given before the Commissioner, the contents of a document or description of a thing produced to the Commissioner, and the identity of a witness (or information that would enable a witness to be identified):

    - must not be 'published, **produced or disclosed**' (emphasis added); or
    - may only be 'published, **produced or disclosed** … in the manner or to the persons that the Commissioner specifies' (emphasis added).

78. Subclause 53(3) provides that these directions may order a person not to 'publish, produce or disclose' material to a court or 'a tribunal, authority or person having power to require the production of documents or the answering of questions'.

79. As there are no statutory criteria for the making of such a direction, issuing decisions are entirely at the Commissioner's discretion. For example, there is no harm-based threshold that would require an assessment of the likely impacts of any 'publication, production or disclosure' as a pre-condition to the issuance of a direction.

80. Nor is there any requirement to consider the likely impacts of making a direction, for example, impacts on third parties who may commence proceedings seeking a remedy, or extant or potential future executive inquiries. There is also no statutory maximum duration for those directions, nor any obligation on the Commissioner to specify a duration for an individual direction having regard to the harm sought to be prevented by issuing it, and the likely impacts on third parties of issuing it.

81. Additionally, there are no rights of administrative review in relation to decisions to issue a direction, or any statutory process requiring the Commissioner to consider whether a direction should be revoked (including on the application of a person).

82. As discussed below, in relation to matters affecting the Commissioner's independence, it is also a matter of concern that this highly significant power is proposed to be delegable to employees of the Attorney-General's Department under clause 15, including employees of **any level** of seniority who are made available by the Secretary of the Attorney-General's Department under clause 14.

Absence of justification

83. The conferral of a discretionary power on a statutory officer to prevent the substance of evidence given to that officer from being produced to a court, an administrative tribunal or another executive inquiry (including a royal commission) is extraordinary.

84. This power extends beyond suppressing the mere fact that evidence was given, or the identity of a person who gave evidence. Subclause 53(1)(b) expressly extends it to the substance of oral or documentary evidence given to the Commissioner.

85. The extrinsic materials to the Bill do not appear to acknowledge the exceptional nature of such a power. In particular, there is little explanation of the perceived need for the Commissioner's directions to override the powers of courts, tribunals and public inquiries to compel production, and not merely to restrict voluntary disclosures or publications.

Impact on the human right to an effective remedy

86. In addition to compromising the independence of courts and administrative tribunals to control the proceedings before them, the practical effect of the proposed direction-making power may be to limit—and possibly extinguish—the rights of individuals to seek legal remedies for violations of their rights.

87. That is, a direction issued under clause 53 of the Bill may mean that a person who has commenced civil proceedings against the Commonwealth (or another defendant) seeking compensation or another legal remedy for loss, injury or damage may be unable to obtain discovery of the relevant evidence.

88. As the Statement of Compatibility with Human Rights in the Explanatory Memorandum to the Bill fails to advert to this possibility, it does not explain how this limitation on the right to a remedy is necessary and proportionate to the achievement of a legitimate objective, and therefore permissible under Article 2(3) of the *International Covenant on Civil and Political Rights*.

Risk of frustration of concurrent or future inquiries

89. The discretionary power of the Commissioner to issue non-disclosure directions under clause 53 may also have the effect of frustrating the ability of other inquiries to obtain relevant, and potentially crucial, evidence to their inquiries (for example, inquiries of the IGADF, IGIS, Ombudsman and royal commissions).

90. Clause 53 of the Bill would, in effect, make these independent entities dependent on a discretionary decision of the Commissioner to allow disclosure. This is incompatible with the independence of individual integrity and oversight bodies and royal commissions from each other.

91. It may also raise significant practical problems, given the potential for extensive overlap between the functions of the Commissioner and those of existing oversight and integrity agencies or office-holders, as outlined above. Similar observations may apply in respect of interactions between the Commissioner's functions and functions of State and Territory Coroners, notwithstanding that the Commissioner's functions would not include making findings about the cause of a person's death.

Recommended amendments

92. To avoid the significant, adverse consequences outlined above, consideration should be given to limiting the Commissioner's direction-making power under clause 53 to restricting voluntary disclosures of information including publication. That is, the Commissioner's directions should not be capable of overriding the powers of courts to order disclosure or discovery. Nor should they override the information-gathering powers of other, independent oversight agencies.

93. Further, it is desirable for there to be statutory criteria governing decisions to issue directions, as well as time limits and caps on the number of consecutive directions. The Law Council also considered that there should also be a process in place for the internal review, and external merits review, of decisions to issue directions.

Recommendation 5—Commissioner's non-disclosure directions (clause 53)

- **Clause 53 of the Bill should be amended to:**
  - **change the name of the relevant directions from 'non-publication directions' to 'non-disclosure directions' to accurately reflect the subject-matter of the proposed power;**
  - **impose a statutory pre-condition to the exercise of the power to make a direction by the Commissioner, which would require the Commissioner to be satisfied, on reasonable grounds, that making the direction is:**
    - **necessary to prevent serious damage to specified interests. (Those interests should cover serious prejudice to Australian's national security, defence and foreign relations; and significant prejudice to an individual's rights, including their human rights to privacy); and**
    - **proportionate to the protection of the identified interest or interests noted in the above point. The Commissioner should specifically be required to consider the impact of a direction on the public interest in transparency of inquiries; its impact on current or potential legal proceedings; and the potential exposure of persons to criminal liability or civil or administrative penalties;**
  - **provide that directions can only restrict the <u>voluntary disclosure</u> of information, and <u>cannot</u> override the powers of courts, administrative tribunals or other executive inquiries or oversight agencies to compel the provision of information;**
  - **provide expressly that, to avoid doubt, the provision does not override the powers or privileges of the Parliament of Australia, or the legislature of an Australian State or Territory;**
  - **impose maximum time limits on directions, and a limit on the number of consecutive directions that may be issued;**
  - **create a statutory process by which a person may request the revocation of a direction, with an obligation on the Commissioner to consider and provide a response to the person;**

- **impose an obligation on the Commissioner to revoke a direction if satisfied that the issuing criteria (as recommended above) are not, or are no longer, met; and**

- **confer a right of merits review to the Administrative Appeals Tribunal, in relation to decisions of the Commissioner to issue a non-disclosure direction, in addition to the availability of statutory judicial review under the *Administrative Decisions (Judicial Review) Act 1977* (Cth).**

Offences for contravening Commissioner's non-disclosure directions

94. Clause 54 of the Bill proposes to create an offence for persons who contravene a direction issued under clause 53, by 'publishing' the relevant information. The offence provision is limited to 'publication' despite the wider coverage of the direction-making power under clause 53 (which, as noted above, also applies to 'disclosure' and 'production'). These different terms are not defined in the Bill.

95. It may be difficult, both as a matter of statutory construction and application in individual cases, to identify a meaningful and reliable distinction between the concepts of 'publication' and 'disclosure'. For example, there may be a risk that 'publication' could be open to interpretation as the giving of evidence at a public hearing of a court, tribunal or administrative inquiry, especially one that is webcast and therefore available globally. The prospect of such an interpretation would compound the problems identified above in relation to the power of direction in clause 53, by attaching a criminal sanction to such disclosures.

96. The exposure of a person to criminal sanction under clause 54 for contravening a direction issued by the Commissioner under clause 53 strengthens the need for the amendments to clause 53, as recommended above, to provide that:

    - the direction-making power and the offence do not apply to the provision of information (howsoever described) to a court, tribunal or executive inquiry; and

    - the power to make a direction must be subject to a statutory pre-condition that the Commissioner is satisfied, on reasonable grounds, that the disclosure of the relevant information is likely to cause serious harm to specified national interests, or prejudice to the rights of an individual person (including privacy).

97. In addition, the offence in clause 54 for contravening such a direction should also be subject to a harm-based threshold, so that only those publications which cause harm to Australia's national security, defence or foreign relations would be subject to criminal sanction. This is consistent with the existing offence in subsection 122.2(4) of the Criminal Code in relation to persons who fail to comply with lawful directions in relation to dealings with Commonwealth information.

Recommendation 6—offence for publication in contravention of direction

- **Clause 54 of the Bill should be amended to:**

    - **particularise the intended meaning of the word 'publish' in the elements of the proposed offence, so that it is clear how the concept of 'publication' differs from the other forms of disclosure that may be the subject of a direction given under clause 53 (being 'disclosure' and 'production'); and**

    - **include a further physical element, that the publication caused, or was reasonably likely to cause, harm to Australia's national**

security, defence or foreign relations. The defendant must have been reckless in relation to this result or likely result.

- **Consideration could also be given to a penalty provision targeting publications in breach of the Commissioner's non-disclosure directions, if the relevant publication caused, or was likely to cause, one or both of the following results (and the defendant was reckless as to that result or likely result):**
  - **serious risk to life, health or safety of another person; or**
  - **a serious and unreasonable interference with the personal privacy of another person.**

Releasing reports and implementing recommendations

98. The website of the Commissioner states that Government 'intends to be fully accountable' and will respond to all of the Commissioner's reports.[28] This is a welcome statement of commitment. However, it does not appear to have been given full effect in the provisions of clauses 60, 61 and 62 of the Bill, governing the tabling of the Commissioner's reports and the release of Government responses.

Parliamentary tabling of the Commissioner's reports and Government responses

99. Subclause 60(3) of the Bill requires the Attorney-General or Prime Minister (as applicable) to table the Commissioner's reports in Parliament within 15 sitting days of receipt. Clause 62 contains an equivalent provision for the tabling of additional reports provided by the Commissioner, if the Commissioner considers that adequate action has not been taken on one of their previous inquiry reports or annual reports.

100. Clause 61 of the Bill requires the Commonwealth to release, by tabling in Parliament, a response to the Commissioner's reports 'as soon as is reasonably practicable' after the relevant report has been tabled by the Attorney-General or Prime Minister (as applicable under clause 60).

101. In practice, the tabling timeframe of 15 Parliamentary sitting days for Commissioner reports can create lengthy delays of several months between the provision of a report to Government and its public release, which occurs via Parliamentary tabling.

102. In principle, a statutory requirement for the release of Government responses to the Commissioner's reports is a welcome inclusion in the Bill. However, clause 61 is problematic because it prescribes an entirely open-ended and potentially indeterminate timeframe for providing those responses. The nebulous concept of 'as soon as practicable' could feasibly span months or years, depending on the complexity of the recommendation and other priorities of the Government of the day.

Recommendation 7—timeframes for tabling reports and Government responses

- **The reporting requirements in clause 60 of the Bill should be amended to impose the following requirements:**

[28] National Commissioner for Defence and Veteran Suicide Prevention, *About the Commissioner: Independence from Government*, <https://www.nationalcommissionerdvsp.gov.au/about>.

- **the Government must table all reports of the Commissioner within four to six Parliamentary sitting days of receiving the relevant report from the Commissioner (not 15 sitting days); and**
- **the Government must table a response to all of the Commissioner's reports within a prescribed period of time, indicatively between three and six months of receiving the report (not the indeterminate, discretionary period of 'as soon as reasonably practicable').**

Support and protection for people participating in inquiries

103. The Bill contains a limited number of provisions to help ensure that individuals participating in the Commissioner's inquiries are provided with appropriate legal support.[29] The Bill also proposes to confer some legal protections on inquiry participants from liability to criminal offences, or reprisals in their employment, in respect of their actions in giving information to the Commissioner.[30]

104. However, there are some potential gaps and limitations in the coverage of these provisions, which may limit the willingness of individuals to come forward with relevant information. Some matters may be unintended oversights.

Legal and other support to families and affected individuals

105. Subclause 27(2) of the Bill enables the Commissioner to determine the manner in which their hearings are to be conducted. Subclause 38(1)(b) also enables the Commissioner, at their discretion, to authorise a legal practitioner to appear before a hearing in order to represent any person. Further, clause 39 provides for the discretionary payment by the Commonwealth of reasonable expenses to witnesses appearing before the Commissioner.

106. In combination, these provisions create a legislative framework enabling the families and other persons affected by the death by suicide of ADF members or veterans to:

- be represented by a lawyer, who may appear on their behalf at hearings;[31]
- be represented by a 'next friend' (a support person who is not a lawyer) or assisted by a support person who is present at a hearing;[32] and
- have their reasonable witness expenses paid by the Commonwealth.[33]

107. The 2020-21 Attorney-General's Portfolio Budget Statement and the Explanatory Memorandum to the Bill indicate that administered funding has been allocated to the Attorney-General's Department for the purpose of 'a dedicated financial legal assistance scheme' for persons appearing before the Commissioner.[34]

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[29] Bill, Subclause 38(1)(b) (discretionary power of Commissioner to authorise a lawyer to appear before an inquiry to represent a person, which operates in combination with the power in subclause 27(2) to determine the manner in which a hearing is to be conducted) and Clause 39 (discretionary payment of reasonable witness expenses).

[30] Ibid, Clause 58.

[31] Ibid, Subclauses 27(2) and 38(1)(b).

[32] Ibid, Subclauses 27(2) and 38(1)(c).

[33] Ibid, Clause 39.

[34] Explanatory Memorandum, 4 at [15]. See also: Australian Government, *Attorney-General's Portfolio Budget Statement 2020-21* (October 2020), 25 and 30.

Recommendations for additional statutory and administrative measures

108. While these mechanisms will go some way towards supporting affected individuals to engage with the Commissioner's inquiries, consideration should be given to applying further statutory parameters, including:

- imposing a positive obligation on the Commissioner to consider whether to make directions or grant approvals in relation to the appearance of a legal representative or attendance of another support person at a hearing (rather than placing the burden solely individuals to approach the Commissioner); and

- conferring a right upon family members of deceased ADF members or veterans to be paid witness expenses, and to be represented by a lawyer if they wish, rather than leaving these matters to the unguided discretion of the Commissioner.

109. Further information should be provided about the proposed eligibility and other rules governing the new legal financial assistance program for people participating in the Commissioner's inquiries, together with details about the costing assumptions underlying the 2020-21 budgetary appropriation and estimated expenditure in the forward estimates period (from 2021-22 to 2023-24). The budget papers and Explanatory Memorandum to the Bill are silent about these matters.

110. The Law Council would welcome an opportunity to be consulted in the development of the proposed rules governing a new Commonwealth legal financial assistance scheme for individuals participating in the Commissioner's inquiries.

Recommendation 8—legal assistance to individual inquiry participants

- **The Bill should be amended to create a legislative framework for a rights-based approach to providing legal and other assistance to affected individuals who are engaging with the Commissioner's inquiries. This should include the following measures:**
  - **imposing a statutory obligation on the Commissioner to pro-actively consider whether to make a direction or grant an approval for a person to be represented by a lawyer or next friend, or to have a support person present, at a hearing if they wish (rather than placing the burden solely an individual to seek permission from the Commissioner);**
  - **conferring a legal entitlement on family members of deceased ADF members or veterans to be paid reasonable witness expenses, and to be represented by a lawyer if they wish, rather than leaving these matters to the Commissioner's unlimited discretion;**
  - **imposing an obligation on the Attorney-General to make rules establishing a specific legal financial assistance scheme for private individuals participating in the Commissioner's inquiries; and**
  - **the legal profession should be consulted on the proposed legal financial assistance scheme before statutory rules are made. This is accordance with the requirement in section 17 of the *Legislation Act 2003* (Cth) to consult relevant stakeholders on proposed legislative instruments, before they are made.**

'Whistleblower protections' for people who give information to the Commissioner

111. The Bill attempts to protect certain people from exposure to secrecy offences, civil or administrative penalties, and reprisals in their employment as a result of their disclosure of information to the Commissioner, or the fact of their appearance before the Commissioner.[35] However, as detailed below, there are several, potentially unintended, limitations in the scope of these protections. The Law Council considers that these limitations require rectification if the Bill is to be passed.

112. In addition, the Bill proposes to expose certain witnesses (namely, persons who hold, or have held, an Australian Government security clearance) to criminal offences in certain circumstances. These offences will apply if a former or current clearance-holder intends to give evidence to the Commissioner, but fails to give advance, written notice to the Commissioner of their intention to disclose 'operationally sensitive information' or 'intelligence information'.[36] The offence would apply even if the person had been compelled by the Commissioner to give that evidence, via the issuing of a summons or notice to produce.[37]

113. For the reasons explained below, the necessity and proportionality of the proposed offence have not been adequately demonstrated. In particular, the Law Council submits that there is a need for greater justification for the perceived need to criminalise a person's failure to lodge a written notice of their intended evidence. In

[35] Bill, Clause 58.

[36] Ibid, Clauses 33, 34, 40, 41 and 47. (See also the definitions in Clause 5.)

[37] Ibid, especially subclauses 33(1)(a)(ii) and 34(1)(a)(ii).

addition, further justification is required for the proposed application of the new offence to broad categories of information ('intelligence information' and 'operationally sensitive information') and broad classes of persons (current or former security clearance holders).

Protection from criminal or civil liability under secrecy provisions

114. Clause 58 of the Bill confers a limited immunity from offences or civil or administrative penalties under 'secrecy provisions' (which are defined in clause 5 as covering non-disclosure provisions under Commonwealth laws) in respect of:

- persons who provide information or documents in accordance with a summons or notice to produce (issued under clause 30 or 32); and
- Commonwealth, State or Territory officials who give information or documents to the Commissioner in reliance on the standing authorisations of such persons in clauses 40 and 41.

115. While it is desirable that such persons should be protected from liability or penalty in respect of their disclosures to the Commissioner under compulsion, the Law Council regards the protection in clause 58 as being too narrow. In particular, it provides no protection for the following disclosures:

- disclosures by certain private individuals – (that is, non-Commonwealth, State or Territory officials, who are therefore not covered by an authorisation in clause 40 or 41) who voluntarily disclose information to the Commissioner, where that disclosure would violate a law of the Commonwealth or a State or Territory would not be covered by the immunity in clause 58; and
- disclosures by former Commonwealth, State and Territory officials.

Comprehensive immunities in other Commonwealth laws

116. In contrast, other Commonwealth legislation provides comprehensive immunities for people who disclose information to an oversight or integrity body, for the purpose of that body performing its functions.[38] Such immunities are not subject to limitations based on the voluntary or compulsory nature of the disclosure, or the person's employment or appointment at the time they made the disclosure.

117. The Law Council considers that there is a need for a comprehensive immunity in the Bill to:

- provide people with confidence and reassurance to come forward to the Commissioner; and
- ensure the reasonable and proportionate use of coercive information-gathering powers.

Recommendation 9—comprehensive statutory immunity for all people giving information to Commissioner

- **Clause 58 of the Bill should be amended to confer a comprehensive immunity from penalty on all people who give information or documents to the Commissioner, or a person assisting the Commissioner, for the purpose of the Commissioner performing a function or exercising a power. This should be modelled on the equivalent immunities in sections 10 and 57 of the PID Act, and section 34B of the IGIS Act.**

[38] See, for example, sections 10 and 57 of the PID Act and section 34B of the IGIS Act.

- **In particular, like the immunities in the PID Act and IGIS Act, the application of the immunity in clause 58 of the Bill should not be dependent on the specific legal mechanism by which a person gave information or documents to the Commissioner (that is, compulsorily or voluntarily) or the capacity in which they did so (that is, as a Commonwealth official or a private individual).**

Absence of protection from 'dealing' offences in Part 5.6 of the Criminal Code

118. The immunity in clause 58 also appears to be limited to actual disclosures made to the Commissioner. It does not cover attempted or planned disclosures that are ultimately unsuccessful. Consistent with existing protections in subsection 122.5(3) of the Criminal Code for people who attempt to make disclosures to other Commonwealth integrity agencies, the proposed immunity in clause 58 of the Bill should expressly cover acts preparatory to disclosures to the Commissioner. The Consequential Amendments Bill should also include amendments to the exception in subsection 122.5(3) of the Criminal Code, to expand its application to disclosures of information to the Commissioner, and to prior 'dealings with' or 'removals of' information for the purpose of making a disclosure to the Commissioner.

Recommendation 10—amendment to defences to Criminal Code secrecy offences

- **The Consequential Amendments Bill should expand the offence-specific defence in subsection 122.5(3) of the Criminal Code to include the Commissioner among the list of integrity agencies covered by that provision. This will ensure that there is a clear defence available to the offences in Division 122, for persons who communicate information to the Commissioner, and persons who deal with information for the purpose of communicating it to the Commissioner.**
- **Clause 58 of the Bill should also be amended to make explicit that conduct which would constitute an offence of attempt, conspiracy or aiding and abetting the commission of a secrecy offence, by reason of an intended disclosure to the Commissioner, are covered by the immunity in clause 58. This would protect a person who attempts, conspires or assists another person to make a disclosure to the Commissioner, even if that disclosure is not ultimately made because the person is apprehended and prevented from doing so.**

Penalty privilege

119. Subclause 64(4) of the Bill confers what is often referred to informally as 'penalty privilege' on witnesses appearing before the Commissioner, and persons who give information or documents in accordance with a summons or notice to produce. It states that the person 'has the same protection as a witness in proceedings in the High Court'.

120. This means that a person could, at their discretion, claim absolute privilege in relation to compulsorily disclosed information in any subsequent proceedings for the imposition of a penalty. This would, for example, provide a defence to defamation or other proceedings for the imposition of a civil penalty on that person, arising from their disclosure of information to the Commissioner.

121. While this protection is important, its scope is limited to people who give evidence, information or documents to the Commissioner **under compulsion**, rather than voluntarily. It is submitted that this privilege should be expanded to voluntary disclosures made in response to a simple request by the Commissioner.

Recommendation 11—coverage of request-based disclosures

- **Subclause 64(4) of the Bill should be amended so that penalty privilege is available to persons who give information or documents to the Commissioner in accordance with a simple request that does not involve the exercise of coercive powers under clause 30 or 32.**

Protections from reprisals in relation to employment

122. In addition to 'penalty privilege', clause 51 of the Bill proposes to confer a limited protection on persons who appear before or give information to the Commissioner against dismissal from their employment or ADF service, or prejudice in their employment, or discipline of an ADF member in their official capacity.

123. It does so by creating an offence for people who dismiss an employee or ADF member, or prejudice a person in their employment, or discipline an ADF member by reason of their appearance, evidence or disclosures to the Commissioner. The offence is punishable by a maximum penalty of 10 penalty units ($2,220) or imprisonment for one year.

124. While the attempt to confer such protection is welcome, its scope requires consideration, particularly in relation to:

- the limitation of the protection to compulsory disclosures;
- an absence of financial legal assistance for people who suffer reprisals;
- an absence of statutory remedies in relation to reprisals;
- a lack of clarity in defining the reprisals which are subject to protection; and
- The disproportionately low maximum penalties.

125. Consideration should be given to amending clause 51 accordingly.

Recommendation 12—comprehensive protections against reprisals

- **Clause 51 of the Bill should be repealed and substituted with provisions equivalent to sections 14-19 of the PID Act, which cover a wider range of reprisals and threatened reprisals, make provision for statutory remedies, and protect aggrieved persons from adverse costs orders in respect of applications for remedies in respect of reprisals.**
- **The maximum penalty for the offence in clause 51 should be aligned with the maximum penalty for the offence in section 19 of the PID Act (being 120 penalty units or two years' imprisonment).**

Criminalisation of failure to give notice of 'operationally sensitive information' or 'intelligence information'

126. Clauses 33 and 34 impose obligations on people who are compelled, requested or wish to pro-actively volunteer information to the Commissioner (in oral or documentary form). These persons must give prior, written notice to the Commissioner, if they intend to give evidence that is, or includes, 'operationally sensitive information' or 'intelligence information'. The latter terms are defined in clause 5 in the following way:

- ***'Operationally sensitive information'*** covers:
  - information about sources, operational activities, methods and particular operations (current, previous or proposed) and methods of a 'law

enforcement or security agency'. The latter term is also defined in clause 5 to cover the ADF, Australian Federal Police, State and Territory Police, the Australian Criminal Intelligence Commission, the Department of Home Affairs and any other agency prescribed in rules made by the Attorney-General; and

- information provided by a foreign government or one of its agencies, where that government does not consent to public disclosure

- ***'Intelligence information'*** means information that was acquired or prepared by an Australian intelligence agency in connection with its functions; information that relates to the performance by such an agency of it functions, or which identifies a current or former employee of ASIO or ASIS. An 'Australian intelligence agency' means one of the six agencies within the Australian Intelligence Community.[39]

127. Clause 47 creates an offence for people who fail to comply with the obligations to give prior written notice to the Commissioner. It applies if a person making a disclosure people currently holds, or has previously held, an 'Australian Government security clearance' (which is defined in clause 5 to cover a security clearance of any level, for example, from 'baseline' through to 'top secret: positive vetting'). The offence is punishable by a maximum penalty of three years' imprisonment.

Necessity and proportionality of clauses 33, 34 and 47

128. It is understandable that advance notice may assist the Commissioner in making the necessary security arrangements for dealing with highly classified information that is given in evidence. This would ensure that information can be stored and handled in accordance with protective security policy requirements (for example, by ensuring that the necessary safes, ICT systems and security cleared staff are available).

129. However, the Law Council queries the necessity or proportionality of imposing a statutory notification obligation on persons giving evidence, and imposing criminal sanctions for non-compliance by current or former security clearance holders. The Explanatory Memorandum does not appear to justify this approach.

Notification obligations in clauses 33 and 34

130. The Law Council is concerned that the Explanatory Memorandum does not identify why it is considered necessary to impose a statutory obligation on all people who intend to give certain evidence to the Commissioner, including under compulsion or where the Commissioner has specifically requested the evidence. Consequently, it does not explain why the burden of this obligation is considered to be reasonable and proportionate.

131. In particular, no attempt appears to be made to explain why the objective of clauses 33 and 34 could not be satisfied administratively, by the Commissioner and their assistants simply taking the necessary practical steps to meet their own information security obligations under the Commonwealth Protective Security Policy Framework (**PSPF**).

132. Compliance with the PSPF is normally a condition of a person's appointment or employment by the Commonwealth, as well as a condition of holding an Australian

[39] The Australian Security Intelligence Organisation (**ASIO**), the Australian Secret Intelligence Service (**ASIS**), the Australian Signals Directorate (**ASD**), the Australian Geospatial-Intelligence Organisation (**AGO**), the Defence Intelligence Organisation (**DIO**) and the Office of National Intelligence (**ONI**).

Government security clearance (which, in turn, is generally an essential condition of employment or appointment in many governmental roles).

133. It is noted that the IGIS Act does not impose such obligations on intelligence agency officials or other persons who may give information to IGIS officials for the purpose of those officials investigating complaints or conducting inspections of, or inquiries into, the activities of intelligence agencies. This is so notwithstanding that most of the information obtained by the IGIS is highly classified, given the nature of the agencies subject to oversight.

134. In sharp contrast to clauses 33, 34 and 47 of the Bill, section 34B of the IGIS Act confers a comprehensive immunity from criminal and civil penalties on all people giving information to the IGIS, irrespective of its classification or sensitivity.

135. Nor does the IGIS Act impose any statutory obligations on people who wish to provide information to the IGIS (including complainants). The IGIS website simply advises prospective complainants, 'if you need to disclose classified information please contact IGIS first so that appropriate steps can be taken to enable you to make a disclosure without breaching security procedures'.[40]

Overbreadth of 'operationally sensitive information' and 'intelligence information'

136. The concepts of 'operationally sensitive information' and 'intelligence information' are excessively broad for the purpose of attracting a legal notification obligation and imposing criminal sanctions against current or former security clearance holders for breaches. This is because:

- the information covered by these terms need not be assigned a national security classification (or any classification) under the PSPF. (That is, the information need not have been assessed as being likely to cause a level of harm to Australia's national security, defence or international relations if it was disclosed without authorisation.)[41] In fact, the broad definitions of 'operationally sensitive information' and 'intelligence information' are capable of covering information whose disclosure to the Commissioner would be completely innocuous, including information that is already lawfully in the public domain;

- the definition of 'intelligence information' covers information that **'relates to'** the performance by an intelligence agency of **any** its functions. Not all of that information, and not all of those agencies' functions, will necessary be classified, covert or otherwise sensitive;

- the definition of a 'law enforcement and security agency' for the purpose of the definition of 'operationally sensitive information' covers the Department of Home Affairs **in its entirety**, not merely the Australian Border Force, or other, specific operational law enforcement functions conferred on officers of that Department under a law of the Commonwealth. This means that:

  - the definition of 'operationally sensitive information' covers information about 'information sources' available to that Department and any or all of its 'operations'. This may create scope for argument that the definition extends to its operations a Department of State, in relation to the provision of policy advice to the Government, the delivery of programs, the making of administrative decisions (such as visa decisions), the

[40] IGIS, *Make a Complaint*, <https://www.igis.gov.au/complaints>.
[41] This is the basis for assigning a national security classification under the PSPF. The different levels of classification (for example, 'SECRET' and 'TOP SECRET') are based on the anticipated degree of harm arising from unauthorised disclosure. Each level of classification attracts different protective requirements.

coordination and monitoring of law enforcement investigations as distinct to conducting them, and other matters of public administration; and

- the functions of that Department can be varied unilaterally by the Executive Government at any time, via machinery of government changes as reflected in the Administrative Arrangements Order; and

- the definition of a 'law enforcement and security agency' can be extended unilaterally by the Attorney-General under paragraph (f) of the definition of that term in clause 5 of the Bill, via the making of statutory rules prescribing additional agencies. There are no statutory conditions or limitations on the agencies that can be prescribed—for example, by reference to the nature of their functions; and a requirement that the Attorney-General must be satisfied of the necessity and proportionality of the consequences of listing an entity.

Necessity and proportionality of criminal offences in clause 47

137. The Law Council considers that the proposed offence in clause 47 should be omitted from the Bill. The mischief to which it is directed is capable of being managed administratively as outlined above. (The relevant mischief appears to be what is informally described as the 'spilling' of classified or otherwise sensitive information, which is essentially the communication or handling of information contrary to requirements of the PSPF. For example, disclosure to a security clearance holder who does not have the necessary level of clearance to access information of that classification; or using communication systems which are only authorised to carry information of a lower classification.)

138. Consideration should also be given to the proportionality of the proposed offence and penalty in clause 47. Particular issues of concern are:

- overbreadth in the types of information subject to the offences, as a result of the excesses in the proposed definitions of 'operationally sensitive information' and 'intelligence information' as noted above;

- the absence of any requirement for the proof of harm to Australia's national security, defence or foreign relations as a result of the person's non-compliance with a requirement in clause 33 or 34 to give prior notice;

- the offences apply to people who give information that has specifically been requested or compelled by the Commissioner;

- the offences apply to the form in which prior notice is given (that is, in writing). A person who gives prior oral notice has technically committed the offence and is reliant on executive discretion not to take enforcement action against them;

- the offences apply to persons who hold, or held, an Australian Government security clearance of any level. The mere fact that a person holds, or once held, such a clearance does not necessarily mean that they could reliably assess whether information was 'operationally sensitive information' or 'intelligence information'. This may be particularly the case for junior ADF members, and ADF members and veterans who are experiencing trauma or illness. People (including veterans) who have not held a security clearance for a considerable period of time may also be under a disadvantage;

- more targeted criminal sanctions already exist for people who intentionally or recklessly breach their information security obligations, in the form of:

    - offences in Division 122 of the Criminal Code for current and former Commonwealth officials who breach a lawful direction in relation to the

handling of official information. If the Commissioner directs a person to provide them with classified evidence in a particular way (for example, to give them prior notice, or to attend a particular place, or to use particular physical security measures or use a particular ICT system) then breach of such a direction may constitute an offence against Division 122; and

- the offence in clause 52 of contempt of the Commissioner would also apply to people who breach directions given by the Commissioner (not merely Commonwealth officials);

- potential exposure to a criminal offence for failure to comply with a notification obligation under clauses 33 or 34 may create a disincentive to voluntary cooperation with the Commissioner; and

- the maximum penalty of three years' information is excessive and disproportionate, given that there is no requirement to prove that the failure to give prior notice caused harm of any kind—either by compromising the security of sensitive information that is given in evidence to an inquiry; or obstructing the Commissioner in the performance of their functions.

Recommendation 13—removal of arbitrary and unnecessary criminal sanctions and statutory obligations on persons cooperating with the Commissioner

- **The Bill should be amended to omit clauses 33, 34 and 47.**
- **If there is no appetite to omit these provisions:**
  - **the definitions of 'operationally sensitive information' and 'intelligence information' in clause 5 should be amended to remove their overbreadth, in line with paragraph [136] of this submission;**
  - **the offence in clause 47 should be amended to include a harm-based element, requiring the prosecution to prove that the failure to give notice caused prejudice to national security or the effective performance by the Commissioner of their operations, and that the defendant was reckless in relation to this result of their conduct.**

Matters relevant to the independence of the Commissioner

139. The Explanatory Memorandum to the Bill and the Government's public comments about the Bill contain strong statements of policy intent about the independence of the Commissioner.[42] However, the Law Council is concerned that several aspects of the Bill, as detailed below, may not be compatible with the stated intention.

140. As noted above, the concept of independence in the unique context of an integrity agency or office-holder is not merely about independence in making findings and recommendations without external interference or subordination to the requirements of Government policy. Rather, independence covers all aspects of the agency or office-holder's role and their day-to-day operations. In the context of the present Bill,

[42] Explanatory Memorandum, 2 at [1] and 5 at [2]; National Commissioner for Defence and Veteran Suicide Prevention, *About the Commissioner: Independence from Government*, <https://www.nationalcommissionerdvsp.gov.au/about>. See also: the Hon Christian Porter MP, Attorney-General, *Second Reading Speech, National Commissioner for Defence and Veteran Suicide Prevention B*ill, House of Representatives Hansard, 27 August 2020, 5742; and the Hon Christian Porter MP, Attorney-General, *National Commissioner for Defence and Veteran Suicide Prevention*, Media Release, 30 September 2020.

this covers all matters from the statutory framework governing the appointment of the Commissioner, to the manner of conduct of inquiries, to the resourcing and governance arrangements for the Commissioner (including their staffing, budgets and financial management responsibilities).

141. Crucially, the independence of an integrity agency or office-holder extends equally to matters of substance and perception. Both of these aspects of independence are equally important to the effectiveness and public credibility of the role.

Appointment and re-appointment of the Commissioner

Statutory eligibility and disqualification

142. Clause 16 of the Bill provides for the appointment of the Commissioner by the Governor-General. However, it does not provide any concrete statutory conditions for the eligibility (including disqualification) of prospective appointees. In particular, clause 16 does not provide for the disqualification of a person from being appointed as Commissioner, if their recent or current employment would raise an unacceptable risk of a substantive, potential or perceived conflict of interest.

143. Such a risk may arise if a person's previous employment involved performing functions or exercising powers that are directly or indirectly relevant to matters that may be the subject of review by the Commissioner. It may also arise if the person had a recent background in politics.

144. For example, at least a perceived conflict may exist if the person's immediate or prior occupation was the Chief of the Defence Force, the Secretary of the Department of Defence or Veterans Affairs, another senior public official in an agency or portfolio with related responsibilities to the functions of the Commissioner, a Government Minister, a Parliamentarian, or a political adviser.

145. To a large extent, the public credibility, and consequently the effectiveness, of the role of the Commissioner will depend on each appointee's perceived independence from the Government and the entities whose actions are likely to be the direct or indirect subject of inquiry, as well as their substantive independence.

146. The Committee may therefore wish to consider amendments to the Bill to provide stronger statutory parameters around eligibility for appointment—for example, the insertion of provisions which disqualify from appointment people who have recently held particular employment or appointment.

Recommendation 14—statutory eligibility criteria to avoid conflicts of interest

- **Clause 16 of the Bill should be amended to provide that persons who hold, or have held within the past 10 years, certain specified positions are not eligible for appointment as Commissioner. This should cover the scenarios described at paragraph [143] of this submission.**

Selection process

147. Neither the Bill nor the Government's public statements about the role of the Commissioner have identified a transparent, participatory, and merit-based process for selecting a preferred appointee, who will be nominated to the Governor-General for formal appointment.

148. Given the important and novel nature of the Commissioner's role, the Committee may wish to consider whether the Bill should make provision for an appointment process. This could include directly prescribing in the Bill consultation requirements

with members of the Parliament and the wider community as a pre-condition to nominating a person to the Governor-General as the recommended appointee.

149. Alternatively, the Bill could be amended to impose a requirement on the Attorney-General to make a legislative instrument setting out a selection process, which must include an independently administered merit-based selection round, and potentially requirements for consultation with the Parliament and community (or key sectors).

150. Section 17 of the *Legislation Act 2003* (Cth) imposes a consultation requirement on the proposed making of legislative instruments, and the Law Council would expect to see broad public consultation on such an instrument, including with the legal profession, before it is made and registered.

Recommendation 15—transparent, merit-based selection process

- **The Bill should be amended to make provision for a transparent, independent, merit-based process for identifying nominees for recommended appointment as Commissioner, in line with paragraphs [148] and [149] of this submission.**

Re-appointments

151. Clause 16 of the Bill does not impose any statutory limitations on the number of times a person may be re-appointed as Commissioner, after serving their first term (which is up to five years). This raises two potential risks:

- it may lead to an individual holding office for a protracted period of time if they are continuously re-appointed (for example, it would be legally possible for a person to hold office for a total period in the range of decades). This may reduce the substantive and perceived independence of that person from the Government, and consequently, the public credibility and effectiveness of the role of the Commissioner. It may also remove the opportunity for regular 'renewal' of the office of the Commissioner, by the regular appointment of different persons from diverse backgrounds; and

- the prospect of re-appointment, if desired by an incumbent Commissioner, may (consciously or subconsciously) influence that person to make findings and recommendations that are most favourable to the Government of the day.

152. Accordingly, it would be preferable if the Bill only permitted a person to be re-appointed once. This would allow them to hold office for a maximum of 10 consecutive years.[43]

Recommendation 16—re-appointments

- **Clause 16 of the Bill should be amended to provide either that a person is not eligible for re-appointment as Commissioner, or is only eligible for one re-appointment.**

Staffing arrangements

153. As noted above, the Bill proposes that the Commissioner would not have the power to engage their own staff. Rather, clause 14 states that the staff assisting the

[43] See, for example, *Inspector-General of Intelligence and Security Act 1986* (Cth), subsection 26(2) (a person may not be appointed as Inspector-General appointed more than twice, resulting in a statutory a maximum term of 10 years, spanning two five-year terms of appointment).

Commissioner are to be certain persons who are made available by the Secretary of the Attorney-General's Department, at the Secretary's complete discretion, namely:

- 'APS employees'[44] of the Attorney-General's Department who are directed by the Secretary to provide assistance to the Commissioner; and
- persons who are engaged by, or on behalf of, the Commonwealth as contractors (and are made available to the Commissioner by the Secretary).

Impacts on Commissioner's independence

154. The inability of the Commissioner to engage their own staff raises doubts about their ability to perform their functions independently from the Executive Government, and the ability of the public to have confidence in the independence of those staff.

155. That is, the Commissioner's ability to obtain, in sufficient numbers, staff with skills, qualifications and personal attributes which are acceptable to the Commissioner is dependent on the exercise of discretion by the Secretary of the Attorney-General's Department. The Bill does not propose to place any statutory conditions or limitations on the Secretary's exercise of discretion in relation to staffing.

156. Concerningly, the ability of the Secretary to make available any person who has been engaged by the Commonwealth as a contractor also makes it possible for the Secretary to make available persons who are presently contractors to the Department of Defence or the Department of Veterans' Affairs, or any other Commonwealth agency whose actions may be under inquiry.

157. The Secretary is not obliged to obtain the agreement of the Commissioner to such actions. The Commissioner also does not have any statutory powers to terminate the appointments of any persons who are assigned to them (for example, by ending an effective 'secondment' of a person to the Commissioner by sending the person back to their home department or agency).

158. It is also of concern that clause 42 of the Bill proposes to impose statutory obligations on the Commissioner in relation to the actions of Departmental staff made available by the Secretary to assist the Commissioner (defined in clause 5 as 'entrusted persons'). The Commissioner is obliged to 'take all reasonable steps' to ensure that these persons handle 'intelligence information' obtained by the Commissioner in accordance with arrangements made between the Commissioner and the heads of Australian intelligence agencies.

159. However, the Bill does not give the Commissioner general, legal powers of direction or management in relation to those Departmental employees (including the ability to terminate their tenure of a person with the Commissioner for mishandling information, or to investigate and administratively discipline a person for a breach of the Australian Public Service Code of Conduct constituted by the mishandling of such information). The Commissioner would instead be reliant on the Secretary of the Attorney-General's Department performing these direction, management and disciplinary functions.

Necessary mechanisms to ensure staff independence

160. For the role of the Commissioner to be demonstrably independent, and to be capable of inspiring public confidence in that independence, the Commissioner requires the power to engage and terminate their own staff. Various options are available to enable this to occur, as outlined below.

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[44] That is, employees of the Department who are employed under the *Public Service Act 1999* (Cth), per the definition in Clause 5 of the Bill (by reference to the defined term in the Public Service Act).

Creating the Office of the Commissioner as a 'listed entity' under the PGPA Act

161. Ideally, the Commissioner's independence in relation to staffing would be achieved by designating the Commissioner and their staff as a 'listed entity' under the PGPA Act (being 'the Office of the Commissioner').

162. This would have the effect of making the Commissioner a separate agency to the Commonwealth (for example, departments of state) for financial and governance purposes, carrying with it the ability to directly hire, manage, direct and terminate staff. This is how many other Commonwealth oversight and integrity bodies are already established, including the Commonwealth Ombudsman, IGIS and ACLEI.[45]

Alternative approaches

163. Alternatively, if there is no appetite to designate the Office of the Commissioner as a 'listed entity' under the PGPA Act, and therefore enable the Commissioner to employ and directly manage their own staff as the head of that entity, then consideration should be given to other statutory mechanisms to facilitate independence.

Staffing arrangements for the IGADF

164. By way of example, the Office of the IGADF is not established as a 'listed entity' under the PGPA Act. However, the IGADF is conferred with an express power to appoint persons as consultants, for and on behalf of the Commonwealth.[46] (This is in contrast to clause 14 of the Bill, which provides that it is the Secretary of the Attorney-General's Department who may make available to the Commissioner consultants who have already been engaged by the Commonwealth.)

165. Further, although the IGADF is staffed by persons made available by the Chief of the Defence Force (**CDF**) or the Secretary of the Department of Defence, Part VIIIB of the Defence Act establishes a number of safeguards to ensure that those persons possess the requisite skills and independence. Section 110P prescribes the positions that staff may hold (namely, Assistant Inspector-General, Inquiry Officer and Inquiry Assistant), and empowers the IGADF to appoint people to those individual roles.

166. Section 110P of the Defence Act further prohibits the IGADF from appointing a person to one of those positions, unless the person meets the eligibility requirements prescribed by the regulations. The IGADF Regulation makes provision for the eligibility requirements, functions and powers of each position. This includes a legal requirement that the position-holder must report to the IGADF, and cannot be appointed in respect of inquiries that relate to the person, or if the person is likely to be required to give evidence or produce documents or things.

Power to directly engage consultants and contractors

167. If the Office of the Commissioner is not established as a 'listed entity' under the PGPA Act, which is headed by the Commissioner, then the Commissioner should have an express statutory power under the Bill to directly engage staff as consultants or contractors for particular inquiries, with such contracts entered into for and on behalf of the Commonwealth (as the IGADF does under the Defence Act).

168. For example, this would enable the Commissioner to directly engage legal practitioners as counsel assisting an inquiry; or to engage people with investigative

[45] See paragraph [20] above and the provisions referenced in the footnotes to that paragraph.

[46] Defence Act, section 110O.

qualifications and skills as specialist investigation officers; or to engage medical or other health professionals as expert technical advisers, as they deemed necessary.

169. This would ensure that the Commissioner is not reliant on the effective 'permission' or 'approval' of the Secretary to engage and make available such persons. Presently the effect of clause 14 of the Bill is that the Commissioner would need to request the Secretary to engage and make available such persons, and the Secretary would have discretion about whether to accept that request.

170. This is reasonably characterised as an effective power of 'veto' over the Commissioner's decision-making about the manner in which an inquiry will be conducted, as reflected in the staffing requirements the Commissioner identifies.

Conditions and limitations on powers of the Secretary to make staff available

171. Further, if the Office of the Commissioner is not established as a 'listed entity' headed by the Commissioner, then consideration should be given to statutory conditions and limitations on the powers of the Secretary of the Attorney-General's Department to make departmental employees available to the Commissioner. This should not be left to the unfettered discretion of the Secretary from time-to-time, as currently proposed in the Bill. Rather, the Bill should be amended to:

- impose a legal requirement that any persons made available by the Secretary as staff to the Commissioner must report exclusively to the Commissioner to perform prescribed duties (similar to the requirements presently in the IGADF Regulation, as noted above); and

- impose the following obligations on the Secretary in making decisions about the staff to be made available to the Commissioner:

  - the Secretary must consult the Commissioner on the following matters:

    - the number of staff the Commissioner requires;

    - the skills and experience of those staff; and

    - the particular staff who the Secretary proposes to make available, and

  - the Secretary must only make available people who are acceptable to the Commissioner;

  - the Secretary must ensure that, at all times, adequate numbers of appropriately skilled and security cleared staff are made available to the Commissioner;

  - the Secretary must establish, implement and maintain administrative arrangements to ensure that the departmental employees who are made available to the Commissioner are, at all times, functionally independent from the Attorney-General's Department, any other Commonwealth departments or agencies, and Government Ministers and Ministerial Offices. This should include arrangements for:

    - an administrative separation process from the Department (such as the revocation of the person's previous access to ICT systems, physical files and premises that were relevant to their previous duties of employment in other areas of the Department); and

- quarantining the information, files, communication systems and premises of the Commissioner from the general Departmental systems and premises, and periodically auditing access; and

- include, in the Department's annual reports, information about the number of staff made available to the Commissioner (head count and full-time equivalent) and a breakdown by source (that is, the numbers of Departmental employees, and consultants or contractors).

Recommendation 17—consistency of staffing arrangements with independence

Preferred option

- **Clauses 13 and 14 of the Bill should be omitted and substituted with provisions that:**
  - **establish the Office of the Commissioner (being the Commissioner and their staff) as a 'listed entity' under the PGPA Act;**
  - **designate the Commissioner as the head of that entity;**
  - **confer powers of employment on the Commissioner, covering the power to employ staff under the *Public Service Act 1999* (Cth) and to engage persons as consultants and contractors.**

Alternative option

- **Alternatively, as a minimum, the Bill should be amended to confer powers on the Commissioner to directly engage consultants and contractors, and to impose the requirements on the Secretary of the Attorney-General's Department set out at paragraph [171].**

Commissioner's powers of delegation and authorisation

Powers of delegation

172. Clause 15 of the Bill proposes to empower the Commissioner to delegate certain, significant inquiry powers (namely, the exercise of coercive information-gathering powers; and the power to issue non-disclosure directions in respect of evidence given to an inquiry) to one or both of following classes of persons:

- persons who have been made available by the Secretary of the Attorney-General's Department to serve as the staff assisting the Commissioner (that is, employees of that Department, at **any level** of seniority; or contractors who have been engaged by the Commonwealth in any capacity); and

- any other employee of the Attorney-General's Department who holds, including on an acting basis, a position classified at the Senior Executive Service (**SES**) level (irrespective of their particular role in the Department or their substantive skills or expertise).

Nature of the powers proposed to be delegated

Coercive information-gathering powers under clause 32

173. The Law Council submits that the Commissioner's power to compel evidence should not be delegable, but rather should be exercisable by the Commissioner alone.

174. The coercive information-gathering powers in clause 32 are highly intrusive. They abrogate the privilege against self-incrimination and may also abrogate legal professional privilege in certain circumstances. These powers also expose individuals to criminal liability for non-compliance with notices to produce documents or provide evidence.

175. Further, evidence which is obtained under compulsion, in response to statutory notices can be used derivatively against a person in future criminal proceedings. The information-sharing provisions in clauses 56 and 57 make this possible, because they permit disclosures to police in connection with the investigation of a potential offence against Commonwealth, State or Territory laws.

176. A power of this gravity should be exercisable by the Commissioner alone. Any involvement of staff who are made available to the Commissioner by the Secretary of the Attorney-General's Department should be limited strictly to the provision of administrative assistance to the Commissioner.

177. For example, staff of the Attorney-General's Department might provide advice to the Commissioner about the possible exercise of coercive powers as opposed to making a simple request for information. Those staff might also draft notices to be settled and issued by the Commissioner, and serve notices once issued.

Non-publication directions under clause 53

178. The heading to clause 53 describes the relevant power conferred under that provision as a 'non-publication direction'. However, clause 53 empowers the Commissioner to issue directions which prohibit a person from disclose the substance of evidence given to the Commissioner (as well as the fact that a person gave evidence to the Commissioner) to a court, or any other non-judicial entity with coercive information-gathering powers.

179. Clause 54 creates an offence for the contravention of a direction given under clause 53, which is punishable by a maximum penalty of three years' imprisonment.

180. This is an extraordinary power. The imposition of non-disclosure requirements in a direction is effectively a power to prescribe the substantive content of the criminal offence in clause 54 for contravening those requirements.

181. In addition, the conferral of a power to effectively direct that otherwise relevant evidence must be withheld from a court or an administrative review or inquiry body may prove controversial. This may have the effect of precluding or frustrating such proceedings or inquiries. By extension, the making of directions to prevent the production of relevant evidence may effectively extinguish the legal rights of aggrieved individuals to obtain judicial or administrative remedies for potentially serious loss, damage, injury or harm.

182. As discussed below, there is a question as to whether the Commissioner should be personally invested with such a power. A proposal for a power of this kind to be delegable to employees of a public service department (including employees of any classification) is disproportionate to its gravity.

Seniority of potential delegates

183. The Law Council has concerns with subclause 15(1)(b) which would make it possible for the Commissioner's highly significant powers to compel information and issue non-disclosure directions to be delegated to an employee of the Attorney-General's Department of **any level**, if the Secretary of the Department has made that employee available to the Commissioner under clause 14 of the Bill.

184. This does not appear to be commensurate with the significance of the powers able to be delegated. It is no answer that delegates must comply with directions given by the Commissioner in exercising their delegated powers, pursuant to subclause 15(2). The existence of written directions does not ameliorate the disproportionately serious nature of the powers which are legally capable of being delegated to departmental employees, including junior employees.

Independence of potential delegates

185. Subclause 15(1)(a) also proposes to empower the Commissioner to delegate their coercive information-gathering powers and their powers to prevent the disclosure of evidence to a court or administrative tribunal or inquiry body to any SES employee of the Attorney-General's Department. Those SES employees do not need to have been made available to the Commissioner under clause 14. For the reasons explained below, this is incompatible with the independence of the Commissioner.

Departmental SES staff performing policy functions

186. SES-level staff of the Attorney-General's Department play a leadership role in the provision of policy advice to the Government, and the implementation of Government policy decisions. This includes advising on, and implementing, whole-of-government decisions, including decisions of the Cabinet and its committees, whose membership includes the Ministers responsible for the agencies whose actions will be under inquiry.

187. There is a serious question as to whether such persons are sufficiently at arm's length to exercise the significant, intrusive powers of inquiry and non-disclosure under clauses 32 and 53 of the Bill. This is particularly concerning, given that such delegates do not need to have been made available to the Commissioner under clause 14, and will therefore continue to perform their ordinary duties. Those duties may be relevant to the matters under inquiry by the Commissioner (particularly as the functions of the Department are set administratively and will vary, in accordance with the Administrative Arrangement Order as in force from time-to-time).

188. The proposed powers of delegation in subclause 15(1)(a) also raise questions as to whether SES employees of the Attorney-General's Department would, as an entire class of potential delegates, possess the requisite, specialised expertise to exercise powers of coercion, and issue non-disclosure directions that may have major adverse impacts on future judicial and administrative proceedings, and administrative inquiries.

189. These matters are not necessarily within the usual competencies of public officials whose primary functions are providing policy advice to the Government, and implementing and administering Government policies.

Differences between the Commissioner and other integrity agencies

Statutory oversight agencies

190. In contrast to clause 15 of the Bill, the existing Commonwealth integrity agencies that have powers to delegate their coercive information-gathering powers, such as the Commonwealth Ombudsman[47] and IGIS,[48] are independent statutory agencies, which engage their own staff, and are financially and managerially separate to public service departments.[49]

[47] Ombudsman Act, section 34.

[48] IGIS Act, section 32AA.

[49] Ombudsman Act, section 4A; and IGIS Act, section 6AA.

191. This means that the statutory powers of delegation presently conferred on the Ombudsman and IGIS can only be exercised in favour of their own staff, who have been directly engaged by those agencies, and therefore report solely to the Ombudsman or IGIS as their agency head. These powers of delegation do not extend to delegating coercive powers to employees of public service departments.

IGADF

192. In addition, the IGADF, whose office is not established as a legally or financially independent agency, does not have equivalent powers of delegation under Part VIIIB of the Defence Act or IGADF Regulations to those in clause 15 of the Bill.

193. The only power of delegation conferred on the IGADF is contained in section 110S of the Defence Act. It is limited to the power to appoint staff to the particular roles prescribed in section 110P of that Act (namely, the role of Assistant IGADF, Inquiry Officer, and Inquiry Assistant). That power of delegation may only be exercised in favour of ADF members of a particular rank, which is specified as the naval rank of captain, or otherwise the rank of colonel or group captain. There is no power conferred on the IGADF to delegate information-gathering powers.

Recommendation 18— Commissioner's powers of delegation

- **Clause 15 should be omitted from the Bill.**
- **If the Bill is amended to establish the Office of the Commissioner as a 'listed entity', with its own staff, consideration could be given to a limited power of delegation in favour of some of the Commissioner's staff, similar to the powers of delegation conferred on the Ombudsman and IGIS under their governing legislation.**

Authorisation of persons to apply for search warrants

194. Subclause 36(2) of the Bill would enable the Commissioner to appoint any member of an Australian police force as an 'authorised person' who may apply for search warrants. There are no limits on the classes of police officers who may be authorised. This would make it legally possible for the Commissioner to authorise junior police officers to apply for search warrants.

195. The breadth of this power of authorisation is disproportionate to the gravity of the power to apply for a search warrant, given the intrusive nature of the powers of search and seizure under those warrants.

Recommendation 19—limitations on Commissioner's powers of authorisation

- **Subclause 36(2) of the Bill should be amended to provide that the Commissioner may only authorise a senior member of the AFP, or a member of a State or Territory police force holding an equivalent rank, to apply for a search warrant.**

Designation of the Commissioner as an 'official' of the Attorney-General's Department for the purpose of the Finance Law

196. As mentioned above, clause 13 of the Bill proposes to designate the Commissioner as an 'official' of the Attorney-General's Department for the purpose of the 'Finance Law'. The latter expression is a defined term in section 8 of the PGPA

Act. Essentially, it refers collectively to the PGPA Act, subordinate legislation made under that Act, and appropriation legislation.[50]

197. The definition of an 'official' in section 13 of the PGPA Act has the effect of making the Commissioner part of the Attorney-General's Department for public governance, administrative and financial purposes.[51]

Lack of financial independence

198. As noted above, the major effect of designating the Commissioner as a Departmental 'official' is that the Commissioner and their staff are not an independent Commonwealth agency. This means that the Commissioner does not receive a separate budgetary appropriation and does not have the powers of an employer, to engage, manage and terminate staff.

Additional impacts on independence

199. Additionally, the proposed designation of the Commissioner as an 'official' of the Attorney-General's Department for the purpose of the Finance Law will have several further consequences under the PGPA Act, which are inimical to the Commissioner's independence. They include the following matters, which are discussed in detail under the subheadings below:

- the Secretary's powers of direction under the PGPA Act, including with respect to the approval of proposed expenditure by the Commissioner on essential services for the conduct of their inquiries;
- potentially conflicting duties of the Secretary under the PGPA Act when performing financial management functions in relation to the Commissioner, including a duty of fidelity to government policy; and
- if the Commissioner does not comply with the Secretary's directions, their appointment may be terminated for misbehaviour. This may include instances of non-compliance with decisions by the Secretary (or delegate) to deny the Commissioner's requests for expenditure approval on goods or services that the Commissioner has identified as necessary for an inquiry. This risk may arise even if the Secretary's directions are incompatible with the independent and effective performance by the Commissioner of their inquiry functions.

Secretary's powers of direction under the PGPA Act

200. As an 'official' of the Attorney-General's Department, the Commissioner will be subject to direction by the Secretary of that Department about any matter relating to the Finance Law.[52]

201. This includes a power of the Secretary to require the Commissioner to obtain approval from the Secretary (or their delegate) for any proposed expenditure on the Commissioner's inquiries and reviews.[53] This could include, for example, approval of proposed expenditure to procure the following services, which the Commissioner has identified as necessary to conduct an inquiry:

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[50] PGPA Act, section 8 (definition of 'Finance Law').

[51] PGPA Act, subsection 13(2): 'an official of a Commonwealth entity ... is a person who is in, and forms part of, the entity'. See also: Division 3 of Part 2-2 for some specific duties imposed on 'officials' and Division 2 of Part 2-2 for duties and powers of 'accountable authorities' (agency heads) in relation to officials, including powers of direction.

[52] PGPA Act, section 15 (duty to govern the entity), section 16 (especially note 1: power to make directions in relation to compliance with the finance law) and section 20A (accountable authority instructions).

[53] Ibid, paragraph 20A(2)(a) (accountable authority instructions—expenditure approvals).

- engaging persons as counsel assisting or independent expert advisers (such as medical or allied health professionals) to assist in a particular inquiry;

- engaging professional transcription and recording service providers, to make audio recordings and transcripts of hearings of inquiries; and

- printing inquiry reports and annual reports, including in accordance with the requirements for providing copies to Parliamentarians for tabling.

202. The inclusion of clause 13 in the Bill means the Secretary of the Attorney-General's Department (or their delegate) will be responsible for considering such requests and determining whether the Commissioner's desired expenditure is an 'efficient, effective, economical and ethical' use of public resources.[54] These are broad concepts that are open to judgment by the relevant approver in individual cases.

203. It is possible that the relevant approving officer within the Attorney-General's Department may have limited understanding of how independent inquiries are conducted, and how the resourcing needs of such inquiries can differ markedly from the routine business of the Department. Their experience and training in approving expenditure, in accordance with the powers delegated by the Secretary, may be limited to routine Departmental business.

204. It is also possible that the individual approving officer within the Attorney-General's Department may not necessarily appreciate the significance of the Commissioner's independence in making decisions about how they will conduct a particular inquiry, within the general parameters set down by their governing legislation. The Commissioner's decisions about how to conduct their inquiries will necessarily be reflected in their resourcing requirements, including all individual instances of proposed expenditure in the course of, and as part of, an inquiry.

205. The effect of deeming the Commissioner to be an 'official' of the Attorney-General's Department is that, for the Commissioner to have any power to personally authorise expenditure on their core inquiry activities, they would be dependent on a discretionary decision of the Secretary of the Attorney-General's Department (as 'accountable authority') to delegate their expenditure approval powers. Even then, the Secretary could revoke that delegation at any time, for any reason.

Competing obligations of the Secretary under the PGPA Act

206. In addition, when the Secretary of the Attorney-General's Department (or their delegate) is exercising financial management functions and powers in relation to the Commissioner, the PGPA Act requires the Secretary (or delegate) to take into account matters that have no meaningful connection with the Commissioner's independent inquiry functions, and may conflict with those functions.

207. In particular, the Secretary is subject to statutory duties under the PGPA Act to:

- act in a manner that is not inconsistent with the policies of the Government of the day (which is effectively a duty of fidelity to Government policy, potentially including policies that may be the subject of inquiry by the Commissioner and advisory recommendations for abolition or major amendment);[55] and

[54] Ibid, section 15 (duties of accountable authority in governing the agency, including to ensure the 'proper use' of public resources) and the definition of 'proper' in relation to the use of public resources in section 8 (which imports the concepts of 'efficient, effective, economical and ethical').

[55] Ibid, section 21.

- promote the achievement of the Department's priorities, and the financial sustainability of the Department.[56] Notably, the Department's functions extend far beyond supporting the work of the Commissioner. It is conceivable that the Secretary may assess other, unrelated aspects of the Department's work as having a higher priority for the allocation of finite resources from the Department's general operating budget than supporting the work of the Commissioner. Further, the quantum of resourcing that is legitimately required by the Commissioner to perform their functions may not necessarily be compatible with the Department's financial sustainability from time-to-time.

Commissioner's exposure to termination

208. Under subclause 22(1) of the Bill, the Commissioner is subject to removal from office for 'misbehaviour'. A failure to comply with a statutory obligation imposed on an 'official' of the Attorney-General's Department under the PGPA Act may constitute 'misbehaviour' for the purpose of the removal provision.[57] This could be the case even if an obligation imposed on the Commissioner, as a Departmental 'official' under the PGPA Act, may conflict with the ability of the Commissioner to independently and effectively perform their statutory inquiry functions.

209. For example, if a delegate within the Attorney-General's Department declined a request by the Commissioner for expenditure approval, in respect of goods or services which the Commissioner had identified as necessary for a particular inquiry, the Commissioner would be obliged to adhere to that decision. Their sole recourse would be to request re-consideration of that decision, which would be a further diversion from their inquiry functions.

210. If the Commissioner simply sought to act unilaterally by entering into a contract for the relevant goods or services, and exercising ostensible authority to commit the Commonwealth to the expenditure, they would be in breach of their obligations to comply with the 'accountable authority instructions' issued by the Secretary of the Attorney-General's Department under the PGPA Act.[58] Such a breach, or a series of breaches, may expose the Commissioner to termination of their appointment on the basis of misbehaviour.

The case for removing clause 13 from the Bill

211. For the reasons explained above, the proposal to make the Commissioner an 'official' of the Attorney-General's Department for the purpose of the Finance Law is inimical to the Commissioner's independence in performing their functions. clause 13 precludes the Commissioner from making decisions about how to allocate resources in order to perform their statutory functions.

212. Contrary to the apparent suggestion in the Explanatory Memorandum,[59] clause 13 is not a benign administrative or 'machinery type' measure. In fact, it is inextricably linked to Commissioner's ability to perform their functions independently from:

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[56] Ibid, paragraphs 15(1)(b) and (c).

[57] Bill, Clause 22. See also, PGPA Act, sections 16 and 21.

[58] PGPA Act, section 21.

[59] Explanatory Memorandum, 22-23 at [29]: 'complying with the requirements of the finance law will not be expected to affect the exercise of any of the Commissioner's functions and powers'. This statement does not appear to recognise the fact that the Secretary of the Attorney-General's Department (as the 'accountable authority for that Department, of which the Commissioner is taken to be an 'official') is empowered under the PGPA Act (being part of the Finance Law) to impose obligations on the Commissioner that are material to the resourcing that the Commissioner requires to perform their independent functions. The fact that a Departmental Secretary wields power to approve, or withhold approval for, the Commissioner's expenditure is incompatible with the independence of the Commissioner to make decisions about the way in which they will perform their functions, which necessarily has resource implications.

- the policy persuasions of the Government of the day; and
- considerations arising from the budget and competing priorities of the Attorney-General's Department, which may have no substantive connection with the Commissioner's statutory functions to conduct inquiries and reviews.

213. As the Parliamentary Joint Committee on Intelligence and Security expressly recognised in 2018, when it endorsed evidence of the then IGIS (which was also supported by the Law Council), the concept of independence in relation to a statutory integrity agency or office-holder means much more than the mere fact that Ministers and their departments (or others) have not dictated or influenced the conclusions of an inquiry. Rather, independence in this special context extends to decision-making by the relevant integrity agency head or statutory office-holder (as applicable) about whether to commence an own-motion inquiry, and the manner in which any inquiry will be conducted.[60]

214. Decisions about the manner in which an inquiry function will be performed, including decisions about the manner of conduct of an individual inquiry, cannot rationally be separated from their resourcing and financial management implications. A lack of independence in making decisions about allocating and managing resources for an inquiry will invariably impact on the capacity of the relevant agency or office-holder to conduct that inquiry.

215. Accordingly, the Law Council considers that clause 13 should be omitted from the Bill. It fails to provide the public with a rational basis upon which to be assured that the Commissioner will be able to perform their functions independently to public service departments, the Ministers who are served by those departments, and Government policies more generally.

Recommendation 20—the Commissioner should not be a Departmental 'official'

- **Clause 13 should be omitted from the Bill, and substituted with a provision stating that the Office of the Commissioner (being the Commissioner and staff who are employed or engaged by the Commissioner) are 'listed entity' under the PGPA Act.**

Arrangements with respect to 'intelligence information'

216. Clauses 42 and 57 of the Bill contain provisions that limit the practical ability of the Commissioner to independently obtain and deal with 'intelligence information' for the purpose of performing their inquiry functions, and to disclose that information to other oversight bodies with relevant oversight functions, such as the IGADF.

Framework in clauses 42 and 57 for accessing and using 'intelligence information'

217. 'Intelligence information' is defined in clause 5, primarily by reference to its source and content, and not by reference to information of a particular classification or any other harm-based threshold in the event of unauthorised access or disclosure. Namely, paragraphs (a) and (b) cover:

- information that was acquired or prepared by or on behalf of an Australian intelligence agency in connection with its functions; and
- information that 'relates to' the performance by an Australian intelligence agency of its functions.

[60] Parliamentary Joint Committee on Intelligence and Security, *Advisory Report on the Home Affairs and Integrity Agencies Legislation Amendment Bill 2018*, (February 2018), 16-17 and 22.

218. An ‘Australian intelligence agency’ is defined in clause 5 to cover the six agencies traditionally regarded as being part of the Australian Intelligence Community, which are within the present oversight remit of the IGIS.[61]

219. Clause 42 of the Bill provides that the Commissioner must ‘take all reasonable steps’ to ensure that an ‘arrangement’ is in force with the head of an Australian intelligence agency, which deals with the way in which the Commissioner will access, handle and make any secondary disclosures of ‘intelligence information’ that ‘relates to’ that intelligence agency.

220. The effect of clause 57 is that the Commissioner is only permitted to disclose ‘intelligence information’ to another agency that is specified in in subclause 57(2) if they have consulted the relevant intelligence agency head and act in accordance with an ‘arrangement’ made under clause 42.

Positive aspects of the proposed framework

221. Some aspects of the proposed arrangements set out under clauses 42 and 57 contain commendable attempts to protect the independence of the Commissioner in accessing and using evidence that is relevant to their inquiries. For example:

- subclause 42(5) provides that an ‘arrangement’ between the Commissioner and an Australian intelligence agency head cannot prevent the performance of the Commissioner’s functions. (However, as noted below, there is an exclusion in subclause 42(4)(a) in relation to the inclusion of information in the Commissioner’s annual reports and reports on individual inquiries); and

- subclauses 57(5) and (6) only require the Commissioner to **consult** with an intelligence agency head and **have regard to** an arrangement made with the head of such an agency under clause 42, before disclosing ‘intelligence information’. The views of the intelligence agency head during consultations, and the terms of an arrangement made under clause 42, do not bind the Commissioner by prohibiting them from disclosing intelligence information contrary to the preferences of the intelligence agency head or the terms of a clause 42 arrangement.

Problems in the proposed framework

222. While there is an understandable need to apply protections to particularly sensitive types of information, those protections should be limited to information that is, in fact, genuinely sensitive. Any such protections must not compromise the independence or effectiveness of the Commissioner’s powers to identify, obtain and use all relevant information in performing their functions of inquiry and review.

223. Despite the proposed measures in clauses 42 and 57 having some positive aspects, as noted above, there are several problems in matters of detail as discussed below.

Overbreadth in the definition of ‘intelligence information’

Coverage of unclassified or otherwise benign information

224. The definition of ‘intelligence information’ in clause 5 is not limited to national security classified information in accordance with the PSPF. Rather, it covers **any information** that was acquired or created by, or for, an Australian intelligence agency;

[61] Namely, ASIO, ASIS, ASD, AGO, DIO and ONI.

or any information that 'relates to' the performance by an Australian intelligence agency of its functions.

225. The definition of 'intelligence information' therefore covers unclassified, benign information that is held by an intelligence agency, as well as national security classified information. Under the PSPF, information is assigned a classification, generally by its originator, on the basis of an assessment of the anticipated harm that its unauthorised disclosure would cause to Australia's national interests. Typically, the greater the degree of likely harm, the higher the level of classification assigned, and the more onerous the requirements for handling that information.[62]

226. An example of information of an unclassified or otherwise benign nature that would legally be covered by the proposed definition of 'intelligence information' is information that that the agency has acquired from open sources that are available to the public, the disclosure of which would not cause any harm to security or other national interests. For instance, the proposed definition would technically cover a publicly available organisational chart of ASD, an unclassified annual report of ASIO, and intelligence reports prepared by ONI which have been uploaded to its Open Source Centre Portal, which is accessible by numerous agencies and individuals.

227. This means that the Commissioner's obligations in relation to 'intelligence information' under the Bill would extend beyond national security classified information.

228. The extrinsic materials to the Bill do not appear to identify the reasons for the proposed breadth of the definition, nor explain the proportionality of the considerable obligations imposed on the Commissioner in relation to 'intelligence information', particularly noting the risk that a breach of those obligations could expose the Commissioner to termination for misbehaviour under clause 22.

Emphasis on the provenance, rather than the sensitivity, of information

229. The proposed definition of 'intelligence information' in clause 5 focuses heavily on the provenance of information, namely, the fact of its prior acquisition or preparation by an intelligence agency. The effect of crafting the definition in this way is that:

- the obligations under clauses 42 and 57 are **not limited** to information which the Commissioner obtains directly from an intelligence agency while conducting an inquiry. (For example, documents provided by an intelligence agency in accordance with a statutory notice to produce that the Commissioner has issued to the head of that agency or another official); and

- the obligations under clauses 42 and 57 will extend to information that is in the holdings of another Commonwealth department or agency, which has been acquired or prepared by an intelligence agency and on-disclosed to the first-mentioned department or agency. This will be the case even if the information or document does not, on its face, clearly identify its provenance (for example, via markings in the header or footer of the document about its origin, or a statement to this effect in its substantive contents).

230. This means, for example, that the requirements in clauses 42 and 57 would apply in the case of documents produced to the Commissioner by the Department of Defence, which that Department had received from ASIO (or from another party or parties, which had previously received them from ASIO and subsequently disclosed

[62] Australian Government, *INFOSEC 8: Sensitive and Security Classified Information* (Version 4, 2018), Commonwealth Protective Security Policy Framework, <www.protectivesecurity.gov.au>.

them to Defence). The requirements in clauses 42 and 57 would technically apply even if there were no indications, on the face of those documents, about their origin.

231. The main risk in scoping the definition in this way is that it could operate to require the Commissioner to divert valuable resources away from their substantive inquiry functions, into tracing the provenance of documents obtained in their inquiries, to determine whether the requirements in clauses 42 and 57 applied to particular information that they have obtained in the performance of their functions.

232. This risk is compounded by the overbreadth of the definition of 'intelligence information' mentioned above, in that the definition is not limited to national security classified information. The Commissioner's obligations under clauses 42 and 57 will apply even if there is no need to protect the relevant information from disclosure or compromise (for example, because disclosure of that information would not cause any harm as it is unclassified, or is already lawfully in the public domain).

Potential for 'clause 42 arrangements' to impose more onerous obligations on the Commissioner than under the PSPF

233. A further consequence of the breadth of the definition of the definition of 'intelligence information' is that an arrangement under clause 42 could result in the Commissioner being subject to more onerous obligations for accessing and using information than would apply to them under the PSPF for information of the relevant classification

234. The Commissioner, as a Commonwealth official, would likely be required to adhere to the PSPF as a condition of holding office under their terms and conditions of appointment (set under clause 17). However, subclause 42(2) states that the obligations on the Commissioner under subclauses 42(1) and (2) to make and adhere to arrangements in relation to 'intelligence information' apply 'despite any other provision of this Act'. Consequently, it appears legally possible for subclause 42 to require the Commissioner to adhere to more onerous obligation than those under the PSPF, if they are included in an arrangement with an intelligence agency.

235. To avoid this risk, it would be preferable for clause 42 of the Bill to state that the terms of any arrangements made in relation to 'intelligence information' must not exceed the Commissioner's obligations under Commonwealth protective security policy in relation to information of the relevant classification.

236. Further, to avoid any risk of doubt or argument to the contrary, it would be preferable if the coercive information-gathering powers in clause 45 made explicit that a person is not excused from complying with a notice to produce documents or appear before the Commissioner to give evidence **merely because**:

- the relevant documents or information sought are, or include, 'intelligence information' within the meaning of clause 5; and
- a clause 42 arrangement **is not in place** as between the Commissioner and the head of the intelligence agency to which that information relates.

Withholding information from the Commissioner's public reports

237. Subclause 42(4)(a) of the Bill provides that an arrangement made under clause 42 may 'limit the circumstances in which intelligence information may be disclosed in a report under section 60 or 62'.

238. Significantly, subclause 42(5) of the Bill provides that arrangements made in relation to the non-disclosure of 'intelligence information' in the Commissioner's

reports **may limit** the Commissioner's statutory duty to report on their inquiries under clauses 60 and 62.

239. The Law Council considers the inclusion of this requirement to be problematic because, as explained above:

- the definition of 'intelligence information' is not limited to national security classified information; and
- there is no explicit statutory limitation on the matters that may be dealt with in a clause 42 arrangement, so that any obligations cannot be more onerous than requirements under the PSPF to which the Commissioner is subject.

240. The absence of these limitations means that a clause 42 arrangement may purport to limit the ability of the Commissioner to report on information that has been acquired or prepared by an intelligence agency (or information that relates to the functions of an intelligence agency) merely because that disclosure would be inconvenient or embarrassing, but would not harm essential national interests.

241. In the interests of transparency, it would be preferable if:

- subclause 42(4)(a) was amended to provide that a clause 42 arrangement can only limit the inclusion of 'intelligence information' in a public report of the Commissioner on the basis that its inclusion would be likely to cause serious prejudice to Australia's national security, defence or international relations;
- the Commissioner was invested with an express statutory power to give classified reports to the Attorney-General or Prime Minister (or both), in addition to providing unclassified reports for Parliamentary tabling; and
- if there was any dispute between the Commissioner and an intelligence agency head about whether an unclassified report provided by the Commissioner, in fact, contained classified information, the Attorney-General should be required to redact any information which they reasonably believe to be classified, before that report is tabled in Parliament.

242. Importantly, the latter requirement would ensure that the removal of any classified information (or information whose asserted classification was contested) from a report is clearly identified as a redaction made by the Government, which in practice may be done on the advice of an intelligence agency. This is consistent with the reporting requirements presently applicable to the IGIS and the Independent National Security Legislation Monitor (**INSLM**) under their governing legislation.[63]

243. The Law Council considers that adopting the model already applied to the IGIS and INSLM (who routinely access and use highly classified information to perform their oversight functions) would be preferable to the present requirements in subclauses 42(4)(a) and 42(5).

244. The proposed requirements in the Bill would effectively require the Commissioner to 'self-censor' their reports, pursuant to the terms of any arrangement or arrangements with intelligence agencies. Those arrangements are likely to be confidential, and are not required to be published on the Federal Register of Legislation, as subclause 42(7) deems them not to be legislative instruments.

[63] IGIS Act, subsection 35(5); *Independent National Security Legislation Monitor Act 2010* (Cth), subsections (5) and (6) of sections 29 and 30.

Limitation of the power to disclose 'intelligence information' to listed agencies

245. Clause 57 of the Bill limits the entities to which the Commissioner may disclose 'intelligence information' and prescribes pre-conditions for the disclosure of that information. These pre-conditions include requirements to consult the head of the relevant intelligence agency to which the information relates, and to have regard to any relevant matters in any clause 42 arrangement with that intelligence agency.

246. It is positive that the Bill does not purport to impose an absolute prohibition on the disclosure of such information. It is also positive that the Bill does not propose to require the Commissioner to obtain the consent of an intelligence agency head to a disclosure (noting that the agency's activities may be the subject of inquiry by the Commissioner, or the body to which the information is disclosed, or both).

247. However, subclause 57(2) limits the power of the Commissioner to disclose 'intelligence information' to five prescribed entities, being the IGIS, the Australian Federal Police, a State or Territory police force, the Australian Criminal Intelligence Commission, or the Australian Commissioner for Law Enforcement Integrity.

248. If the Commissioner wishes to disclose 'intelligence information' to any other agency or body or office-holder, that entity must be prescribed in statutory rules made by the Attorney-General.

249. As the IGADF is not named in subclause 57(2) the ability of the Commissioner to disclose 'intelligence information' to the IGADF would require the approval of the Attorney-General via the making of rules (and deciding not to unilaterally revoke that approval by amending those rules to remove a reference to the IGADF).

250. This is similarly the case for State and Territory Coroners, who may have obligations to investigate suspected deaths by suicide of ADF members or veterans who performed functions for, and on behalf of, Australian intelligence agencies.

Problems arising from the overbreadth of the definition of 'intelligence information'

251. Given the overbreadth of the definition on 'intelligence information', clause 57 may prevent the Commissioner to information disclosing to the IGADF or a coroner the fact that an ADF member was performing functions for, and on behalf of, an intelligence agency at the time of their death by suicide, **unless and until** the Attorney-General decided to approve the disclosure by making rules permitting the disclosure. This would be the case even if:

- there was no disclosure of the specific functions that the ADF member was performing that were classified (for example, the fact that the ADF member whose death by suicide was being examined was, at or around the time of their death, exercising authority under an intelligence agency's warrant, or otherwise participating in a covert intelligence-collection operation);

- there were no sensitivities in disclosing the general nature of the functions the ADF member was performing for an intelligence agency. This is likely to be the case for an ADF member who was directed to perform 'employment-like' duties for an intelligence agency, where there is no general legal prohibition on disclosing the identities of the staff of that intelligence agency; and

- the receiving agency, body or office-holder complied with all applicable requirements under the PSPF, including:

    - holding the appropriate level of security clearance (and any additional 'compartment briefings' which are necessary to access certain, highly sensitive information under the PSPF);

- having a genuine need to know the information to perform their functions; and

- having access to approved physical and electronic facilities to securely handle and store the information in line with the PSPF.

252. The Explanatory Memorandum does not appear to provide adequate justification for not including the IGADF and Coroners as named entities in subclause 57(2) at least in respect of the disclosure of 'intelligence information' in the circumstances set out at paragraph [251] above.

253. Nor does the Explanatory Memorandum appear to explain how an effective Ministerial approval requirement, via the Attorney-General's rule-making power in subclause 57(2), is thought to be compatible with the independence of the Commissioner and other integrity bodies such as the IGADF. This includes the independent activities of those agencies in sharing information with each other in order to identify and manage any areas of overlap in their jurisdiction, and to avoid duplication or conflict in their respective inquiries.

Recommendation 21—access to, and use of, 'intelligence information'

- **Paragraphs (a) and (b) of the definition of 'intelligence information' in clause 5 of the Bill should be amended so they are limited to:**
  - **information which has been assigned a 'national security classification'; and**
  - **that classification has been assigned in accordance with a Commonwealth policy, as in force from time-to-time, which assigns classifications to official information on the basis of the degree of harm to Australia's national security that is likely to arise from unauthorised disclosure. (Currently, this is the Commonwealth Protective Security Framework); and**
- **Clauses 42 and 57 of the Bill should be amended to:**
  - **limit the obligations on the Commissioner to make arrangements and comply with requirements for subsequent disclosures to information that <u>reasonably appears</u> to have been acquired or prepared by an intelligence agency in the performance of its functions;**
  - **provide that the terms of an arrangement made under clause 42 cannot fetter the power of the Commissioner to include information in their reports. Rather:**
    - **the Commissioner should be given the power to give classified and unclassified reports to the Attorney-General and Prime Minister; and**
    - **if either of those Ministers reasonably believe that an unclassified report provided by the Commissioner contains information whose disclosure would be likely to prejudice Australia's national security, defence or foreign relations, the Minister who tables that report must make a redaction from the report as tabled, and publicly declare that they have done so; and**
  - **include the IGADF in subclause 57(2) as one of the entities to which the Commissioner may disclose intelligence information, without being reliant on the permission of the Attorney-General via the making (and non-repeal) of rules under paragraph 57(2)(f).**

Resourcing for the Commissioner

Lack of financial independence

254. As noted above, the Commissioner and their staff will not be established as an independent statutory agency, with separate legal personality from the Commonwealth.

255. As a minimum, it would have been open to establish the Office of the Commissioner as a 'listed entity' under the PGPA Act, which would have given it financial and governance-related independence from Commonwealth Departments of State, even if it was not given a separate legal identity to the Commonwealth.

256. However, the Bill does not propose to create legal or financial independence in this manner. Rather, while the Commissioner will individually be a statutory appointee, they will be deemed to be an official of the Attorney-General's Department for the purposes of public sector financial and governance laws.[64]

257. As also noted above, one consequence of this approach is that the Commissioner will not receive a separate annual appropriation of funds for their annual operating budget (such as inquiry operating costs and staff provisions). Rather, the Commissioner's funding will be part of the general budget of the Attorney-General's Department, and their staffing will be provided by that Department.

Lack of public transparency in resource allocation

258. In addition to significant impacts on the independence of the Commissioner, as discussed above, in practical terms this will also make it difficult to identify, from the annual budget papers, the portion of the Department's general operating budget that is directed supporting the functions of the Commissioner.

259. Other than the Commissioner's salary costs, which will be set by the Remuneration Tribunal and published in a determination made by that Tribunal,[65] the amount of operational funding that has been administratively allocated from within the Department's budget to enable the Commissioner to perform their functions is not required to be itemised in the Commonwealth budget.

260. The 2020-21 Attorney-General's Portfolio Budget Statement (**PBS**) does not provide a breakdown of the Commissioner's operating budget (noting the appointment of an interim Commissioner, on a non-statutory basis, on 30 September 2020). The PBS only itemises separate funding that is administered by the Attorney-General's Department, on behalf of the Government, to deliver a grant-based legal financial assistance program to persons participating in the Commissioner's inquiries. (This reflects that the itemisation of 'administered funding' is required under Commonwealth financial reporting rules.)[66]

261. Consequently, the Parliament and the public are dependent on *ad hoc* advice from the Attorney-General and their Department about the proportion of the Department's general budget ('departmental expenses') that has been administratively earmarked to support the work of the Commissioner. This will make it more difficult to access the

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[64] Bill, Clause 13.

[65] Ibid, Clause 18, and *Remuneration Tribunal (Remuneration and Allowances for Holders of Full-Time Public Office) Determination 2020*, made under subsections 7(3)-(4) of the *Remuneration Tribunal Act 1973* (Cth).

[66] Australian Government, *Attorney-General's Portfolio Budget Statement 2020-21*, (October 2020), 25 (allocating 2.18 million in 2020-21 and approximately 1.3 million annually over the forward estimates period (from 2021-22 to 2023-24).

relevant information, and to be alerted to any changes (particularly reductions) as compared to the ability to unilaterally consult the budget papers.

262. This also raises a further concern about the ability of the Secretary of the Attorney-General's Department to act unilaterally to vary the amount of funding that was merely administratively earmarked within the Department's general budget to support the functions of the Commissioner. This has the potential to further undermine the independence of the Commissioner.

Preferred reform: establishing the Office of the Commissioner as a 'listed entity'

263. Establishing the Office of the Commissioner as a 'listed entity' under the PGPA Act, as recommended above, would provide both a safeguard to the independence of the Commissioner, as well as ensuring transparency in public financial reporting as part of the Commonwealth budget process. It would remove all of the impediments to the independence of the Commissioner outlined above.

Alternative option: additional Departmental financial reporting requirements

264. Alternatively, if there is an appetite to retain the current proposal, under which the Commissioner is treated as an 'Attorney-General's Department official' for the purpose of the Finance Law, the Committee may wish to consider whether there should be additional requirements for transparency, in the form of pro-active, periodic disclosure obligations in relation to the Commissioner's operating budget.

265. In particular, the Committee may wish to recommend that the Government routinely includes this breakdown Attorney-General's PBS, and in the financial statements provided in the Attorney-General's Department annual reports.

266. If this information were included in the Attorney-General's PBS and the Department's annual reports, it would remove the onus on individual Parliamentarians or members of the public to periodically request the disclosure of this information. In particular, it would enhance the ability of the Senate to scrutinise this information as part of the Senate Estimates process, and the reviews undertaken by its general purpose Committees of annual reports.

Recommendation 22—financial independence and transparency

- **If the Office of the Commissioner is not established as a 'listed entity' under the PGPA Act (as recommended in this submission) then the Bill should be amended to require the Attorney-General's portfolio budget statements and Departmental annual reports to include a breakdown of the Commissioner's annual operating budget from within the Department's general operating budget.**

Information-gathering powers of the Commissioner

267. The Bill confers broad powers on the Commissioner to compel the provision of information and the production of documents, and to compel the appearance of persons at public or private hearings to answer questions (including under oath).[67] It also proposes to confer warrant-based powers of search and seizure.[68]

268. However, as discussed below, the Committee may wish to consider in further detail several technical issues in the scope of powers an immunities, including:

[67] Bill, Clauses 30 and 32.

[68] Ibid, Clause 36.

- the effectiveness of the proposed partial abrogation of client legal privilege, in relation to legal advice obtained by the Commonwealth, or other communications between the Commonwealth and its lawyers; and

- the reasons for proposing to confer warrant-based search and seizure powers on the Commissioner (in contrast to other Commonwealth integrity agencies and office-holders, such as IGIS and the Ombudsman, which do not have equivalent powers), and the adequacy of attendant safeguards.

Abrogation of self-incrimination privilege & client legal privilege

269. The Bill replicates standard provisions in Commonwealth legislation conferring summons or notice-based coercive information-gathering powers, which:

- abrogate the privilege against self-incrimination, in respect of people who are served with a summons to appear before the Commissioner and answer questions, or a notice to provide information or produce documents, but:

  - confers a use immunity, which prevents that information or those documents from being admitted in evidence against the person in subsequent criminal proceedings (except proceedings in connection with offences for providing false or misleading information to the Commissioner);[69] and

  - confers 'penalty privilege' on witnesses appearing before the Commissioner, and persons who give information or documents to the Commissioner;[70] and

- replicates provisions in the Royal Commissions Act[71] and analogous provisions in the *Law Enforcement Integrity Commission Act 2006* (Cth) (**LEIC Act**)[72] which partially abrogate or override legal professional privilege. Namely, a claim of legal professional privilege is stated not to constitute a reasonable excuse to decline to provide information or produce documents. However, similar to the Royal Commissions Act, the Bill provides for the following exceptions:

  - a court has held that the information is privileged; or

  - the Commissioner decides to accept a privilege claim made to them.[73]

270. These measures are not objectionable in principle, given the following matters:

- their broad equivalence to existing powers of royal commissions and integrity agencies;

- their importance in ensuring that the Commissioner has access to critical evidence in their inquiries; and

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[69] Ibid, Clause 50.

[70] Ibid, Clause 64.

[71] Royal Commissions Act, section 6AA.

[72] LEIC Act, paragraph 80(5)(c) (legal professional privilege is not a valid basis for refusing to comply with compulsory production or disclosure obligations) but see subsection 80(6) which provides that compulsory disclosure to ACLEI does not abrogate privilege as against any third parties. See also section 79, which permits a legal practitioner to decline to provide compelled information to ACLEI on the basis of legal professional privilege, but they must provide the name and contact details of the client in whom that privilege vests. Subsection 80(6) and section 79 of the LEIC Act do not have equivalent provisions in the present Bill.

[73] Bill, Clause 48.

- the conferral of use immunity and penalty privilege as an attempt to mitigate the effects of abrogating self-incrimination privilege.

271. However, the Law Council queries the legal effectiveness of the partial abrogation of legal professional privilege, where coercive information-gathering powers are purportedly exercised against the Commonwealth to seek the production of legal advice or other privileged information.

Uncertainties in the application of clause 48 to Commonwealth information

272. Given the subject-matter within the Commissioner's inquiry functions, it seems likely that the Commonwealth would be the principal target of any exercise of the Commissioner's powers to abrogate legal professional privilege, via the compulsory disclosure of legally privileged information, and the potential inclusion of that information in their inquiry reports.

273. For example, it is conceivable that the Commissioner may issue statutory notices under clause 32 to officials of Commonwealth departments and agencies, and potentially Ministers, requiring them to produce documents containing legal advice, which they obtained in the course of performing their functions or exercising their powers in the matters that are under inquiry by the Commissioner.

274. However, there is scope for legal uncertainty or argument as to whether the general provisions of clause 48 of the Bill, as presently drafted, would be legally effective in compelling the production of that information to the Commissioner.

275. It is not clear that these provisions enable one emanation of the Commonwealth (being the Commissioner) to abrogate legal professional privilege that vests in the Commonwealth (as represented by another emanation of that polity, such as a departmental or agency official or a Minister) by compelling the disclosure of privileged information, and enabling its inclusion in public reports on inquiries.

276. Similarly, it is not clear that the general provisions of clause 48 could enable one emanation of the Commonwealth to claim privilege against another emanation of the Commonwealth.[74]

277. As drafted, clause 48 of the Bill would leave this potentially complex and controversial issue to the determination of a court, or the Commissioner in individual cases, if a Commonwealth official (who would likely act on the direction of their agency head, portfolio Minister or the Attorney-General) declined to comply with a statutory notice to produce documents over which the Executive Government asserted legal professional privilege. Deferring the resolution of this issue to individual cases which arise during the Commissioner's inquiries has the potential to create prolonged uncertainty, and could significantly frustrate or delay the Commissioner's inquiries.

[74] See: *NSW Council for Civil Liberties Inc v Classification Review Board (No. 1)* [2006] FCA 1409 (3 November 2006) at [29]–[34] (per Edmonds J). It was held that disclosure of legal advice by one emanation of the Commonwealth (the Classification Review Board) to another emanation of the Commonwealth (the Attorney-General's Department) was not legally capable of waiving legal professional privilege because there was no disclosure outside the single legal entity in which that privilege vested (namely, the Commonwealth). But compare *Mann v Carnell* (1999) 201 CLR, [1999] HCA 66 (21 December 1999) at [68]-[93] (per McHugh J, in dissent) in which it was suggested that the position may be different if one or both of the entities was demonstrated to have separate legal personality to the Crown in right of the relevant polity. While the reasoning in these cases is focused on the question of waiver of privilege, it could have broader application to the interpretation of powers of compulsion, which purport to abrogate legal professional privilege.

Suggested amendments to the Bill

278. It may be clearer and simpler for the Bill to simply provide that a person cannot make a claim of legal professional privilege for, and on behalf of, the Commonwealth, as a basis for that person:

- refusing to comply with a statutory notice issued under clause 32; or
- refusing to answer a question asked of them during their appearance before the Commissioner in accordance with a summons issued under clause 30.

279. Indeed, precedent for this approach can be found in the LEIC Act, noting that the targets of ACLEI's investigations are also emanations of the Commonwealth.

280. Subsection 80(5) of the LEIC Act makes explicit provision for the compulsion of information subject to legal professional privilege that vests in the Commonwealth. It provides that a person is not excused from giving information or producing documents or things to ACLEI on the basis that compliance with a notice to produce would disclose legal advice given to a Minister or Commonwealth agency, or another communication between a Commonwealth officer or another person or body that is subject to legal professional privilege. Subsection 80(6) also provides that compulsory production to ACLEI does not vitiate legal professional privilege claims by the Commonwealth as against third parties.

Suggested matters for further scrutiny by the Committee

281. It would be worthwhile for the Committee to pursue this issue with the Government. In particular, the Committee may wish to seek an assurance from the Government about the legal effectiveness of the Commissioner's powers to compel Commonwealth legal advice or other information over which the Commonwealth asserts legal professional privilege. The Committee may wish to seek an assurance that the Attorney-General and his Department, have obtained, and duly considered, legal advice on this matter in the development of the Bill.

282. The Committee may also wish to seek an undertaking from the Government that its stated intent to cooperate fully with the Commissioner[75] extends to the full and frank disclosure of all legal advice, and lawyer-client communications or related communications, as may be requested by the Commissioner in their inquiries.

283. If there is a policy intention that the Commonwealth should be able to claim legal professional privilege to resist production or disclosure under a notice or summons issued by the Commissioner, the Committee may wish to consider whether the Bill should require the Attorney-General to make statutory rules prescribing the circumstances in which Commonwealth officials may, and must not, make such claims and the process for doing so.

284. For example, the Bill could be amended to provide that the Attorney-General must make rules designating themselves, or another senior official, as the person responsible for making a decision about whether privilege will be claimed before the Commissioner, in order to ensure appropriate seniority and consistency in decision-making, and in any subsequent claims made to the Commissioner.

285. The Law Council cautions that any such rule-making power should not, in any way, disturb the independent exercise of discretion by the Commissioner under clause 48

[75] See, for example, See, for example, Mr Greg Moriarty, Secretary of the Department of Defence, General Angus Campbell, Chief of the Defence Force, and Ms Liz Cosson, Secretary of the Department of Veterans' Affairs, *Joint Submission to the Senate Foreign Affairs, Defence and Trade Committee on the Bill and Consequential Amendments Bill*, (October 2020), 1: 'The Defence and Veterans' Affairs Portfolios will provide our absolute support to the National Commissioner and their office'.

to determine whether to accept a claim of privilege; or limit or otherwise affect the jurisdiction of a court to determine whether information is subject to privilege.

Recommendation 23—legal professional privilege vested in the Commonwealth

- **The Government should provide an explanation to the Committee of the following matters, and the Explanatory Memorandum should be amended accordingly:**
  - **whether there is an intention for the Commonwealth (via departments, agencies and officials) to be able to claim legal professional privilege to resist disclosing legal advice or other information to the Commissioner, in response to a summons or notice to produce;**
  - **if so, how this is consistent with the stated policy intention that the Government will cooperate fully with the Commissioner; and**
  - **whether legal advice has been obtained about the effectiveness of clauses 30, 32 and 48 in abrogating legal professional privilege vested in the Commonwealth by compelling disclosure of privileged information to the Commissioner, and enabling the Commissioner to include that information in their public reports, or to share it with other entities under clauses 56 and 57.**
- **If a satisfactory explanation is not provided, the Bill should be amended to:**
  - **provide that a claim by the Commonwealth of legal professional privilege is not a reasonable excuse for failure to comply with a summons or notice; or**
  - **if there is an appetite to permit the Commonwealth to claim legal professional privilege to decline to cooperate with the Commissioner—impose a statutory obligation on the Attorney-General to make rules setting out**
    - **the circumstances in which privilege may, and must not, be claimed; and**
    - **a process for pre-authorisation by the Attorney-General (or another senior Commonwealth official) to claim legal professional privilege before the Commissioner. Compliance with that approval process would be an essential pre-condition to the validity of any privilege claim made to the Commissioner.**

Conferral of warrant-based search and seizure powers

286. Clauses 36 and 37 of the Bill propose to confer a power on the Commissioner to obtain search warrants, enabling police and other 'authorised persons' to enter private premises and seize documents or things relevant to matters under inquiry, and to use force if necessary to conduct searches and seize items.

287. These highly intrusive powers to enter and search private premises, and to seize items and use force, are not available to other Commonwealth oversight bodies with existing responsibilities relevant to defence and veteran suicide.[76]

[76] For example, no such powers are conferred on the IGADF, the Commonwealth Ombudsman (in relation to Departments of Defence and Veterans Affairs), or the IGIS (in relation to intelligence agencies who engage ADF members to perform certain functions and exercise certain powers for and on behalf of those agencies.

Recommendation 24—justification for conferring search and seizure powers

- **The Government should explain the perceived need to confer warrant-based search and seizure powers on the Commissioner, particularly given that other Commonwealth integrity agencies (including IGADF, IGIS and the Commonwealth Ombudsman) do not have such powers. The Explanatory Memorandum should be amended accordingly.**
- **In the absence of a compelling justification, clauses 36 and 37 should be omitted from the Bill.**

Absence of information about intended targets of search and seizure powers

288. The Explanatory Memorandum does not provide adequate insight into the anticipated targets of search powers conferred on the Commissioner. For example, it would be useful to know whether there is an intention that these powers:

- would only be used against officials or agencies, such as the ADF, Department of Defence, Department of Veterans' Affairs and Comcare; and
- should also be capable of being exercised against the families of deceased ADF members and veterans, if they are not willing to participate in an inquiry (which may be attributable to trauma, grief or illness) but are believed to hold relevant information, such as records or other things that were in the personal possession of the deceased member or veteran.

289. The provisions of clauses 36 and 37 of the Bill as drafted would make it legally possible for search warrants to be obtained and executed in both of the scenarios listed above.

290. This is difficult to reconcile with the statement of policy intent on the Commissioner's website that 'we will take a restorative and trauma-informed approach' which will 'recognise and respect that people may not wish to share their experiences with us' and, most importantly for present purposes, that 'people should have the choice about whether or not to participate'.

291. The spectre of intrusive powers of search and seizure, including exposure to the use of force in the execution of a warrant, may be a disincentive to the individuals who have been personally affected by the death of an ADF member or veteran from participating in an inquiry. It may create a fear that their voluntary participation is occurring 'in the shadow of coercion' if they declined to assist.

292. Consequently, the Committee may wish to consider whether the proposed scope of the search and seizure powers is compatible with the stated policy intent about voluntary participation by individuals who have been personally affected; and whether these powers could be narrowed (if they are to be conferred at all).

Recommendation 25—clarification of intended targets of search & seizure powers

- **The Government should provide an explanation of the intended targets of the search and seizure powers, and in particular whether—and, if so, why—there is an intention that such powers should be exercisable against veterans, survivors and families. The Explanatory Memorandum, including the Statement of Compatibility with Human Rights, should be amended to include that explanation.**
- **If no cogent justification is provided, the Bill should be amended to prohibit the exercise of powers of search and seizure against these persons. That prohibition should either be absolute; or subject to a**

very limited exception directed to obtaining critical evidence that cannot be obtained via other means, in exceptional circumstances.

Oversight and transparency in the exercise of search and seizure powers

293. The Bill contains no independent audit or reporting requirements on the Commissioner's use and execution of search warrants, including the use of force. For example, the Commissioner is not required to submit annual reports providing statistical information about the number of search warrants issued, or to maintain a register of all search warrants sought and issued.

294. In addition, the Consequential Amendments Bill does not include amendments to the Ombudsman Act to confer a periodic inspection function on the Commonwealth Ombudsman in relation to those search warrants.

295. While the Royal Commissions Act does not contain equivalent oversight or audit provisions, this arguably reflects the limited duration and 'one-off' nature of royal commissions of inquiry, in contrast to the ongoing functions of the Commissioner under the Bill.

296. The Committee may wish to consider whether additional statutory measures, such as those noted above, would be desirable to facilitate oversight and transparency in the use of intrusive powers of search and seizure.

Recommendation 26—reporting and oversight of search and seizure powers

- **The Bill should be amended to strengthen reporting, record-keeping and oversight requirements in relation to warrant-based search and seizure powers, including:**
  - **annual reporting requirements on the number of warrants sought, issued and executed, and things seized, as part of the Commissioner's annual reports under subclause 60(1); and**
  - **the maintenance of a register of warrants.**
- **Consideration should be given to conferring a specific inspection function on the Commonwealth Ombudsman in relation to the Commissioner's search warrants (and the allocation of any additional resources that the Ombudsman requires to perform this function).**

Absence of procedural requirements and safeguards for powers of seizure

297. The Bill does not contain any requirements for occupants of premises to be notified of the execution of the search warrant, or to be given receipts for items seized.[77]

298. Additionally, the Bill does not contain any provisions governing the return of seized items. There is no obligation to return items after a reasonable period, and nor is there a statutory process for the making and determination of requests for return.

299. If powers of seizure are used against individuals (including families and persons affected by defence and veteran suicide) this has the potential to deprive such

[77] Cf *Crimes Act 1914* (Cth), section 3J, 3M, 3N, 3P, 3Q (occupiers rights to notification and to be present during search, and rights to receipt for things seized and compensation for damage to operation of electronic equipment on premises). See also, Division 4C of Part IAA (using, sharing and returning things seized under a search warrant). See further sections 3SA 3ZX (express statements of preservation of parliamentary privilege and legal professional privilege). Also Cf LEIC Act, section 116 (announcement before entry), sections 119-129 (occupiers' rights, including to watch search and to have copies of, and receipts for, things seized), and section 138 (express preservation of legal professional privilege).

persons of their property indefinitely, including for prolonged periods of time. Given the breadth of property able to be seized (namely, 'things') this could have a significant, adverse effect on individuals' ability to conduct their personal and business affairs. For example, it would be possible to indefinitely seize computers and smartphones under a search warrant, if they were suspected to contain relevant records of matters relevant to an inquiry, and the thresholds for a search warrant were met in relation to apprehended destruction or concealment.

300. Consequently, there would be merit in amending the search powers contained in the Bill, to limit the duration of seizure and to impose notification and return requirements when things are seized. This would bring the provisions into line with standard law enforcement search warrant provisions.[78]

Recommendation 27—notification, receipt and return provisions for seized items

- **Clauses 36 and 37 of the Bill should be amended to include stronger statutory safeguards in relation to the power of seizure of items under a search warrant, including:**
  - **requirements to notify occupiers of premises of the search warrant, and to give receipts for things seized;**
  - **a limitation on the maximum duration of seizure, and requirements to return things seized under warrant; and**
  - **a process by which persons may request the return of things seized under warrant**

Absence of use immunity or penalty privilege in relation to seized items

301. As noted above, clause 50 of the Bill abrogates the privilege against self-incrimination in relation to documents and information given to the Commission in accordance with a statutory notice to produce. Subclause 50(3) confers a use immunity, so that this information cannot later be admitted in evidence in criminal proceedings against the person (except in proceedings for offences for providing false information to the Commissioner). Subclause 64(4) also confers 'penalty privilege' on persons giving information to the Commissioner under summons or notice to produce.

302. However, the Bill does not confer use immunity or penalty privilege in relation to things that are seized under a search warrant issued under clause 36 or 37. This seems to be an anomaly, given that either a summons or notice, or a search warrant, could be used to obtain the same document or thing.[79] However, use immunity would only be available if the Commissioner decided to proceed by way of a summons rather than a search warrant, following their assessment of the risks of relevant information being destroyed.

303. The Law Council acknowledges that other legislation, particularly law enforcement legislation, does not confer use immunity in respect of things seized under a search warrant. However, the powers of the Commissioner to gather information are distinguishable because both warrants and notices could be issued to obtain the same information, for the same purpose. There is an an arbitrary distinction in the level of protection that is given to a person in relation to the privilege against self-incrimination and penalty privilege, based on the Commissioner's discretionary decision-making about the type of compulsory power to be exercised. It may also risk

[78] Ibid, especially Crimes Act, Divisions 2 and 4C of Part IAA.

[79] Indeed, the threshold for obtaining a search warrant in Subclause 36(3)(b) requires the Commissioner to consider whether it would be possible to issue a summons or notice, and be satisfied that it would not be possible in the circumstances, because of a risk that the thing may be destroyed, tampered with or concealed.

creating a perverse incentive for the Commissioner to seek to use search warrants over summonses. While there is unlikely to be a subjective intent to use the powers in this way, the Bill should be amended to remove any risk that this could occur.

304. As the Explanatory Memorandum does not explain why use immunity has not been extended to things seized under a search warrant, this may have been an unintended omission.

Recommendation 28—use immunity and penalty privilege for seized things

- **Subclauses 50(3) and 60(4) of the Bill should be amended to confer use immunity and penalty privilege on persons from whom things are seized under a search warrant, in relation to those things.**

Persons authorised to exercise powers of search and seizure (including force)

305. Subclause 36(4) provides that the persons who may be authorised to execute search warrants are members of an Australian police force, and 'any other person named in the warrant'.

306. There is no requirement that the 'other persons' named in the warrant must be trained and experienced in the execution of warrants (including the use of force, which is authorised by the issuing of the warrant) as a precondition to their being listed in the warrant as an 'authorised person'.

307. This contrasts with the circumstances of police, who are authorised to execute warrants under many other Commonwealth, State and Territory laws, and are regularly trained and possess experience in the use of force.

308. The Committee may wish to consider whether the classes of persons who may be authorised to execute warrants should be limited to members of an Australian police force.

309. If a legitimate operational need for broader classes of executing officers identified, then consideration could be given to also allowing the Commissioner to authorise other Commonwealth officials who have statutory powers under other laws to execute warrants (including to use force), and who the Commissioner is reasonably satisfied have adequate training and experience.

Recommendation 29—persons authorised to execute warrants

- **Subclause 36(4) of the Bill should be amended to:**
  - **limit the persons who may execute a search warrant to police (federal, state and territory); or**
  - **omit the reference to 'any other person named in the warrant' (ie, any person other than a police officer) and substitute it with:**
    - **an exhaustive, statutory reference to the specific classes of persons who are able to be authorised—on the basis that they are authorised under other legislation to use powers of search and seizure including the use of force, and are trained in the exercise of such powers; or**
    - **a more general requirement that the eligible judge must be satisfied, on reasonable grounds, that any other 'authorised person' who is specified in a warrant instrument has**

appropriate training and experience in the execution of search warrants, including the use of force.

Scope of the proposed power to use force under search warrants

310. The power to use force in the execution of search warrants is not specifically identified in clause 36 as being limited to the use of force against things (such as breaking open locked doors or cabinets).

311. In the absence of a specific authorisation to use force against persons, it is arguable that the provision does not extend to such force.[80] However, given the intrusive nature of the powers conferred, greater precision of drafting is important, so that there is certainty as to its scope for all readers of the legislation.

312. If there is a policy intention that the provision should authorise the use of force against persons, this must be accompanied by the following conditions:

- a rigorous policy justification, clearly identifying the necessity and proportionality of the power (which should be documented in the Statement of Compatibility with Human Rights in the Explanatory Memorandum to the Bill);
- reporting and oversight mechanisms (as recommended above); and
- more stringent limitations on the persons authorised to apply for, and execute, warrants (as recommended above, in relation to powers of authorisation and delegation and other matters relevant to the Commissioner's independence).

Recommendation 30—scope of the power to use force

- **In the absence of any justification directed to the potential use of force against persons, Subclause 36(4) of the Bill should be amended to provide that a search warrant issued under clause 36 only authorises the use of force against things, and not persons.**

Exemptions from freedom of information and privacy laws

Freedom of information exemptions

313. Clause 1 of the Consequential Amendments Bill proposes to fully exempt the Commissioner from the disclosure regime in the FOI Act.

314. Clause 2 further proposes to exempt certain documents of the Attorney-General's Department from the FOI Act, namely, documents 'in respect of' the performance by the Commissioner of most of their functions (the conduct of inquiries, including private hearings) and the exercise of most of their powers (coercive information gathering powers, voluntary disclosures by officials, and the sharing of information).

315. The Explanatory Memorandum states that these measures are needed to 'reflect the importance of effectively protecting documents which relate to the internal operations of the Commissioner, including documents which have been obtained by as evidence by the Commissioner, via the use of a compulsory power'.[81]

[80] This is by reference to the principle of legality in statutory interpretation, under which clear words are required to displace a fundamental right (including rights to bodily integrity and personal inviolability).

[81] Explanatory Memorandum, Consequential Amendments Bill, 4 at [8].

316. The Law Council opposes both proposed exemptions and recommends that clauses 1 and 2 should be omitted from the Consequential Amendments Bill. They are contrary to fundamental public interests in transparency, and represent a concerning approach to this essential matter by the portfolio with responsibility for FOI and Commonwealth integrity policy. The proposed exemptions are inconsistent with the treatment of other oversight and integrity agencies.[82]

Privacy exemptions

317. The proposed amendments to the FOI Act will result in the full exemption of the Commissioner, and the partial exemption of the Department, from the obligations in the Privacy Act in relation to the collection, handling, disclosure, use and retention or destruction of personal information (including requirements for sensitive personal information, such as health information).

318. This is because the application provision in section 7 of the Privacy Act excludes acts or practices of agencies listed in provisions of Schedule 2 to the FOI Act. (Clauses 1 and 2 of the Consequential Amendments Bill propose to add the Commissioner and Attorney-General's Department to Schedule 2 to the FOI Act.)

Effect of proposed exemptions

319. The proposed amendments will remove the otherwise applicable obligations under the Privacy Act to adhere to the requirements of the Australian Privacy Principles (**APPs**) in relation to dealings with personal information.

320. They will also place the Commissioner and the Department beyond the compliance oversight jurisdiction of the Privacy Commissioner, which includes an ability for aggrieved individuals to make complaints about alleged breaches of the APPs. Further, individuals whose privacy has been breached will have no recourse to the enforcement mechanisms and remedies under the Privacy Act.

321. Further, the mandatory notifiable data breach requirements in Part IIIC of the Privacy Act would not apply where there is unauthorised access to or disclosure of personal information, held by the Commissioner or Departmental staff assisting them; or a loss of personal information that would be likely to result in unauthorised access or disclosure. Significantly, Part IIIC of the Privacy Act imposes notification and remediation obligations on APP entities, and compliance is subject to oversight by the Privacy Commissioner.

322. While the Explanatory Memorandum to the Consequential Amendments Bill identifies that the proposed amendments in clauses 1 and 2 will have the effect of displacing the Privacy Act,[83] it does not identify the legal impacts of that displacement, as noted above, and therefore offers no justification for them.

Inadequate privacy protections in the Bills

323. The Explanatory Memorandum to the Consequential Amendments Bill suggests that other mechanisms in the Bill would provide adequate protection in the absence of the detailed, legally binding privacy protection regime under the Privacy Act.[84] The Explanatory Memorandum refers to refers to secrecy offences, private hearings, discretionary non-publication orders and the requirement for the Commissioner to

[82] For example, the Commonwealth Ombudsman, ACLEI, Australian Human Rights Commission, Office of the Australian Information Commissioner and the INSLM are not exempt from the FOI Act. Royal Commissions are also subject to the FOI Act, subject to some specific exemptions (generally for records of the Royal Commission into Institutional Responses to Child Sexual Abuse).

[83] Explanatory Memorandum, Consequential Amendments Bill, 4-5 at [10] and 10 at [23].

[84] Ibid, 4-5 at [10].

take a trauma-informed approach to the performance of their functions. It also states that the absence of the legal right under the APPs of an individual to make corrections to their personal information 'could be facilitated administratively' at the discretion of the Commissioner or the Attorney-General's Department.[85]

324. It is submitted that these measures fall short of the strong legal protections, remedies and enforcement mechanisms in the Privacy Act, which are available, as of right, to people participating in the inquiries or reviews of other Commonwealth integrity agencies that are not exempt from the Privacy Act.

Recommendation 31—removal of proposed FOI and privacy exemptions

- **The Consequential Amendments Bill should be amended to omit clauses 1 and 2.**

Absence of prior consultation on proposed exemptions

325. A decision to exempt an agency from FOI and privacy regimes is significant and has the potential to have significant unforeseen and unintended consequences, to the detriment of individual rights to privacy and information access. Any such proposals should be the subject of specific consultations with information law experts and civil society stakeholders before policies are finalised and Bills introduced to Parliament. The Law Council stands ready to participate in any such pre-legislative consultations.

Recommendation 32—consultations on proposed FOI and privacy exemptions

- **The Government should routinely consult with the Office of the Australian Information Commissioner and civil society stakeholders, including the Law Council of Australia, on all proposals to exempt agencies from the FOI Act or Privacy Act (or both).**
- **These consultations should be completed before Bills are introduced.**
- **The fact and outcomes of those consultations should be routinely documented in the extrinsic materials to the relevant legislation.**

[85] Ibid, 10 at [25].