

7 August 2018

Mr Andrew Hastie MP
Chair
Parliamentary Joint Committee on Intelligence and Security
PO Box 6021
Parliament House
Canberra ACT 2600

By email: pjcis@aph.gov.au

Dear Chair

Office of National Intelligence Bill 2018 and the Office of National Intelligence (Consequential and Transitional Provisions) Bill 2018

1. The Law Council welcomes the opportunity to provide this brief submission to the Parliamentary Joint Committee of Intelligence and Security (**the Committee**) regarding its current inquiry into the Office of National Intelligence Bill 2018 (**the Bill**) and the Office of National Intelligence (Consequential and Transitional Provisions) Bill 2018 (**the Consequential Bill**).
2. The Law Council acknowledges the assistance of its National Criminal Law Committee in the preparation of this submission. It has also had the benefit of examining the Inspector-General of Intelligence and Security's (**IGIS**) submission and the Joint submission of the Department of Prime Minister and Cabinet and the Office of National Assessments (**the Joint Submission**) to the Committee regarding its inquiry.
3. The Bill, if enacted, would create the Office of National Intelligence (**ONI**) further to a recommendation of the 2017 Independent Intelligence Review conducted by Mr Michael L'Estrange AO and Mr Stephen Merchant PSM. ONI would replace the current Office of National Assessments (**ONA**) and ONI's proposed functions include:
 - leading the national intelligence community;
 - carrying out evaluations;
 - assessing, correlating and analysing international and domestic matters of political, strategic or economic significance to Australia;
 - advising the Prime Minister of intelligence matters; and
 - open source collection.¹

¹ Office of National Intelligence Bill 2018 (Cth) s 7.

Privacy

4. The ONI Bill would enable ONI to collect and handle the personal information of more Australian citizens than is currently the case with ONA.² This occurs for example through the new function relating to the collection of open source material.³ Proposed section 53 of the Bill requires the Prime Minister to make privacy rules relating to identifiable information. ONI will be exempt from the *Privacy Act 1988* (Cth) (**Privacy Act**) as is currently the case with intelligence agencies such as those operating under the *Intelligence Services Act 2001* (Cth) (**ISA**) and the Australian Security Intelligence Organisation.
5. The Law Council supports the IGIS's recommendation that the Bill be amended to require the proposed privacy rules to be made public. This is important to ensure transparency in ONI's dealings with identifiable and personal information and would be consistent with requirements for agencies operating under the ISA.
6. However, the Law Council is concerned that agencies which are currently subject to the Privacy Act (i.e. the Australian Transaction Reports and Analysis Centre; the Australian Federal Police (**AFP**), the Department of Home Affairs and the Department of Defence, not including the Australian Geospatial-Intelligence Organisation and the Defence Intelligence Organisation) are now proposed to be exempt from the Privacy Act to the extent that the agency performs specific functions relating to intelligence.⁴ The Law Council recommends that the Committee seek an assessment of the Bill from the Privacy Commissioner to inform its consideration of the Bill. Further, consideration should be given to amending the Bill to require:
 - appropriate privacy protection measures to be included in the primary legislation. Depending on the sharing of information that may occur, such appropriate measures may include requirements to conduct privacy impact assessments, annual compliance audits, the provision of appropriate training, requirements to publicly report on the number of instances where information is disclosed or used in a manner inconsistent with the privacy rules. Appropriate privacy protection measures for inclusion in the Bill should be developed in consultation with the Privacy Commissioner and the IGIS; and
 - the Prime Minister to consult with the Privacy Commissioner before the making of the proposed privacy rules (in addition to the Director-General, the IGIS and the Attorney-General as is proposed).

² Australian Government Solicitor, Privacy Impact Assessment: Establishing the Office of National Intelligence (19 June 2018), 8, Attachment D in Department of the Prime Minister and Cabinet and the Office of National Assessments, Submission No 2 to the Parliamentary Joint Committee on Security and Intelligence, *Office of National Intelligence Bill 2018 and the Office of National Intelligence (Consequential and Transitional Provisions) Bill 2018*, July 2018, 21.

³ Office of National Intelligence Bill 2018 (Cth) s 7(1)(g).

⁴ Office of National Intelligence Bill 2018 (Cth) s 4, Office of National Intelligence (Consequential and Transitional Provisions) Bill 2018 (Cth) s 86.

Secrecy offences

7. The Law Council supports the recommendation of the Joint Submission that the Bill, including the Explanatory Memorandum, be amended to remove proposed section 43 (offence – subsequent communications of certain information) in its entirety for the reasons given in the Joint Submission.⁵
8. In relation to proposed section 42 (offence – communicating certain information), the Law Council recommends:
 - the Committee examine the Bill’s consistency with recommendations made by the Australian Law Reform Commission in its Report No 122, *Secrecy Laws and Open Government in Australia* and to the extent that there is any inconsistency that these matters be addressed prior to enactment;
 - the Committee consider whether officers from Commonwealth authorities or agencies that may have dealings with ONI such as the AFP may be captured by the offence provision. If there is the potential for such officers to be captured (e.g. by reason of entering into an agreement or arrangement with ONI to provide information), appropriate exceptions should be included for disclosures to the Commonwealth Ombudsman and the Law Enforcement Integrity Commissioner (or their staff). Officers that are familiar to reporting through such channels may inadvertently continue to use such integrity measures rather than reporting to the IGIS in the first instance or there may be a duplication of reporting where a matter of concern arises;
 - the Committee consider whether an exemption for disclosures made under the *Public Interest Disclosure Act 2013* (Cth) and *Freedom of Information Act 1982* (Cth) may be required if officers of agencies other than ONI may be captured; and
 - the Bill be amended to provide defences for information communicated for the purposes of obtaining legal advice and to a court or tribunal. This is consistent with the approach taken in the *National Security Legislation Amendment (Espionage and Foreign Interference) Act 2018* (Cth), which was recently enacted by the Australian Parliament.

Offence – dealing with and making records

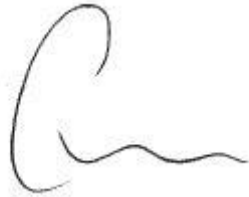
9. In relation to proposed section 44 (offences – dealing with and making records), the Law Council recommends that the Committee consider whether officers from Commonwealth authorities or agencies that may have dealings with ONI such as the AFP may be captured by the offence provision. If there is the potential for such officers to be captured (e.g. by reason of entering into an agreement or arrangement with ONI to provide information), appropriate exceptions should be included for inadvertent dealings with or the making or records to the Commonwealth Ombudsman and the Law Enforcement Integrity Commissioner (or their staff). As noted above, officers that are familiar with reporting through such channels may inadvertently continue to use such integrity measures rather than reporting to the IGIS in the first instance.

⁵ Department of the Prime Minister and Cabinet and the Office of National Assessments, Submission No 2 to the Parliamentary Joint Committee on Security and Intelligence, *Office of National Intelligence Bill 2018 and the Office of National Intelligence (Consequential and Transitional Provisions) Bill 2018*, July 2018, 3 [4].

Thank you again for the opportunity to provide this submission to the Committee.

Please contact in the first instance, Dr Natasha Molt, Acting Director of Policy, on (02) 6246 3754 or at natasha.molt@lawcouncil.asn.au, should you have any queries or require further information.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Morry Bailes', with a large initial 'M' and a wavy line extending to the right.

Morry Bailes
President