

# DESIGNER INTELLIGENCE OR LEGITIMATE CONCERN?: ESTABLISHING AN OFFICE OF NATIONAL INTELLIGENCE AND COMPREHENSIVELY REVIEWING THE NATIONAL INTELLIGENCE COMMUNITY LEGAL FRAMEWORK

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*The establishment of an Office of National Intelligence (ONI) to collect, co-ordinate, integrate and share intelligence from a variety of sources signals a significant new intelligence facilitative role in Commonwealth governance. The ONI Act provides a reformative framework for implementing the prospective recommendations of the Comprehensive Review of the legal framework governing the National Intelligence Community (NIC). This may well produce an increased securitisation of the Australian polity, a broadened intelligence use and interoperability, and a transformative impact beyond rationally justified national security protective definitions. Harmonising intelligence activities across the NIC may be aided through a Government discourse of safety and security, and the absence of a Charter of Rights to reconcile public policy contestations through criteria of legality, necessity, proportionality and related jurisprudence, from other comparable liberal democratic states.*

## I INTRODUCTION

The *Office of National Intelligence Act 2018* (Cth) (ONI Act), in framing co-ordination and leadership roles for an expanded Australian intelligence community, provides indicators and predictors of likely recommendations of the Comprehensive Review of the Legal Framework of the National Intelligence Community (Comprehensive Review).<sup>1</sup> The creation of specific roles within the Office of National Intelligence (ONI), anticipates, prior to the Comprehensive Review recommendations, an increased importance of the ten intelligence agencies or agencies with an intelligence role or function,<sup>2</sup> through co-ordination, integration and the sharing of intelligence. Such developments anticipate the ONI emerging as a powerful centralising organisation in Commonwealth governance, through which

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<sup>1</sup> Attorney General's Department 'Comprehensive review of the legal framework governing the National Intelligence Community' with attached Terms of Reference (Mr Dennis Richardson AO, reviewer) < <https://www.ag.gov.au/NationalSecurity/Pages/Comprehensive-review-of-the-legal-framework-governing-the-national-intelligence-community.aspx> > (as at 2 September 2019).

<sup>2</sup> ASD, ASIO, ASIS, AGO and DIO (Defence Intelligence Organisation) and the Australian Criminal Intelligence Commission are the intelligence agencies; Austrac, AFP, Department of Home Affairs and the Defence Department (other than AGIO or DIO) are the agencies with an intelligence role or function. Collectively, these ten agencies constitute the National Intelligence Community: see definitions of 'national intelligence community', 'intelligence agency' and 'agency with an intelligence role or function', in s.4 of the *ONI Act*.

a vast quantum of intelligence will be collated, filtered and applied to government decision making processes, extending beyond national security.

Within this anticipated new framework, the Comprehensive Review was announced by the Attorney General on 30 May 2018,<sup>3</sup> to examine the effectiveness of the legislative framework governing the National Intelligence Community (NIC) and to prepare findings and recommendations for reforms.<sup>4</sup> This review was recommended by the 2017 Independent Intelligence Review.<sup>5</sup>

The Australian Intelligence Community was previously reviewed in the 2011 Independent Review of the Intelligence Community,<sup>6</sup> the 2004 Report of Inquiry Into Australian Intelligence Agencies,<sup>7</sup> the 1984 Royal Commission on Australia's Security and Intelligence Agencies<sup>8</sup> and the 1977 Royal Commission on Intelligence and Security.<sup>9</sup> In citing the Hope Review's aspiration that the Office of National Assessments (now the ONI) would assume a co-ordinating, leadership role for Australian intelligence agencies,<sup>10</sup> cultural and institutional change involving integration and enlargement of intelligence and intelligence function roles was advocated and planned for. The ONI Act provides the major institutional architecture for implementation of the forthcoming Comprehensive Review recommendations.

This paper looks *critically* and *sequentially* at the two major components of this set of reforms – first, the central features of the ONI Act and secondly, major characteristics of the Comprehensive Review. The essential features of the ONI Act are examined as they provide a framework around which future recommendations of the Comprehensive Review are able to be implemented. These ONI Act features

<sup>3</sup> Attorney General Media Release 'Review of national intelligence legislation' 30 May 2018 (Christian Porter) < <https://www.attorneygeneral.gov.au/Media/Pages/Review-of-national-intelligence-legislation.aspx> > (as at 2 September 2019); Andrew Tillett, 'Intelligence review no threat to civil liberties: Christian Porter' *Australian Financial Review* (Sydney) 30 May 2018; Paul Maley, 'Intelligence-sharing flaws spark biggest spy review in 40 years' *The Australian* (Sydney) 30 May 2018. The *Office of National Intelligence Bill 2018* (Cth) was introduced into the House of Representatives on 28 June 2018, passed the House on 27 November 2018, passed the Senate on 29 November 2018 and was assented to on 10 December 2018.

<sup>4</sup> Attorney General's Department, 'Comprehensive review of the legal framework governing the National Intelligence Community', above n 1. The *Comprehensive Review* is due to report at the end of 2019.

<sup>5</sup> Michael L'Estrange and Stephen Merchant *2017 Independent Intelligence Review*, Department of Prime Minister and Cabinet (June 2017) (subsequently *2017 Review*) Recommendation 15.

<sup>6</sup> Robert Cornall and Rufus Black *2011 Independent Review of the Intelligence Community Report*, Department of Prime Minister and Cabinet (subsequently *2011 Review*).

<sup>7</sup> Philip Flood *Report of the Inquiry Into Australian Intelligence Agencies July 2004*, Department of Prime Minister and Cabinet (subsequently *2004 Review*).

<sup>8</sup> Justice Robert Hope *Royal Commission on Australia's Security and Intelligence Agencies General Report* December 1984 (*Second Hope Report*) (AGPS Canberra, 1985).

<sup>9</sup> Justice Robert Hope *Royal Commission on Intelligence and Security 1977 (First Hope Report)* First Report – Fourth Report (AGPS Canberra, 1977).

<sup>10</sup> Commonwealth, *Parliamentary Debates* House of Representatives 28 June 2018, 7 (Christian Porter).

include a new collection of open source domestic intelligence, ONI request powers to Commonwealth authorities to make available a broad suite of information, powers for Commonwealth authorities to voluntarily provide a broad suite of information to the ONI, and legislated mechanisms for cultural change, co-ordination and integration of the NIC. These features are facilitated and empowered by a weak, discretionary and ministerial based privacy rules model governing the communication and use of intelligence.

Second, conscious that the main features of the ONI Act are adaptable to prospective recommendations of the Comprehensive Review, the comment then highlights the broad reference terms of the review, including review of the legislative framework for the NIC, related legislation and more acutely focused questions around removal of present protective legislative separations concerning agency functions and methods. Various indicators, historical, evolutionary and contiguous to national security developments, are canvassed in relation to the Comprehensive Review. These indicators are argued to make the Comprehensive Review recommendations fairly predictable, trending towards expansion, liberalisation and harmonisation of intelligence matters, increased reliance on executive discretion, and the construction of an enterprise management culture across the NIC. This will involve institutional integration, co-ordination and pooling of resources amongst intelligence agencies and agencies with an intelligence function.

Conduct and methodology of the Comprehensive Review confirm that it is of a different qualitative character than the Hope Royal Commissions, which are cited in partial support for conducting the Comprehensive Review. A likely result is that the Comprehensive Review recommendations will be sufficiently flexible for integration with the enabling, enlarging provisions of the ONI Act, providing a template for incrementally increasing intelligence reach into Commonwealth governance. It is concluded that these prospective legislative changes around intelligence are exponential, involving an increased securitisation of the Australian polity and a broadened use of intelligence in government decision making.

This comment further approaches this criticism of the ONI Act and the Comprehensive Review against a background of common identifiable features around expanded intelligence collation, analysis and its potential application. These informing background matters include this present quantum expansion of the intelligence legislative footprint, a culmination of significant, incremental increases in intelligence and related powers since the September 11 2001 terrorist attacks. Secondly, intelligence is reconceptualised, in that it is normalised and mainstreamed within increased areas of Commonwealth government activity, beyond specialised security applications. A third factor in such development is the

removal or relaxation of restrictions, hitherto thought necessary for the protection of privacy, human rights and the dispersal of institutional power, in intelligence sharing and exchange, between agencies. This is justified on the basis of multiple emergent challenges and threats,<sup>11</sup> impacting upon Australia's security and other interests. It creates a rationale for augmenting and optimising multiple sources of available intelligence into a combined intelligence product, a practical manifestation of a reconfigured intelligence community. It is also exacerbated in the Australian context by the absence of the analytical tools of legality, necessity and proportionality, inherent in applying a statutory Bill of Rights.

As the framework ONI Act is central to the reconfiguration of intelligence and the National Intelligence Community, it is timely to first analyse major foundational features of that Act, before proceeding to consider key aspects of the Comprehensive Review.

## II EXTENDING THE REACH AND ROLE OF INTELLIGENCE: CRITICAL MAJOR FACTORS OF THE ONI ACT

The ONI Act is highlighted by several major, enlarging features relating to information intelligence, of consequence to the general Australian community. It is in the expanded quantum of intelligence and in the broadening of intelligence categories and subject matters that the ONI Act most clearly displays the framework for a transformative intelligence agenda. Collectively, the three mechanisms identified below form an exceptional framework to communicate a vast array of intelligence (including on domestic matters) to the ONI, providing for the authorised transmission of information, otherwise anterior to the agency's functions,<sup>12</sup> which are already exempt from the *Privacy Act 1988* (Cth).

The first involves expanding the intelligence remit from purely overseas intelligence to the collection of open source domestic intelligence,<sup>13</sup> 'relating to matters of political, strategic or economic significance to Australia'. However, 'open source' is somewhat misleading, in that the *ONI (Consequential and Transitional Provisions) Act 2018* (Cth)<sup>14</sup> amends the *Crimes Act 1914* (Cth)<sup>15</sup> to

<sup>11</sup> Interview, 'Australia's head of national intelligence Nick Warner' *Saturday Extra* ABC Radio National, 6 April 2019 < <https://www.abc.net.au/radionational/programs/saturdayextra/director-general-of-the-office-of-national-assessments-and-inte/10967168> > (as at 2 September 2019).

<sup>12</sup> *AGS Report Privacy Impact Assessment Establishing The Office Of National Intelligence* (2018), 2 (Attachment D to Joint Submission of Department of Prime Minister and Cabinet and Office of National Assessments to Parliamentary Joint Committee on Intelligence and Security inquiry into Office of National Intelligence Bill 2018 and Office of National Intelligence (Consequential and Transitional Provisions) Bill 2018 (July 2018)).

<sup>13</sup> *ONI Act* s.7 (1) (g) 'to collect, interpret and disseminate information relating to matters of political, strategic or economic significance to Australia that is accessible to any section of the public'.

<sup>14</sup> Clause 32 of the Bill; subsequently *ONI C and T Act*.

<sup>15</sup> S.15KA (3)(A) *Crimes Act 1914* (Cth)

give ONI access to the assumed identity regime, and applies it for s.7 (1)(g) ONI Act functions.<sup>16</sup> Significantly, this facilitates ONI assumed identity access to internet based platforms, including social media and subscription services requiring account verification,<sup>17</sup> which are considered as open sources for the purposes of the Act.

The second point is the broad information corpus that may be assembled, correlated and analysed, extends well beyond national security – to ‘international matters that are of political, strategic or economic significance to Australia, including domestic matters relating to such matters’<sup>18</sup> and ‘information relating to other matters that are of political, strategic or economic significance to Australia...if doing so would support the performance of any other function or the Director-General’s functions, or complement the work of the national intelligence community’.<sup>19</sup> This wording indicates an exceptional scope for ONI intelligence gathering and related activity. It is reinforced by further changes relating to how that intelligence is identified, and then obtained and communicated.

First, s.37 (1) allows ONI for its s.7 (1)(c) purpose, to request a Commonwealth authority – broadly defined<sup>20</sup> – to make available information relating to international matters of political, strategic or economic significance to Australia, or domestic aspects relating to such international matters.<sup>21</sup> ONI has obligations prior to making the written request to consult with the Commonwealth authority and consider any concerns raised by it.<sup>22</sup> The Commonwealth authority must then provide that requested information, unless a relevant law prohibits the provision of the information.<sup>23</sup>

Second, s.38 (1) allows a Commonwealth authority to voluntarily provide information to the ONI which the Commonwealth authority considers relates to matters of political, strategic or economic significance to Australia, even where such provision otherwise would not fall within the Commonwealth authority’s statutory functions.<sup>24</sup> Third, s.39 allows an intelligence agency or an agency with

<sup>16</sup> Department of Prime Minister and Cabinet Office Of National Assessments *Joint Submission to the Parliamentary Joint Committee on Intelligence and Security* ONI Bill and ONI C and T Bill July 2018 (subsequently, *Joint Submission*).

<sup>17</sup> *Ibid*, 9.

<sup>18</sup> *ONI Act* s.7 (c) (i)

<sup>19</sup> *ONI Act* s.7 (d) (ii). For the definition of the national intelligence community (subsequently NIC) see above n 2.

<sup>20</sup> *ONI Act* s.4 Definition ‘Commonwealth authority’.

<sup>21</sup> *ONI Act* s 37(1)(a) and (b)

<sup>22</sup> *ONI Act* s.37 (2)

<sup>23</sup> *ONI Act* s.37 (3). The *ONI C and T Act* added exemptions to the *Privacy Act 1988* (Cth) for agencies with an intelligence role or function, in the provision of personal information to the ONI.

<sup>24</sup> *ONI Act* s 38 (2).

an intelligence role or function to provide to ONI information that relates or may relate to any of ONI's functions.

The legislative quantum of intelligence and expanded intelligence categories are of course only one dimension of the transformative impact of the ONI Act. The practical operation of ONI functions will be conditioned as much by the aspirational cultural values and objectives in the Act, supporting information liberalisation, as the Act's enabling powers. These values and objectives include leadership<sup>25</sup> and enterprise management of the National Intelligence Community (NIC),<sup>26</sup> including its co-ordination and integration,<sup>27</sup> underpinned by the direction and guideline making powers of the OIC Director General.<sup>28</sup> This reflects 'the importance of creating a genuine national intelligence enterprise to harness the synergies between foreign, security, criminal and financial intelligence'.<sup>29</sup>

The mutuality and reciprocity in these legislated values is intended to maximise intelligence flows to the NIC, through interdependent relationships, which are cultivated and managed by the ONI. The substantial powers of the ONI are intended to be augmented and complemented by this legislative regime for cultural and organisational change – producing a multiplier effect, in practical delivery, of the enabling features of the ONI Act, as set out above.

### III ADOPTING THE PRIVACY RULES MODEL IN THE NEW ONI ARRANGEMENTS

This facilitative role of intelligence communication in the ONI Act is contrasted by the objectively weak model for privacy protection. From one perspective, a weak, discretionary and ministerially based model of privacy protection in the expanded scheme necessarily complements the overall objective of increasing intelligence exchange, collation and analysis. On the other hand, the presence of a privacy protection model in the ONI Act can be utilised for public reassurance that the ONI is operating lawfully within government determined boundaries of information access, with Rules transparently displayed on the ONI website.<sup>30</sup> The level of discretion afforded by the ministerial making of Privacy Rules, but in the absence of a human rights culture shaped around a statutory bill of rights, in turn influencing those Privacy Rules, is substantial.

<sup>25</sup> S.8 *ONI Act* reinforces the leadership role of ONI for the NIC and gives practical examples of the leadership principle in s.8 (2)(a) to (c).

<sup>26</sup> S.4 of the *ONI Act* definition of national intelligence community (NIC).

<sup>27</sup> S.7 (1) (a) and s.8 of the *ONI Act*.

<sup>28</sup> S.8 (4) (a) and (b), s.20 and s.21 of the *ONI Act*.

<sup>29</sup> *Joint Submission*, above n 16, 5.

<sup>30</sup> Interview 'Australia's head of national intelligence Nick Warner', above n 11.

Accordingly, the ONI Act significantly expands the capacity to collect and communicate domestic intelligence. Importantly, it achieves this within a framework of relatively weak and discretionary ministerially derived Privacy Rules, where the IGIS has recently identified some substantial breaches. Obviously this is a cause for legitimate concern around the individual breaches, but also because existing privacy arrangements proved deficient, even before the expanded remit of the ONI Act.

The new requirement in the ONI Act is for the Prime Minister (as responsible ONI minister) to make two sets of Privacy Rules. Rules are required first to regulate the collection of open source information in s.7 (1) (g) where that information is ‘identifiable information’ – that is information or an opinion about an identified Australian citizen or permanent resident, or an Australian citizen or permanent resident who is reasonably identifiable (a) whether the information or opinion is true or not and (b) whether the information or opinion is recorded in a material form or not.<sup>31</sup> Privacy Rules are also required in general, for the communication, handling and retention by ONI of such identifiable information.<sup>32</sup> The predecessor *Office of National Assessments Act 1977* (Cth) did not have a formal privacy rules structure,<sup>33</sup> so the ONI Act, with legislative provision for making of Privacy Rules,<sup>34</sup> is actually highlighted as improving privacy restraints.

The Privacy Rules are not legislative instruments,<sup>35</sup> are not tabled in Parliament, nor subject to a disallowance motion. However, the PJCIS Report recommendation<sup>36</sup> that the Privacy Rules be published on the ONI’s website as soon as practicable after the rules are made (except to the extent that the rules contain information that has a protective security classification) was accepted into the ONI Act.<sup>37</sup>

Perhaps most revealing about the efficacy of the Privacy Rule (or ASIO guidelines equivalent)<sup>38</sup> model are the breaches identified in the Inspector General

<sup>31</sup> S.4 *ONI Act* definition ‘identifiable information’ and s.53 (1) (a) *ONI Act*.

<sup>32</sup> *ONI Act* s 53 (1) (b).

<sup>33</sup> S.15 *Intelligence Services Act 2001* (Cth) covering ASIS, AGO and ASD only; *ONA Guidelines to Protect the Privacy of Australians*, ‘Legislative Framework’: ‘ONA and DIO – in consultation with the Inspector General of Intelligence and Security (IGIS) – have established *Privacy Guidelines* to be consistent with those privacy rules made under section 15 of the *Intelligence Services Act 2001* that apply to ASIS, AGO and ASD.’

<sup>34</sup> Australian Government Solicitor Report – *Privacy Impact Assessment: Establishing the Office of National Intelligence*, above n 12, 4.

<sup>35</sup> *ONI Act* s s.53 (8).

<sup>36</sup> Commonwealth, Parliamentary Joint Committee on Intelligence and Security *PJCIS Advisory Report on the Office of National Intelligence Bill 2018 and the Office of National Intelligence (Consequential and Transitional Provisions) Bill 2018* (2018), Recommendation 4.

<sup>37</sup> *ONI Act* s.53 (4A).

<sup>38</sup> Made under s.8A of the *ASIO Act 1979* (Cth): *Attorney- General’s Guidelines in relation to the performance by the Australian Security Intelligence Organisation of its function of obtaining, correlating,*

of Intelligence and Security (IGIS) report.<sup>39</sup> The serious breaches indicate that the Privacy Rule model is a sub-optimal method for restraint and accountability in intelligence collection and dissemination. It is surprising not only that this model has been selected for the ONI Act, but that it is presented as a notable improvement, simply because of the lack of a formal privacy rules structure in the predecessor Office of National Assessments. The background of these related breaches is not, of course, communicated in this advocacy.

The IGIS observed for the ASIO guidelines, that a number of breaches in relation to investigative activity and personal information had occurred, revealing that ‘ASIO’s access to and use of AUSTRAC material identified extensive non-compliance with the requirements of ASIO’s MOU with AUSTRAC and with ASIO internal policy, as well as a potential breach of the AML/CTF Act’.<sup>40</sup> Observations were also made by IGIS in relation to the scheme of written rules under s.15 of the *Intelligence Services Act 2001* (Cth) (ISA Act) regulating the communication and retention of intelligence information by the Australian Secret Intelligence Service (ASIS), the Australian Signals Directorate (ASD) and the Australian Geospatial Intelligence Organisation (AGO).<sup>41</sup>

For ASIS, there was ‘a small number of instances where the Privacy Rules were not applied prior to ASIS reporting on an Australian person or company’.<sup>42</sup> For ASD, ‘several cases uncovered matters of concern’ – inter alia, ASD communication of lawfully intercepted information, but without authorisation to do so, breaching s.63 (1) of the *Telecommunications Interception Act 1979* (Cth) (TIA Act); conducted activity on an individual erroneously presumed to have foreign nationality, not applying the Privacy Rules; breaching s.8 (1) of the ISA Act by producing intelligence on an Australian person without ministerial authorisation; and a further four breaches of section 8 (1) of the ISA Act by producing intelligence on an Australian person without a ministerial authorisation; and breaches of s.7 of the TIA Act involving interceptions by unauthorised persons, or unauthorised interceptions of certain communications.<sup>43</sup> For AGO, no issues of concern were identified in relation to the production of intelligence on Australian persons,<sup>44</sup> or

*evaluating and communicating intelligence relevant to security* (including politically motivated violence) 17 September 2007.

<sup>39</sup> Inspector General of Intelligence and Security *2017-2018 Annual Report*, 22-43 (hereafter *IGIS 2017-2018 Annual Report*); Karen Middleton, ‘Turning on the monitors’ *Saturday Paper* (Melbourne), November 3-6 2018, 11.

<sup>40</sup> *IGIS 2017-2018 Annual Report*, 43.

<sup>41</sup> See also the respective definitions for ASIS, ASD and AGO in s.3 of the *Intelligence Services Act 2001* (Cth).

<sup>42</sup> *IGIS 2017-2018 Annual Report*, above n 39, 31.

<sup>43</sup> *Ibid*, 35-36.

<sup>44</sup> *Ibid*, 38.

for compliance with privacy rules.<sup>45</sup> However, the serious breaches indicate that the Privacy Rule model is a sub-optimal method for restraint and accountability in intelligence collection and dissemination.

Further, the Privacy Rules model should also be assessed against more recent developments. Bureaucratic resistance has emerged in relation to proposals for an extended PJCIS mandate to review operational matters of intelligence agencies, such as ONI,<sup>46</sup> to provide additional oversight on the collection, production and communication of intelligence on Australian persons. This resistance may be revelatory of some broader cultural concerns underpinning the IGIS identified Privacy Rule and ASIO guideline breaches. It may indicate some attitudinal shortcomings or perceptions in intelligence agencies in how the Privacy Rules model should be applied and administered.

#### IV LINKING THE ESTABLISHMENT OF THE ONI TO THE COMPREHENSIVE REVIEW OF THE LEGAL FRAMEWORK OF THE NATIONAL INTELLIGENCE COMMUNITY

The preceding outline of the essential features of the ONI Act confirms its reformative content through a significantly expanded co-ordination of intelligence collection and dissemination, with a liberalised reach over domestic matters and Australian citizens. The preparatory legislative framework of the ONI Act ultimately is adaptable and accommodative of any part of relevant prospective recommendations of the Comprehensive Review which are then proposed to be legislatively implemented.

These essential features of the ONI Act, as outlined, provide a legislative interface with the legislated powers of members of the NIC. The overarching task of the Comprehensive Review is to ‘comprehensively examine the effectiveness of the legislative framework for the National Intelligence Community and prepare findings and recommendations for any reforms’.<sup>47</sup> This necessarily involves consideration of the legislation of the six intelligence agencies<sup>48</sup> and the four organisations with an intelligence role or function, to the extent that legislation

<sup>45</sup> Ibid, 39.

<sup>46</sup> Sally Whyte, ‘Parliamentary oversight of intelligence agencies resisted by departments’ *Sydney Morning Herald* 16 October 2018; ‘MPs’ expanded oversight of spy agencies under cloud’ *Sydney Morning Herald* 19 May 2018; Commonwealth, *Parliamentary Debates* Senate 29 November 2018, 54 (Rex Patrick).

<sup>47</sup> *Comprehensive Review, Terms of Reference*: < <https://www.ag.gov.au/NationalSecurity/Documents/Terms-of-reference-comprehensive-review.pdf> > (2 September 2019).

<sup>48</sup> ASD, ASIO, ASIS, AGO and DIO (Defence Intelligence Organisation) and the Australian Criminal Intelligence Commission: above n 2.

relates to that role or function.<sup>49</sup> However, the terms of review make clear that the legislation which may be considered is not specifically limited, and might extend to related legislation.<sup>50</sup>

The Comprehensive Review also includes more acutely focused legislative references – whether legislative distinctions should be maintained between foreign intelligence and security intelligence, and intelligence collection onshore and offshore; whether a common legislated intelligence framework should be adopted for agencies; the canvassing of a range of potential improvements to the legislative framework of the national intelligence community in particular areas, subjects or themes.<sup>51</sup> These potential improvements include co-ordination, control and direction of intelligence functions; co-operation, liaison and sharing amongst NIC agencies, and with other Australian and foreign governments; support for NIC member intelligence purposes, functions administration and staffing; as well as providing for transparent accountability and oversight across NIC agencies. It can also consider any proposal for legislative reform.<sup>52</sup> Again, recommendations responding to these terms of reference will fall within the roles assigned to the ONI, and, if legislatively adopted, further extend its newly legislated roles of co-ordination and integration.

## V COMPREHENDING THE BROADER CONTEXT OF THESE INTELLIGENCE DEVELOPMENTS

The likely orientation of Comprehensive Review recommendations in relation to these legislative issues is reasonably predictable, following signature characteristics in the evolution of national security laws from 2001. This evolution points towards a slow, incremental realisation of a national security state, by adaption and migration of intelligence and terrorism laws to broader purposes. Australia has serially enacted many far reaching national security laws since 2001.<sup>53</sup> These laws often have been expedited through a legislative urgency principle,<sup>54</sup> forestalling full review of laws and their implications, including

<sup>49</sup> Austrac, AFP, Department of Home Affairs and the Defence Department (other than AGIO or DIO), above n 2.

<sup>50</sup> The *Surveillance Devices Act 2004* (Cth), the *Telecommunications (Interception and Access) Act 1979* (Cth), the *National Security Information Act 2004* (Cth) the *Inspector General of Intelligence and Security Act 1986* (Cth) and the *Independent National Security Legislation Monitor Act 2010* (Cth) are mentioned.

<sup>51</sup> *Comprehensive Review*, Terms of Reference, above n 47.

<sup>52</sup> *Ibid.*

<sup>53</sup> George Williams, 'A Decade of Australian Anti-Terror Laws' (2011) 35 *Melbourne University Law Review* 1136; Rebecca Ananian-Welsh and George Williams, 'The New Terrorists: The Normalisation and Spread of Anti-Terror Laws in Australia' (2014) 38 *Melbourne University Law Review* 362, 365 and Kent Roach, *The 9/11 Effect: Comparative Counter Terrorism* (Cambridge University Press, 2011), 309-310.

<sup>54</sup> For example, Andrew Lynch, 'Legislating Anti-Terrorism: Observations on Form and Process' in Victor V Ramraj et al (eds) *Global Anti-Terrorism Law and Policy* (Cambridge University Press 2<sup>nd</sup> Ed 2012),

complicated interactions with related legislation. The legacy of legislative urgency, and piecemeal, disconnected laws has serendipitously and ironically provided a rationale for the Comprehensive Review, as ‘evolving threats to Australia’s security require more enduring and better integrated intelligence and domestic security arrangements’.<sup>55</sup>

Further, the idea of a national security community, covering a broad sweep of government agencies, with a desirable aspiration of intelligence sharing and interconnectedness, was previously advanced by the Prime Minister’s department<sup>56</sup> and its then national security adviser.<sup>57</sup> It is no coincidence that the ONI sits within the Prime Minister’s ministerial responsibilities.

Relevant also is the Commonwealth and State political rhetoric around the theme of safety and security as a first priority of government.<sup>58</sup> In the absence of a legislated charter of rights to reconcile competing legal and public policy through principles of legality, necessity and proportionality, and comparative jurisprudence, safety and security has increasingly materialised through laws accumulatively eroding rights and transforming democratic structures and processes<sup>59</sup> along more perfunctory and authoritarian lines. A dismantling of protective intelligence separations, as between foreign and domestic intelligence, Australian and overseas citizens, and legislative tasking of intelligence roles into discrete intelligence agencies under the control of different ministers, as contemplated in present and potential developments, aligns with these trends.

151; Andrew Lynch, ‘Legislating with Urgency – The Enactment of the Anti-Terrorism Act (No 1) 2015’ (2006) *Melbourne University Law Review* 747; Anthony Reilly, ‘The Processes and Consequences of Counter-Terrorism Law Reform in Australia : 2001-2005’ (2007) 10 *Flinders Journal of Law Reform* 81, 91-95; Greg Carne, ‘Prevent Detain Control and Order?: Legislative Process and Executive Outcomes in enacting the Anti-Terrorism Act (No 2) 2005 (Cth)’ (2007) 10 *Flinders Journal of Law Reform* 17, 49-50.

<sup>55</sup> Joint Media Release with the Prime Minister, Attorney-General and Minister for Justice, ‘A strong and secure Australia’ 18 July 2017 < <https://minister.homeaffairs.gov.au/peterdutton/2017/Pages/a-strong-and-secure-australia.aspx> > (2 September 2019).

<sup>56</sup> Department of Prime Minister and Cabinet *National Security Information Environment Roadmap: 2020 Vision* (2010); Greg Carne, ‘Beyond Terrorism: Enlarging The National Security Footprint Through the Telecommunications Interception and Intelligence Services Legislation Amendment Act 2011 (Cth)’ (2011) 13 *Flinders Law Journal* 177, 209-210.

<sup>57</sup> Mr Duncan Lewis, AO DSC CSC, recently retired Director General of Security.

<sup>58</sup> Prime Minister ‘Address to the Sydney Institute’ 15 December 2018, Sydney (Scott Morrison) < <https://www.pm.gov.au/media/address-sydney-institute> > (as at 2 September 2019); Commonwealth *Parliamentary Debates* House of Representatives 24 November 2015, 13483-6 (Malcolm Turnbull); Commonwealth *Parliamentary Debates* House of Representatives 22 September 2014, 9957 (Tony Abbott).

<sup>59</sup> See George Williams, ‘The Legal Assault on Australian Democracy’ (2015) 236 *Ethos* 18; George Williams ‘The Legal Legacy of the ‘War on Terror’ (2013) 12 *Macquarie Law Journal* 3; Greg Carne, ‘Reviewing The Reviewer: The Role Of The Parliamentary Joint Committee On Intelligence and Security – Constructing Or Constricting Terrorism Law Review?’ (2017) 43 *Monash University Law Review* 334, 338.

This is also consistent with the presumption that executive discretion is an adequate restraint in the exercise of far reaching intelligence powers, a preferred alternative to a human rights integrated approach. Liberalising the collection, processing and distribution of intelligence on Australian citizens, rationalised through contemporary threats and technologies, drives such reforms which encourage further accretions of executive power.

Justification for the establishment of the ONI as the first stage of intelligence integration also lies with aligning the leadership role of the ONI for the NIC with the unrealised aspiration of the Hope Royal Commission that the ONA would assume such a role.<sup>60</sup> Comparisons from the Hope Royal Commissions have been strategically invoked to lend legitimacy to the current intelligence project.<sup>61</sup> In reality, a major recommendation of the Hope Royal Commission,<sup>62</sup> subsequently implemented, was the removal of the concept of subversion from ASIO's legislative mandate, replaced with the more precisely calibrated concept of politically motivated violence.<sup>63</sup> The ONI's vastly increased open source intelligence gathering and dissemination powers, relating to domestic matters and Australian citizens, signals a potential reinvention of a modern version of subversion.<sup>64</sup> Much will turn upon discretions: including agency priorities and how stringently the Privacy Rules are drafted, and applied and the ex post facto review of their application by IGIS.<sup>65</sup>

Recently enacted legislation has made quantum leaps normalising and institutionalising mass intelligence accumulation and surveillance: information sharing and co-operation amongst intelligence, law enforcement and other government agencies,<sup>66</sup> meta-data retention and access,<sup>67</sup> access to data encryption codes and passwords,<sup>68</sup> foreign agent<sup>69</sup> and foreign influence<sup>70</sup> legislation and

<sup>60</sup> *Second Hope Report General Report* (1984), above n 8, 19, 22; Geoff Miller, 'From ONA to ONI: Getting closer to the original plan' Home Affairs and Intelligence Review *The Interpreter*, Lowy Institute, 24 July 2017.

<sup>61</sup> Commonwealth, *Parliamentary Debates* House of Representatives 28 June 2018, 7 (Christian Porter).

<sup>62</sup> *Second Hope Report Report on the Australian Security Intelligence Organization* (1984), (AGPS, Canberra, 1985) Chapter 4, 45-84.

<sup>63</sup> *Ibid*, Chapter 5, 86-112; *ASIO Act 1979* (Cth) s.4 definitions of 'politically motivated violence' and 'security' as including at (a) (iii) 'politically motivated violence'; s.17 'functions of the organisation' as including those relating to 'security'.

<sup>64</sup> See Karen Middleton, 'New domestic intelligence powers' *Saturday Paper* (Melbourne) 22 September 2018.

<sup>65</sup> For an indication of the current IGIS operating principles relevant to IGIS review, see Inspector General of Intelligence and Security *Legal Framework of the National Intelligence Community Submission to the Comprehensive Review* 7 September 2018, 3-8.

<sup>66</sup> *Telecommunications Interception and Intelligence Services Legislation Amendment Act 2011* (Cth).

<sup>67</sup> *Telecommunications (Interception and Access) Amendment (Data Retention) Act 2014* (Cth).

<sup>68</sup> *Telecommunications and Other Legislation Amendment (Assistance and Access) Act 2018* (Cth).

<sup>69</sup> *National Security Legislation Amendment (Espionage and Foreign Interference) Act 2018* (Cth).

<sup>70</sup> *Foreign Influence Transparency Scheme Act 2018* (Cth).

facial recognition technology legislation.<sup>71</sup> These laws cumulatively provide the framework for potential mass intelligence gathering and dissemination. The ONI Act and the Comprehensive Review are therefore complementary to a larger, evolving, and potentially transformative Australian intelligence project. Part of this project migrates the model of exceptional terrorism law powers into an intelligence mainstream, by broadening agency roles, interoperability and normalisation, in intelligence gathering and exchange.

The ONI Act and the Comprehensive Review terms of reference also reflect a managerial and bureaucratic context and ethos, invoking corporatist public service concepts of leadership and enterprise management.<sup>72</sup> For the ONI, this involves ‘a focus on NIC-wide governance, capability, coordination, integration and evaluation’.<sup>73</sup> There will be a realisation that all contributory agencies will accrue status, resources, efficiencies and influence through a co-operative, collectivist approach constituting an intelligence community. Expressed differently, there is an institutional imperative or self-interest of agencies to be seen to positively contribute to a new, co-ordinated intelligence structure.

Parallel to this has been the bureaucratisation of some of the intelligence agencies and agencies with an intelligence role or function under the ministerial responsibility of the Home Affairs department,<sup>74</sup> in turn ultimately subject to the ONI Act powers.

## VI CONDUCTING THE COMPREHENSIVE REVIEW – FURTHER LEGITIMATE CONCERNS

The Hope Royal Commissions have been severally raised in relation to the present legislative reforms and review.<sup>75</sup> However, there are distinguishing features of the genealogy and orientation of the forms of review, pointing to different orientations and likely outcomes.

<sup>71</sup> *Identity Matching Services Bill 2019* (Cth); *Australian Passports Amendment (Identity Matching Services) Bill 2019* (Cth); Special Meeting Of the Council of Australian Governments on Counter-Terrorism: *National Facial Biometric Matching Capability* COAG Communique 5 October 2017.

<sup>72</sup> See OIC ‘Enterprise management’: ‘ONI’s enterprise management role underpins our leadership, coordination and guidance functions for the NIC. Enterprise management involves a focus on NIC –wide governance, capability, coordination, interpretation and evaluation’: < <https://www.oni.gov.au/enterprise-management> > (as at 2 September 2019)

<sup>73</sup> *Ibid.*

<sup>74</sup> Paddy Gourley, ‘The folly of the Coalition’s Home Affairs super ministry shake-up’ *Canberra Times* 30 July 2017; Geoff Kitney, ‘Politics and policy meet in new Home Affairs Department,’ Home Affairs and Intelligence Review *The Interpreter* Lowy Institute 18 July 2017; Alan Dupont, ‘Home Affairs change driven by manifest need’ Home Affairs and Intelligence Review *The Interpreter* Lowy Institute 26 July 2017.

<sup>75</sup> *2017 Review*, above n 5, 6; Commonwealth, *Parliamentary Debates* House of Representatives 28 June 2018, 7 (Christian Porter).

The enactment of the ONI Act and subsequent legislative review fall squarely within a continuity of intelligence reviews, with a strong pro-intelligence and security orientation. The 2017 Review<sup>76</sup> is central first in framing the new OIC legislation<sup>77</sup> and secondly in recommending NIC legislative framework review.<sup>78</sup> The 2017 Review has a more liberal recommendation than the eventual terms of reference for the Comprehensive Review:

A comprehensive review of the Acts governing Australia's intelligence community be undertaken to ensure agencies operate under a legislative framework which is clear, coherent and *contains consistent protections for Australians*. This review should be carried out by an eminent and suitably qualified individual or *number of individuals*...<sup>79</sup>

This recommendation has a larger scope than in the Comprehensive Review terms of reference for checks and balances on intelligence activities, as well as a broader reviewer membership consistent with a more integrated conception of intelligence and human rights. The Comprehensive Review terms of reference also relevantly list 'that the legislative framework for the NIC...provides for accountability and oversight that is transparent and as consistent across the NIC agencies as is practicably feasible'.<sup>80</sup> This is listed last as one of the possible improvements to the NIC.

The real concern is that whilst the Comprehensive Review is likely to recommend harmonisation of intelligence activities across agencies (which may encourage a lowest common denominator of legal standards) substantially increasing executive power, it operates within familiar reference points of executive discretion, a privacy rules model, and an auditing and ex post facto IGIS oversight model, all vulnerable to being overwhelmed by the sheer dimensions of the likely recommended changes.

Other indicators locate the Comprehensive Review squarely within the parameters of other intelligence reviews. These include the background of the reviewers,<sup>81</sup> the list of persons interviewed and interlocutors,<sup>82</sup> and the submissions (organisational and individual) received<sup>83</sup> – each displays a predominately security,

<sup>76</sup> 2017 Review, above n 5.

<sup>77</sup> Ibid, Recommendations 1, 2, 3, 4 and 5.

<sup>78</sup> Ibid, Recommendation 15.

<sup>79</sup> Ibid, (emphasis added).

<sup>80</sup> *Comprehensive Review* Terms of Reference, above n 47.

<sup>81</sup> See Prime Minister Media Release 'Independent Intelligence Review' 7 November 2016 (Malcolm Turnbull)

<<https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressrel%2F4922875%22>> (as at 2 September 2019) for the public service and other occupational backgrounds of Michael L'Estrange AO and Stephen Merchant PSM.

<sup>82</sup> 2017 Review, above n 5, 128-130.

<sup>83</sup> Ibid, 131.

intelligence and executive background, not democratically balanced by more broadly based membership, witnesses and submissions. Likewise, the 2017 Review, shaping as it does the ONI creation and the conduct of the Comprehensive Review, is properly seen as the successor to both the 2004 Review<sup>84</sup> and the 2011 Review.<sup>85</sup>

In contrast, the Hope Royal Commissions were precisely that – Royal Commissions with the full suite of royal commission powers,<sup>86</sup> Justice Hope being a distinguished judge of the NSW Supreme Court and Court of Appeal and a former president of the NSW Council of Civil Liberties. The present reviewer for the Comprehensive Review is Dennis Richardson AO, a former Secretary of the Department of Defence, Department of Foreign Affairs and Trade, Ambassador to the United States and Director General of ASIO.<sup>87</sup> This is a highly distinguished curriculum vitae, but it clearly represents a particular perspective – ‘an extensive career in the Australian public service, especially in the national security, defence and foreign affairs environment’.<sup>88</sup> It will be unsurprising if the Comprehensive Review recommendations support a complementary substantial increase in executive power by dismantling intelligence function separations and facilitating much greater intelligence reach and interchange amongst the NIC.

No public hearings are announced for the Comprehensive Review,<sup>89</sup> and it is also advised that ‘submissions received by the review will not be published’.<sup>90</sup> This

<sup>84</sup> 2004 Review, above n 7.

<sup>85</sup> 2011 Review, above n 6.

<sup>86</sup> The *First Hope Royal Commission* (1977) investigated the activities of ASIO, ASIS DSD and DIO – see Copy of Letters Patent, *First Report*, above n 9 Appendix 1A, 14. The *Second Hope Royal Commission* (1984) reviewed, inter alia, ASIO’s performance since the earlier inquiry – Letters Patent, *General Report*, above n 8 Appendix A, 35. For a summary of the activities of the Hope Royal Commissions on Intelligence and Security, see Aidan Parkes, ‘Lessons through Reform: Australia’s Security Intelligence’ (2017) 19 *International Journal of Intelligence, Security and Public Affairs* 157, 160-167.

<sup>87</sup> ‘Review of National Intelligence Legislation’, above n 3.

<sup>88</sup> *Ibid.*

<sup>89</sup> This is reflected on the Comprehensive Review web page which omits listing of invited witness public hearings and transcripts of evidence. This approach should be compared and contrasted with the practices of the Commonwealth Parliamentary Joint Committee on Intelligence and Security in conducting numerous national security law inquiries < [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Intelligence\\_and\\_Security/Completed\\_inquiries/45th\\_Parliament\\_completed\\_inquiries](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Intelligence_and_Security/Completed_inquiries/45th_Parliament_completed_inquiries) > (as at 2 September 2019).

<sup>90</sup> Attorney General’s Department ‘Comprehensive review of the legal framework governing the National Intelligence Community’, above n 1. Some organisations have independently made their submissions available: See Law Council of Australia *Comprehensive review of the legal framework governing the National Intelligence Community* 28 November 2019 < <https://www.lawcouncil.asn.au/resources/submissions/comprehensive-review-of-the-legal-framework-governing-the-national-intelligence-community> > (as at 2 September 2019) and Human Rights Law Centre *A dangerous lack of accountability and transparency in Australia’s national intelligence organisations* Submission to the Comprehensive Review- Legal Framework of the National Intelligence Community 12 December 2018 (with assistance from Digital Rights Watch) < <https://www.hrlc.org.au/submissions/2018/12/20/submission-a-dangerous-lack-of-accountability-and-transparency-in-australias-national-intelligence-organisations> > (as at 2 September 2019) and see

contracts democratic participation, interaction, deliberation, scrutiny and contestation, particularly for law professional and academic expertise external to the security and intelligence community. Precedents exist, ignored here, for more broadly based reviews advantageously drawing together different expertise and more likely providing greater balance in their recommendations – such as the Sheller Committee<sup>91</sup> and the Whealy Committee.<sup>92</sup> The terms of reference and the appointment of only one reviewer represent a missed opportunity to provide a genuinely comprehensive review that these two earlier reviews achieved.

## VII CONCLUSION

The ONI Act and the Comprehensive Review are the latest in a stream of legislative developments around intelligence and national security since 2001. On this occasion, the prospective qualitative change to these legal arrangements is accelerated and exponential. The objectives of harmonisation of intelligence roles and co-ordination, co-operation and sharing of information between agencies lean towards a permeation and horizontalisation of intelligence into the lives of everyday Australians. The measures signal an increasing securitisation of the citizen and state relationship, mirrored in the creation of the Home Affairs department and related advocacy,<sup>93</sup> encompassing several of the relevant agencies. This generalisation of the collection, exchange and use of domestic intelligence amongst relevant agencies is also properly seen as directly related to broader developments in the statutory conferral of discretion and setting of interpretative and priority matters in specific national security contexts.<sup>94</sup>

The recently legislated and likely proposed intelligence reforms lean towards a subtle reconstruction of Australian governance through an increasing elevation of security matters in the Australian polity and integration of intelligence with

Inspector General of Intelligence and Security *Legal Framework of the National Intelligence Community Submission to the Comprehensive Review*, (unclassified version) above n 65, 3-8

<sup>91</sup> Commonwealth of Australia *Report of the Security Legislation Review Committee* (June 2006). The Committee was established under the *Security Legislation Amendment (Terrorism) Act 2002* (Cth) s.4 (1) as amended by the *Criminal Code Amendment (Terrorism) Act 2003* (Cth). It was chaired by the Hon Simon Sheller AO QC, a retired New South Wales Supreme Court judge, and comprised seven other members with strong, cross-sectional senior legal accountability framework and expertise backgrounds

<sup>92</sup> Australian Government Council of Australian Governments *Review of Counter Terrorism Legislation* (2013). The COAG Review Committee was chaired by Hon Anthony Whealy QC, a retired New South Wales Court of Appeal judge, with other members representing very broad cross-institutional legal accountability and institutional membership expertise.

<sup>93</sup> See Middleton, above n 39, 10; James Button, 'The minister, Pezzullo and the demise of Immigration' *The Monthly* February 2018; Michael Pezzullo, 'Keynote Address – Data Analysis, privacy and National Security Research' Women in National Security Conference Power Security and Change, Canberra, 25 October 2018; Michael Pezzullo 'Prosper the Commonwealth: The Public Service and Nationhood' Speech to the Institute of Public Administration Australia (ACT Division), Canberra, 30 October 2018.

<sup>94</sup> Michelle Grattan, 'Grattan on Friday: In Conversation with ASIO Chief David Irvine' *The Conversation* 15 August 2014; David Irvine, 'Evolution of Terrorism – and What It Means for Australia' (Speech delivered at the Australian Institute of International Affairs), Sydney, 12 August 2014.

government decision making in even routine and mundane transactions. This may well involve loosening or eliminating hard won legislative safeguards instituted through parliamentary committee and independent review processes, seen now as unhelpful to an enhanced domestic intelligence role, but justified by the government articulations of a first priority of keeping Australians safe and secure.