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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

# OFFICE OF NATIONAL INTELLIGENCE BILL 2018

EXPLANATORY MEMORANDUM

(Circulated by authority of the Prime Minister,
the Honourable Malcolm Turnbull MP)

# OFFICE OF NATIONAL INTELLIGENCE BILL 2018

## GENERAL OUTLINE

1. The Office of National Intelligence Bill 2018 (the Bill) implements the recommendation of the *2017 Independent Intelligence Review* (the Review), as endorsed by Government, to establish an Office of National Intelligence (ONI) as an independent statutory agency within the Prime Minister's portfolio reporting directly to the Prime Minister. The Review recommended that the role, functions and staff of the Office of National Assessments (ONA) be subsumed into ONI.

2. Consequential and transitional matters in connection with the Bill are dealt with in the *Office of National Intelligence (Consequential and Transitional Provisions) Bill 2018* (the C&T Bill).

### *The 2017 Independent Intelligence Review*

3. On 7 November 2016, the Prime Minister, the Hon Malcolm Turnbull MP, announced that Mr Michael L'Estrange AO and Mr Stephen Merchant PSM would jointly undertake an independent review of the Australian Intelligence Community. The timing of the review was consistent with the 2011 Independent Review of the Intelligence Community recommendation that periodic review occur every five years or so.

4. On 18 July 2017, the Prime Minister released the unclassified version of the Review report. The Review made 23 overarching recommendations in relation to the structural, legislation and oversight architecture of the intelligence community, including the establishment of ONI as an independent statutory agency within the Prime Minister's portfolio.

### *Brief History of ONA*

5. ONA was established as a result of Australia's first Royal Commission into its intelligence and security agencies, conducted by Justice Robert Hope from 1974 to 1977.

6. Hope's key recommendation was that Australia establish an independent agency to provide the Prime Minister with intelligence assessments on political, strategic and economic issues. This agency was also to 'assume responsibilities for the leadership and co-ordination of the Australian intelligence community as a whole'.

7. ONA was established by the *Office of National Assessments Act 1977* (ONA Act) and began operating in February 1978. As part of its establishment, ONA assumed most of the foreign intelligence assessment functions of Defence's then Joint Intelligence Organisation.

8. In his second Royal Commission (1983-84), Justice Hope recognised ONA had proven itself to be a 'valuable source of independent assessment for the Government'.

9. However, successive intelligence reviews recognised, and tried to correct, two important shortcomings in relation to ONA:

a) first, ONA never had the analytical resources it needed to cover its ever broadening assessment remit;

b) and, second, it never had the authority or resources, despite its legislated mandate, to properly coordinate the Australian intelligence community, set national intelligence requirements and evaluate agencies' efforts against them.

10. Justice Hope's second Commission acknowledged ONA's need for more resources and stronger structures to carry out its coordination function, recommending that a National Intelligence Committee be set up to discuss intelligence priorities and requirements. Mr Philip Flood's 2004 intelligence review recommended ONA double in size from 70 to 140 people and that its coordination and evaluation mandate be strengthened.

11. However, the 2017 Review recognised that these incremental changes have not been sufficient to provide ONA with the resources and powers required to meet Government's needs for a better coordinated and more integrated intelligence community.

12. The Review also considered that the changing nature of Australia's security environment and the blurring lines between foreign and security intelligence and between intelligence and law enforcement necessitated an integrated intelligence enterprise.

13. The Review suggested that the National Intelligence Community for these purposes include the traditional Australian Intelligence Community (AIC) - (ONA, Australian Security Intelligence Organisation (ASIO), Australian Secret Intelligence Service (ASIS), Defence Intelligence Organisation (DIO), Australian Signals Directorate (ASD) and the Australian Geospatial-Intelligence Organisation (AGO)) as well as the intelligence functions of the former Department of Immigration and Border Protection (now the Department of Home Affairs), the Australian Federal Police (AFP), the Australian Criminal Intelligence Commission (ACIC) and the Australian Transaction Reports and Analysis Centre (AUSTRAC).

***Proposed arrangements***

14. This Bill continues the former ONA as ONI. Specifically the Bill implements the recommendations of the Review in relation to ONI, including by the following:

a) providing that ONI's functions include to lead the national intelligence community (NIC) which will, for the purposes of the Bill, include the traditional AIC, the ACIC in its entirety, and the intelligence related activities and capabilities of the Department of Home Affairs, the AFP, AUSTRAC and the Department of Defence;

b) providing that ONI's assessment functions extend beyond ONA's existing role to include matters of political, strategic or economic significance to Australia without an international aspect, to support the performance of any of their other functions or complement the work of the NIC;

c) extending ONA's existing evaluation role beyond foreign intelligence activities to include the intelligence activities and capabilities of the NIC;

d) providing that ONI's functions include providing advice to the Prime Minister on national intelligence priorities, requirements and capabilities and matters relating to the NIC more generally;

e) providing ONI with a specific function of collecting, interpreting and disseminating information relating to matters of political, strategic or economic significance to Australia that is accessible to any section of the public;

f) requiring ONI to perform its function of leading the NIC in ways that promote the appropriate integration of the intelligence capabilities of the NIC; and

g) positioning the Director-General National Intelligence (Director-General) as the head of the NIC, whose responsibilities include keeping the Prime Minister informed on matters relating to the NIC.

15. Consistent with the Review, the Bill makes clear that neither ONI nor the Director-General will be able to direct the operational activities of other agencies or inappropriately impact or encroach on their functions, powers and responsibilities.

16. The Bill contains a number of mechanisms to support ONI and the Director-General in the performance of their functions, including provisions facilitating ONI's access to information and enabling the Director-General to give directions and issue guidelines to be followed by the NIC or particular agencies within the community.

17. The Bill also makes provision for the continuance of the National Assessments Board and provides for other matters such as secrecy obligations and privacy rules to be made to protect the collection, communication and handling of identifiable information.

**FINANCIAL IMPACT STATEMENT**

18. There is nil financial impact associated with the Bill.

## STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

*Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011*

### Office of National Intelligence Bill 2018

1. This Bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

### Overview of the Bill

2. This Bill continues the former ONA as ONI. Specifically the Bill implements the recommendations of the Review in relation to ONI, including by the following:

a) providing that ONI's functions include to lead the national intelligence community (NIC) which will, for the purposes of the Bill, include the traditional AIC, the ACIC in its entirety, and the intelligence related activities and capabilities of the Department of Home Affairs, the Department of Defence, the AFP and AUSTRAC.

b) providing that ONI's assessment functions extend beyond ONA's existing role to include matters of political, strategic or economic significance to Australia without an international aspect, to support the performance of any of their other functions or complement the work of the NIC;

c) extending ONA's existing evaluation role beyond foreign intelligence activities to include the intelligence activities and capabilities of the NIC;

d) providing that ONI's functions include providing advice to the Prime Minister on national intelligence priorities, requirements and capabilities and matters relating to the NIC more generally;

e) providing ONI with a specific function of collecting, interpreting and disseminating information relating to matters of political, strategic or economic significance to Australia that is accessible to any section of the public;

f) requiring ONI to perform its function of leading the NIC in ways that promote the appropriate integration of the intelligence capabilities of the NIC; and

g) positioning the Director-General National Intelligence (Director-General) as the head of the NIC, whose responsibilities include keeping the Prime Minister informed on matters relating to the NIC.

3. Consistent with the Review, the Bill makes clear that neither ONI nor the Director-General will be able to direct the operational activities of other agencies or inappropriately impact or encroach on their functions, powers and responsibilities.

4. The Bill contains a number of mechanisms to support ONI and the Director-General in the performance of their functions, including provisions facilitating ONI's access to information and enabling the Director-General to give directions and issue guidelines to be followed by the NIC or particular agencies within the community.

5. The Bill also makes provision for the continuance of the National Assessments Board and provides for other matters such as secrecy obligations and privacy rules to be made to protect the collection, communication and handling of identifiable information.

**Human rights implications**

6. This Bill engages the following rights:

a. the right of non-discrimination in Article 2(1) of the International Covenant on Civil and Political Rights (ICCPR),

b. the right to privacy in Article 17 of the ICCPR,

c. the right to freedom of expression in Article 19(2) of the ICCPR,

d. the right to liberty and security of the person in Article 9(1) of the ICCPR,

e. the right to freedom from arbitrary detention in Article 9 of the ICCPR,

f. the prohibition on cruel, inhuman or degrading treatment or punishment in Article 7 of the ICCPR and the Convention Against Torture,

g. the right to freedom of movement in Article 12 of the ICCPR,

h. the right to be tried without undue delay in Article 14(3)(c) of the ICCPR, and

i. the right to presumption of innocence in Article 14(2) of the ICCPR.

***Right to non-discrimination – Article 2(1) of the ICCPR***

7. Article 2(1) of the ICCPR requires States to respect and ensure to all individuals within their territory and subject to their jurisdiction the rights recognised in the ICCPR, 'without distinction of any kind' and prohibits discrimination on various grounds, including nationality.

8. Clause 53 of the Bill requires the Prime Minister to make privacy rules regarding 'identifiable information', which means information about an Australian citizen or permanent resident. This engages the right of non-discrimination as the privacy rules are only required to apply to Australian citizens and permanent residents, rather than all individuals within Australian territory or subject to Australian jurisdiction. However, while the Prime Minister must make rules regarding identifiable information, the provision does not limit the matters in relation to which the Prime Minister may make rules. It remains open to the Prime Minister to extend these rules, or to make additional rules, to protect the personal information of others, including foreign nationals. However, for the reasons outlined below, the requirement to do so relates only to Australians.

9. The aim of this distinction is to achieve a legitimate purpose, which is to provide protections for Australians while facilitating the performance of ONI's functions in the interests of national security and for Australia's economic, strategic and political benefit. The discrimination in this case promotes the rights of Australians, rather than establishing a way to remove rights or deprive any other group of protections under international human rights law.

10. Special protection for Australians is a long-standing, core principle of accountability for intelligence agencies, which was recognised by the Hope Royal Commissions and acknowledged as a relevant and reasonable principle of intelligence law by the 2017 Review. The Review identified [at 2.22] that there is "an emphasis on the special rights to privacy and civil liberties of Australian persons" and that "the privileging of Australian persons in the mandates of particular Australian

intelligence agencies and in Australian law remains strong." This is especially so in relation to foreign intelligence agencies. While ONI's functions will have domestic aspects, the agency will remain primarily focused on international matters, with a heavy reliance on intelligence provided by foreign intelligence collection agencies.

11. The provisions are reasonable, necessary and proportionate to achieve these objectives. All NIC agencies are subject to strict controls regarding when they are able to collect personal information. When this information is passed to ONI, ONI will be subject to strict secrecy and information handling provisions that provide strong protections for all of its information, including personal information of Australians and non-Australians. These protections are in many ways stronger than other information protection mechanisms, including those available under the *Privacy Act 1988* (Privacy Act).

12. Agencies that will be providing information to ONI include foreign intelligence collection agencies whose legislation and rules distinguish between Australians and non-Australians. Extending the privacy rules to all individuals within Australia's jurisdiction would impose a disproportionate burden on ONI by requiring ONI to identify whether a foreign national is currently in Australia, and therefore subject to stricter privacy obligations, in circumstances where the agency providing the information was under no obligation to make such a distinction and the majority of the information was collected outside Australian territory. ONI requires access to all of this information in order to perform its functions.

13. As such, these provisions do not impermissibly breach the right to freedom from discrimination, as they provide additional protections for Australians that are reasonable, necessary and proportionate to achieve a legitimate objective.

***Right to privacy – Article 17 of the ICCPR***

14. Article 17 of the ICCPR prohibits arbitrary or unlawful interference with an individual's privacy, family, home or correspondence. Any provisions of a Bill that permit the disclosure of personal information will engage this right to privacy.

15. The right to privacy under Article 17 can be permissibly limited in order to achieve a legitimate objective, where the limitations are lawful and not arbitrary. In order for an interference with the right to privacy to be permissible, the interference must be authorised by law, be for a reason consistent with the ICCPR and be reasonable in the particular circumstances. The United Nations Human Rights Committee has interpreted the requirement of 'reasonableness' to imply that any interference with privacy must be proportionate to a legitimate end and be necessary in the circumstances of any given case.

16. There are four ways in which the establishment of ONI in accordance with the ONI Bill has the potential to impact on the right to privacy:

a. ONI will be established with broad statutory functions, including a function of collecting open source intelligence, and can therefore be expected to collect and use more information, including more personal information, than ONA;

b. the ONI Bill makes provision for ONI to gather, and for other government agencies to provide, information, and imposes obligations on ONI with regard to the use and protection of information provided to it;

c. the ONI Bill contains secrecy provisions restricting the communication of ONI information; and

d. the ONI Bill provides for the making of, and ONI's compliance with, privacy rules.

*Broader statutory functions*

17. The establishment of ONI with broad functions, including the expansion of ONI's assessment function to include assembling, correlating and analysing information in relation to non-international matters of political, strategic or economic significance to Australia (paragraph 7(1)(d)), will limit the right to privacy in Article 17, as it provides for ONI to use and disclose personal information in the performance of these functions. ONI's open source function in paragraph 7(1)(g) also engages the right to privacy by recognising ONI's ability to collect information that is available to the public, including personal information.

18. ONI's functions are directed at two legitimate objectives: firstly, to ensure national security, by collecting, interpreting and disseminating open source intelligence on matters of significance to Australia, and by promoting the collective performance of the NIC agencies through its leadership and enterprise management functions; and secondly, to promote well-informed and rigorous policy making by the Australian government through preparing and communicating assessments on matters of significance.

19. The limitation on the right to privacy is not arbitrary, as it is reasonable, necessary and proportionate to achieve these objectives. The Review considered establishment of ONI with strong enterprise management and assessment functions was necessary to transform Australia's world-class intelligence agencies into a world-class intelligence community. Unlike other NIC agencies, ONI has no special powers to collect intelligence (such as the ability to obtain warrants or conduct compulsory questioning). The powers given to ONI to perform its functions, considered below and in the explanatory materials to the C&T Bill, go no further than is reasonable, necessary and proportionate to achieve the legitimate objectives for which ONI is being established.

*New information-gathering powers with obligations on ONI regarding use and protection of information*

20. The introduction of provisions enabling ONI to seek information from Commonwealth authorities and NIC agencies limits the right to privacy in Article 17. It gives ONI the ability to obtain, and in some circumstances to compel, information including personal information from NIC agencies and Commonwealth authorities. This information could include personal information that relates to an ONI assessment, such as information about an individual involved in a significant international development, and information regarding the employees of other NIC agencies for ONI's leadership functions.

21. The provision in new clauses 37 and 38 also limit the right to privacy by providing a requirement or authorisation under law for the purposes of the Privacy Act, enabling an entity subject to the Privacy Act to disclose the information to ONI.

22. ONI's information gathering powers are directed at the two legitimate objectives outlined in paragraph 18 above.

23. The compulsory information gathering power in section 37 is broad, but it is not unconstrained. It can only be exercised for the purposes of ONI's international assessments function under paragraph 7(1)(c). The Director-General is also obliged to consider any privacy concerns raised by the relevant Commonwealth authority before making the request to compel information. This ensures that requests will not be made unless the Director-General considers that the importance of obtaining the information outweighs the importance of preserving the right to privacy. Given the purpose for which these assessments are made, and the importance of ensuring ONI has access to relevant information in preparing assessments, it is reasonable and necessary to limit the right to privacy.

24. In addition, the limitation is proportionate, as section 37 does not overcome any existing secrecy provisions, and ONI will have express legislative obligations in relation to the use and protection of information collected under section 37. Information obtained in the exercise of the compulsory power in section 37 can only be used for that purpose, unless the relevant head of the Commonwealth authority consents to an alternative use. Further, ONI will have an obligation to make arrangements for the protection of information provided to it. There will also be strict secrecy provisions restricting the on-disclosure of personal information obtained by ONI under section 37.

25. The provisions supporting the voluntary disclosure of information by Commonwealth authorities (section 38) and NIC agencies (section 39) are also reasonable, necessary and proportionate.

26. Section 38 provides a permissive authority for Commonwealth authorities to provide information to ONI even if doing so would not otherwise fall within the scope of its statutory functions. This is necessary and proportionate, as it only applies to ONI's assessment functions under 7(1)(c) and 7(1)(d), and it does not override secrecy provisions that would otherwise protect the information.

27. Most Commonwealth authorities will be subject to the Privacy Act, which precludes personal information that was collected for a particular purpose being used or disclosed for a secondary purpose, except if a relevant exception applies. One such exception is where the use or disclosure of the information is 'required or authorised by or under an Australian law'. Section 38 will constitute an authorisation for the purposes of the Privacy Act, allowing Commonwealth authorities to provide personal information to ONI even where it was not collected for that purpose.

28. Similarly, section 39 provides for the voluntary disclosure of information to ONI by NIC agencies. This ability to disclose is broader than the power under section 38, but this broader ability is reasonable because the NIC agencies will hold far greater amounts of information that directly relates to ONI's enterprise management functions, including its evaluation, leadership and coordination roles, than Commonwealth agencies more generally.

29. Information that is provided by a NIC agency will be covered by the protection in section 41 that requires ONI to make an arrangement with the relevant agency head for the protection of the information. Alternatively, if no such arrangement is made, ONI has an obligation to take all reasonable steps to ensure the appropriate handling and disclosure of that information.

30. Strict secrecy obligations will apply to the disclosure of information obtained by ONI in the performance of its functions, including information under sections 38 and 39. This provides an additional protection for personal information, enhancing the proportionality of the information-sharing authorisations under those provisions.

*Secrecy provisions protecting personal information held by ONI*

31. The right to privacy is also engaged by the secrecy regime in Part 4 Division 2 of the Bill, which applies criminal penalties to the unauthorised communication or handling of information. These offences will prohibit the unauthorised communication or handling of personal information, in a way that is more restrictive than other privacy protections under Australian law including the Privacy Act, and in this way promote the right to privacy.

*Legislative requirement for privacy rules relating to 'identifiable information'*

32. The Bill engages the right to privacy by including a requirement that the Prime Minister make privacy rules regulating ONI's collection of identifiable information under the open source function, and ONI's communication, handling and retention of identifiable information more generally.

33. This requirement supports enhanced privacy protection for Australians. The privacy rules are analogous with the rules applying to other agencies in the NIC, although they can be tailored to suit the nature and purpose of ONI's functions as necessary and appropriate. The rules will be made by the Prime Minister, not by ONI itself, following consultation with the Attorney-General, the Inspector-General of Intelligence and Security and the Director-General. The consultation requirement will ensure the rules are informed by independent advice and take account of the IGIS's operational oversight and the Attorney-General's responsibility for integrity and the rule of law.

***Right to liberty and security of the person – Article 9(1) of the ICCPR; Right to freedom from arbitrary detention – Article 9 of ICCPR; Prohibition on cruel, inhuman or degrading treatment or punishment in Article 7 of ICCPR and the CAT; Right to freedom of movement – Article 12 of the ICCPR***

34. Article 9(1) of the ICCPR states that everyone has the right to liberty and security of the person and that no one shall be subjected to arbitrary arrest or detention. Under Article 9(3), the right to liberty extends to the right to be tried within a reasonable period or to be released. Limitations on the right to liberty are permitted to the extent that they are 'in accordance with such procedures as are established by law', provided that the law and the enforcement of it is not arbitrary, and where they are reasonable, necessary and proportionate to achieve a legitimate objective. This Bill limits the right to liberty of a person and freedom from arbitrary arrest and detention by imposing penalties of imprisonment for the unauthorised disclosure or handling of information and by allowing the arrest and remand of persons in custody pending the Attorney-General's consent for the prosecution of those offences.

35. The Bill also limits the rights to a fair trial, freedom from arbitrary detention, protection from cruel, inhuman or degrading treatment or punishment and freedom of movement on the basis that it contains offences for the unauthorised disclosure or handling of ONI information, with maximum penalties of between three and ten years, which require the Attorney-General's consent to prosecute.

36. Currently, secrecy provisions relating to ONI information are contained in the *Intelligence Services Act 2001*, and this Bill moves them from that Act into the ONI Bill and makes minor changes to reflect changes in drafting practice. The existing offences apply to staff members of ONA, persons who have entered into any contract, agreement or arrangement with ONA, and employees of those who have entered into a contract, agreement or arrangement with ONA. The offences will continue to apply to those people who have a similar relationship with ONI, but the Bill also introduces a new offence for ONI 'outsiders', or those who disclose ONI information that they have come across other than by way of their relationship with ONI.

37. However, in recognition of the higher burden of trust and confidentiality that applies to ONI insiders and to avoid unduly restricting the freedom of expression, the outsider offence will only apply where the person intends or knows that their conduct will cause harm to national security or endanger the health or safety of another person. A lower penalty applies to this offence and reflects the findings of the Independent National Security Legislation Monitor's report into section 35P of the *Australian Security Intelligence Organisation Act 1979* (ASIO Act), which considered that it is appropriate to hold insiders to a higher standard of conduct in relation to their use, handling and disclosure of sensitive information. Persons who are engaged as staff members of ONI, or who enter into a contract, arrangement or understanding, are privy to extremely sensitive information with the potential to cause grave harm to national security.

38. Penalties of between three and ten years imprisonment are not so significant that they would constitute arbitrary detention or cruel, inhumane or degrading treatment or punishment, or an unlawful restriction on the freedom of movement. The penalties implement a gradation consistent with established principles of Commonwealth criminal law policy, as documented in the Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers. Lower penalties apply to

the unauthorised handling and recording offences, and higher penalties apply to the unauthorised disclosure offences, reflecting the increased severity of the consequences of unauthorised disclosure.

39. The unauthorised disclosure of information by ONI insiders is considered to be more culpable than unauthorised disclosures by those who have come across ONI information by other means. For this reason the 'outsider' offence in section 43 applies only where a person intends to cause harm to national security or an individual, or knows that their disclosure will cause such harm. The penalty of up to five years imprisonment applying to the outsider offence maintains parity with the penalties applying to unauthorised disclosures of information originating from other intelligence agencies under the ASIO Act and the Intelligence Services Act.

40. Responsibility for determining criminal guilt and imposing an appropriate sentence rests with the courts in their exercise of judicial power. The court will have discretion to impose an appropriate penalty based on all of the circumstances of the case. In this regard, the application of the penalties is not disproportionate. The offences will be subject to a number of safeguards to ensure their appropriate application and which promote the right to liberty and freedom from arbitrary detention, including the availability of defences, bail and parole entitlements and fair trial rights.

41. The Attorney-General's consent is required for the prosecution of the secrecy offences. The Bill confirms that the requirement for the Attorney-General to provide consent prior to a prosecution being instituted does not preclude the arrest, charge, remanding or release on bail of a person in relation to the offences. The arrest, charge and remand in custody of a person in such circumstances may limit the rights to liberty and freedom of movement and freedom from arbitrary arrest and detention, since the person arrested and detained would have no case to answer should the Attorney-General decline to consent to a prosecution. The remand in custody of a person awaiting consent of the Attorney-General may also limit the right to be tried within a reasonable period or to be released.

42. The remand in custody of an accused may be necessary in the circumstances to prevent the communication of information already within the knowledge or possession of the accused that has the potential to damage Australian interests or otherwise threaten Australia's national security. It may also be necessary to prevent interference with evidence or flight of the accused. The granting or refusal of bail is not arbitrary, as it is determined by a court in accordance with the relevant rules and principles of criminal procedure. Further, the Bill ensures that the accused may be discharged if proceedings are not continued within a reasonable time. As such, if there is a significant delay between a person's arrest, charge, remand or release, and the Attorney-General's decision on whether to consent to prosecution, a person may be discharged and released from detention.

***Right to be tried without undue delay – Article 14(3)(c) of the ICCPR***

43. Article 14(3)(c) of the ICCPR states that in the determination of any criminal charge, everyone has the right to be tried without undue delay. This right reflects the common law principle that 'justice delayed is justice denied'. It relates not only to the time by which a trial should commence, but also to the time by which it should conclude and judgment be given.

44. The right to be tried without undue delay may be limited where the delay is not 'undue' and where it is reasonable, necessary and proportionate to achieve a legitimate objective. According to the Human Rights Committee, whether a delay is 'undue' will depend on the circumstances of each case taking into account the complexity and seriousness of the case and whether the accused is remanded in custody.

45. The Bill also engages the right to be tried without undue delay by requiring the Attorney-General's consent to the prosecution of the secrecy offences in sections 42, 43 and 44. The Bill limits the right to be tried without undue delay to the extent that a person may be charged, arrested and remanded in custody or on bail prior to and pending the Attorney-General's consent. The arrest,

charge and remand in custody or on bail of an accused may be necessary in the circumstances to prevent the communication of information already within the knowledge or possession of the accused that has the potential to damage Australian interests or otherwise threaten Australia's national security. Further, the Bill ensures that the accused may be discharged if proceedings are not continued within a reasonable time. As such, if there is a significant delay between a person's arrest, charge, remand or release, and the Attorney-General's decision on whether to consent to prosecution, a person may be discharged.

46. On this basis, the limitation imposed on the right to be tried without undue delay is reasonable, necessary and proportionate to ensure the protection of Australia's national security.

***Right to presumption of innocence - Article 14(2) of ICCPR***

47. Article 14(2) of the ICCPR provides that everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law. The presumption of innocence may be limited when it is reasonable in the circumstances, such as where it relates to matters peculiarly in the knowledge of the defendant, and necessary and proportionate to achieve a legitimate objective. The Bill limits the presumption of innocence by placing an evidentiary burden on the defendant with respect to defences.

48. The Bill imposes an evidential burden on the accused in respect of the exceptions to the offences in sections 42, 43 and 44 of the Bill. An evidential burden is created by confirming the application of subsection 13.3(3) of the Criminal Code, which provides that a defendant who wishes to rely on any exception provided for by a law creating an offence bears an evidential burden in relation to that matter.

49. Placing an evidential burden on the defendant in these circumstances is reasonable and necessary where the facts in relation to the exception are peculiarly within the knowledge of the defendant. Evidence suggesting a reasonable possibility of the authorised nature of the disclosure should be readily available to the accused, who would have had such authority (or perceived such authority) at the time he or she disclosed the relevant information.

50. The reversal of proof provisions are proportionate because the burden placed on the defendant is evidential only and the prosecution will still be required to prove each element of the offence beyond reasonable doubt. An element of the offence requiring the prosecution to prove, beyond reasonable doubt, that disclosure was not made pursuant to any of the available defences would impose a disproportionate burden on the prosecution.

51. The reversal of proof provisions go no further than necessary in that they do not apply to disclosures by IGIS officials. An IGIS official is under strict secrecy obligations, and disclosures by an IGIS official required to discharge a reversed burden could potentially breach that obligation (set out in section 34 of the *Inspector-General of Intelligence and Security Act 1986*).

52. On this basis, the limitation on the right to the presumption of innocence is reasonable, necessary and proportionate to achieving the legitimate objective.

***Right to freedom of expression – Article 19(2) of the ICCPR***

53. Article 19(2) of the ICCPR stipulates that all individuals shall have the right to freedom of expression. This Bill engages the right to freedom of expression by restricting the communication or publication of ONI information.

54. While Article 19(3) permits 'certain restrictions' on the right to freedom of expression, these must be provided for by law, and reasonable, necessary and proportionate to a legitimate objective.

55. Part 4, Division 2 of the Bill contains a series of provisions that impose criminal penalties upon individuals for the unauthorised disclosure or handling of certain information and records:

a. Under proposed section 42, an individual may be subject to criminal penalties for the communication of information related to ONI's functions if that person came into contact with the information via employment or other arrangement with ONI.

b. Proposed section 43 imposes criminal liability upon individuals who come into contact with information related to the functions of the ONI by other means, who communicate that information with the knowledge or intention that the communication will 'cause harm to national security or endanger the health or safety of another person'.

c. Under proposed section 44, an individual may be subject to criminal penalties for the unauthorised dealing with or making of records related to the functions of the ONI, if that person came into contact with such information via employment or other arrangement with ONI.

56. Article 19(3) of the ICCPR provides that the right to freedom of expression may be restricted where reasonable, effective, and necessary for the protection of national security. Part 4, Division 1 of the Bill provides for the provision to ONI of information relating to international and non-international matters of political, strategic or economic significance to Australia. Such information is likely to be sensitive, and unauthorised disclosure or handling could threaten Australia's national security. The provisions also provide for NIC agencies to give ONI documents or things that relate to ONI's functions. This information is likely to relate to highly sensitive information that could prejudice national security if disclosed – for example, information relating to intelligence workforce information, intelligence capabilities or national intelligence priorities.

57. The secrecy offences are directed to the legitimate objective of protecting national security. The offences prohibit the unauthorised disclosure or handling of information that was acquired or prepared by or on behalf of ONI in connection with its functions, or that relates or related to the performance by ONI of its functions (ONI information).

58. The offences are also directed to the legitimate objective of enabling ONI to perform its functions, which were identified in the 2017 Review as being important to support national security and wellbeing by ensuring Australia has a world-class intelligence enterprise. It also promotes ONI's ability to perform its functions of preparing national assessments on matters of strategic, political or economic significance to Australia, and of promoting a well-integrated intelligence community, by giving agencies and Commonwealth authorities comfort that their information will remain secure if it is shared with ONI, and encouraging those agencies and authorities to share all the information ONI needs to perform these functions effectively.

59. A further legitimate objective of the secrecy offences is to protect the right to privacy of individuals whose personal information is provided to ONI. This is a legitimate objective under Article 19(3) of the ICCPR, which provides that freedom of expression may be restricted where necessary '[f]or respect of the rights…of others'.

60. There is a rational connection between the limitation on the freedom of expression provided for in the secrecy provisions and the legitimate objectives listed above. By providing a deterrent against the disclosure or handling of information without authorisation, the risk of national security being prejudiced through that disclosure or inappropriate handling is minimised, the risk of a person's privacy being breached is lowered, and agencies will be more willing to provide information to ONI in the knowledge that there are strict penalties for unauthorised disclosure of that information.

61. The secrecy offences contained within Part 4, Division 2 are reasonable, necessary and proportionate to achieving these legitimate objectives. The Bill contains a number of carve-outs,

which provide for legitimate disclosures or recording of information. Under proposed sections 42 and 44, for example, an individual will not be subject to criminal penalties if the relevant conduct is undertaken in the course of their employment or other arrangement with ONI, or with the authorisation of the Director-General or their representative. Proposed sections 42, 43 and 44 contain specific exceptions for information or matters that have already been lawfully communicated to the public, and communications made to IGIS officials. Proposed section 43 also contains exceptions for communications made for the purposes of certain legal proceedings, or in accordance with any legal requirement.

62. The offences are reasonable in that they distinguish between those who access or obtain information in the course of their duties as ONI employees or contractors, and those who obtain information through other means. Those who enter into a relationship with ONI, either as an employee, contractor, or otherwise through a contract, arrangement or understanding, gain privileged access to highly sensitive, often highly classified information. It is reasonable and proportionate to impose a higher burden on those individuals to protect that information, particularly as a person has a choice not to enter into a relationship of trust with ONI if they do not accept the associated secrecy obligations.

63. It is proportionate to apply increased obligations on a trusted insider. The disclosure of any information by a trusted insider is likely to cause more harm than disclosures by a person who has no relationship with ONI. Disclosures by an insider, such as an ONI employee, are likely to reveal ONI's intelligence enterprise management or assessment priorities and its areas of focus.

64. Any disclosures by trusted insiders – regardless of the content of the disclosure – also have the additional consequences of reducing trust in ONI's ability to protect highly sensitive information. If NIC and other Commonwealth agencies fail to share information with ONI on the basis of these concerns, ONI will have a reduced ability to make assessments (whose rigour and comprehensiveness require full access to all relevant information) and fulfil its enterprise management functions (which require access to highly sensitive information about capabilities, workforce, budgets and other issues facing NIC agencies).

65. A particularly severe breach of ONI's secrecy provisions also has the potential to reduce Australia's standing in the international community and harm its intelligence relationships with state, territory and foreign partners – particularly given the Director-General's new role as head of the Australian intelligence community. Domestic and international partnerships are vital to the Australian intelligence community's ability to perform their functions effectively, so any harm to those relationships will have negative consequences for Australia's national security. Prohibiting all unauthorised disclosures by ONI 'insiders' is therefore reasonable, necessary and proportionate to protect Australia's national security.

66. Those who gain access to ONI information other than through a trusted relationship will only commit an offence where they intend to cause, or know that their disclosure will or is likely to cause, harm to national security or to an individual. This is a reasonable, necessary and proportionate response to protect Australia's national security and the privacy and other rights of individuals within the community.

67. In particular, all of the offences contain carve-outs for disclosures to an IGIS official for the purpose of the IGIS performing her oversight role and functions, including under the *Public Interest Disclosures Act 2013*. There is no evidential burden of proof placed on IGIS officials, which means that the prosecution bears the burden of proving that a disclosure or handling was not in the course of the person's duties as an IGIS official, providing an additional safeguard for those disclosures.

68. The secrecy provisions are sufficiently precise and reasonable, necessary and proportionate to the legitimate objectives of protecting national security and the right to privacy, so as to remain consistent with the right to freedom of expression under international human rights law.

**Conclusion**

69. The Bill is compatible with human rights because, to the extent that it may limit human rights, those limitations are reasonable, necessary and proportionate.

**NOTES ON CLAUSES**

**Part 1 – Introduction**

**Clause 1 – Short title**

1. This clause provides for the short title of the Act to be the *Office of National Intelligence Act 2018*.

**Clause 2 – Commencement**

2. This clause provides for the commencement of each provision in the Bill, as set out in the table.

3. Item 1 in the table provides that clauses 1 and 2, and anything in the Act not covered elsewhere in this table will commence on the day the Act receives the Royal Assent.

4. Item 2 in the table means that clauses 3 to 55, which contain the substantive provisions of the Bill, will commence on a single day to be fixed by Proclamation. However, if these provisions do not commence within six months beginning on the day this Bill receives the Royal Assent, they will commence on the day after the end of that period.

5. Allowing the substantive provisions of the Bill to commence through Proclamation will provide the Government with sufficient time to prepare for ONI's establishment.

**Clause 3 – Simplified outline of the Act**

6. This clause provides a simplified outline of the Bill to aid readers. This outline is not intended to be comprehensive and readers should rely on the substantive provisions.

**Clause 4 – Definitions**

7. Subclause 4(1) provides definitions of the key terms used in the Bill. Definitions of particular note include:

***Agency with an intelligence role or function***

8. This definition reflects the recommendation of the Review that the remit of ONI and the Director-General only extend to the intelligence-related activities of the former Department of Immigration and Border Protection (now the Department of Home Affairs), the AFP and AUSTRAC.

9. The definition also includes the intelligence-related activities of the Department of Defence to the extent that those activities are undertaken in parts of the Defence Department other than AGO or DIO. This will also exclude activities undertaken by ASD as they will be a statutorily independent agency from 1 July 2018. The activities of AGO, DIO and ASD will be captured within the remit of ONI and the Director-General through the definition of intelligence agency.

10. The note to this definition provides that the Defence Department does not include the Australian Defence Force (ADF), reflecting that the ADF as defined in the *Defence Act 1903* does not form part of the Defence Department for the purposes of this definition. In particular, activities undertaken by the ADF or capabilities maintained or developed by the ADF will not be captured within paragraph (d) of the definition.

11. The functions of ONI and the Director-General will only apply to those agencies to the extent to which they are undertaking intelligence-related activities as defined in paragraphs (e) and (f) of the

definition. In addition, the boundaries of the remits of ONI and the Director-General in relation to these agencies are further limited by clauses 10 and 16. It also needs to be considered in the context of ONI's leadership functions under paragraph 7(1)(a), the focus of which is at the strategic level.

12. For example:

- ONI's evaluation function under paragraph 9(1)(c) will not extend to evaluating aspects of these four agencies that do not constitute intelligence-related activities for the purposes of this definition; and

- Guidelines or directions given by the Director-General under clauses 20 and 21 will not extend to activities undertaken by those agencies that do not constitute intelligence-related activities for the purposes of this definition.

13. Paragraph (e) of the definition is intended to capture the intelligence activities of Home Affairs, the AFP, AUSTRAC and the Department of Defence (other than those undertaken by DIO or AGO) that relate to national intelligence priorities, requirements or capabilities.

14. Paragraph (e) is not intended to include general operational matters and activities of the Department of Home Affairs, such as activities related to the collection of evidence undertaken by the Australian Border Force. It is also not intended to include activities undertaken by the Department of Home Affairs that are subject to administrative review by a court or tribunal, for example, the making of a decision whether to issue a visa under the *Migration Act 1958*. Paragraph (e) is also not intended to include the AFP's policing activities undertaken under paragraphs 8(1)(a) and (aa) of the *Australian Federal Police Act 1979* or the regulatory activities of AUSTRAC.

15. Paragraph (f) of the definition is intended to capture all four of those agencies to the extent that they maintain or develop a capability that materially assists or is designed to materially assist in the performance of those core intelligence activities. In the case of the Department of Defence, this is intended to capture capabilities maintained or developed in the Department of Defence that materially assist the activities of DIO or AGO (to the extent that those activities fall within paragraph (e) of the definition).

16. The reference to "materially assist" is intended to ensure that only those capabilities are captured that contribute to the production of intelligence in a substantial way. It is not intended to capture all capabilities that contribute to the production of intelligence.

17. This will ensure that ONI and DGNI will be able to undertake activities in the performance of their functions that relate to such capabilities.

***Intelligence agency***

18. This definition includes the traditional members of the AIC (other than ONA/ONI) together with the Australian Criminal Intelligence Commission (ACIC, established as the Australian Crime Commission under the *Australian Crime Commission Act 2002*). The ACIC has been defined as an intelligence agency for the purposes of ONI's functions because its function of collecting, correlating, analysing and disseminating criminal information and intelligence, including intelligence that may be relevant to national security, is inseparable from its other functions.

***National intelligence community***

19. This definition provides that the NIC for the purposes of the Bill includes ONI, each intelligence agency (ASIO, ASIS, ASD, AGO, DIO, ACIC), and each agency with an intelligence role or function (Home Affairs, AUSTRAC, AFP and Defence to the extent that they undertake

intelligence related activities as captured within the definition of agency with an intelligence role or function).

*Subclause 4(2)*

20. Subclause 4(2) provides that the Prime Minister may authorise persons employed by the Commonwealth for the purposes of paragraph (j) of the definition of prescribed Commonwealth officer, which will enable such persons to make requests for an assessment or report under clause 22.

**Clause 5 – Extension to external Territories**

21. This clause provides that the Bill extends to every external territory.

**Part 2 – Office of National Intelligence**

**Division 1 – Office of National Intelligence**

***Clause 6 – Establishment***

22. This clause continues the Office of National Assessments established under the ONA Act under the name Office of National Intelligence (ONI). Subclause 6(2) provides that for the purposes of the finance law (within the meaning of the *Public Governance, Performance and Accountability Act 2013*), ONI is a listed entity and the Director-General is the accountable authority for ONI. Subclause 6(2) also includes a list of persons who are officials of ONI for the purposes of the finance law and provides that the purposes of ONI include the functions of ONI set out in clause 7.

**Division 2 – Functions and Powers**

***Clause 7 – Functions of ONI***

23. This clause sets out the functions of ONI which include leading the NIC as described in clause 8 and carrying out evaluations as set out in clause 9.

*Assessment functions*

24. Paragraphs 7(1)(c) and (d) set out ONI's assessment functions. Paragraph 7(1)(c) replicates ONA's current assessment role under section 5 of the ONA Act. Paragraph 7(1)(d) creates a new assessment function for ONI beyond international matters of political, strategic or economic significance, in support of the performance of its other functions or to complement the work of other NIC agencies. This could include, for example, the preparation of an assessment for the AFP or ACIC on serious and organised crime. This reflects the recommendations of the Review regarding the need for ONI's assessment capability to have greater scale and scope to meet Government requirements, while also recognising the existing roles and statutory functions of other assessment agencies including ASIO and DIO.

25. Paragraph 7(1)(i) provides that ONI's functions include providing assessments or reports prepared under these paragraphs to a person or body, inside or outside Australia. This will support implementation of the recommendation of the Review that ONI develop a more intensive and substantive program of interaction with experts outside government to inform assessments. This will be subject to the secrecy provisions and other provisions in Part 4 of the Bill that set out the conditions under which information can be shared by ONI.

*Advisory functions*

26. Paragraphs 7(1)(e) and (f) reflect the recommendations of the Review regarding the Director-General's role as principal adviser to the Prime Minister on intelligence matters, supported by ONI's role as the principal advisory agency to the Prime Minister on intelligence matters. This will include advice on intelligence collection and assessment priorities, and the allocation of responsibility for intelligence collection across the NIC, as well as matters relating to the NIC more generally.

27. The focus of ONI's advisory role under these functions will be on providing advice from a whole-of-NIC perspective, and will complement the existing advisory roles and responsibilities of other NIC agencies in relation to specific intelligence matters, such as ASD's role in providing advice on information security or ASIO's role in providing advice on security matters.

*Open source collection*

28. Paragraph 7(1)(g) will support ONI's operation of the Open Source Centre. The Open Source Centre's internet activities involve exploiting online information and social media discourse for material of intelligence value. For instance, the Open Source Centre reviews around 450 foreign media sites on a routine basis. Its focus is at the strategic level, for example, observing online discourse regarding foreign political or electoral processes; trends in online terrorist propaganda and narratives; and state-based interactions in particular geographic areas. Generally, the Open Source Centre's collection is about what people are saying cumulatively rather than the individuals involved.

29. The activities of the Open Source Centre are currently conducted as part of ONA's assessment function under section 5 of the ONA Act. The inclusion of a specific function in paragraph 7(1)(g) is consistent with the Review recommendation that the Open Source Centre be enhanced as a centre of expertise for open source collection, analysis, tradecraft and training.

30. The reference to 'accessible to any section of the public' is intended to capture information that is generally available to the public, including information that requires conditions to be met before it can be accessed, for example, the payment of a fee or membership of a group. It does not require information to be available to all sections of the public. The function does not authorise ONI to undertake unlawful activity to obtain the information.

*Other functions*

31. Paragraph 7(1)(h) will provide ONI with a specific function to enable it to cooperate with or assist bodies referred to in, and in accordance with, proposed clause 14. This will be in addition to ONI's ability to cooperate with other entities in connection with the performance of its functions under proposed clause 13. This function will ensure that ONI is also able to cooperate with and assist other agencies in the performance of the other agencies' functions.

32. Paragraph 7(1)(j) provides that ONI's functions include other functions conferred on ONI under the ONI Act or any other law of the Commonwealth.

33. Paragraph 7(1)(k) provides that ONI's functions include anything incidental or conducive to the performance of any of its functions.

34. Subclause 7(2) provides that ONI must perform its leadership function (under paragraph 7(1)(a)) in ways that promote the appropriate integration of the intelligence capabilities of the national intelligence community. This reflects the central theme of the Review on the need to strengthen integration across Australia's national intelligence enterprise.

***Clause 8 – Leading the national intelligence community***

35. Clause 8 sets out how ONI is to provide leadership of the NIC for the purposes of its function under paragraph 7(1)(a). Subclause 8(1) sets out the main outcomes to be achieved through ONI's leadership and reflects the recommendations of the Review that ONI be established to conduct enterprise-level management of Australia's intelligence capabilities across the NIC, including that:

- ONI be given responsibility for coordination in relation to national intelligence priorities and allocation of resources in accordance with those priorities;

- ONI foster a strategic approach to intelligence capability across the NIC, including in relation to NIC workforce management; and

- ONI should lead a more structured approach to responding to technological advancements.

36. Subclause 8(2) provides examples of the ways in which ONI may achieve these outcomes. This is not intended to be an exhaustive list, but is instead illustrative of the ways in which ONI may provide leadership by guiding the direction of the NIC.

37. This includes identifying particular areas of intelligence focus that require greater integration and overseeing appropriate action (paragraph 8(2)(a)), reflecting the recommendation of the Review that promoting integration and synergies in areas of high priority intelligence focus would be a critically important responsibility of ONI in its national intelligence enterprise management role.

38. The note to subclause 8(2) provides a non-exhaustive list of examples of the areas in which ONI may provide leadership. This includes matters that fall within ONA's current coordination functions such as intelligence liaison with international partners, as well as areas recognised in the Review as requiring a greater degree of leadership and coordination across the NIC, such as data management.

39. Subclause 8(3) provides that ONI must perform its leadership function in ways that are consistent with other NIC agencies developing relationships with other entities, including international partners and the private sector. This reflects that ONI's engagement with other entities for the purposes of its leadership role is intended to complement (rather than replace) the relationships developed or maintained by other NIC agencies in connection with the performance of their roles or functions.

40. Subclause 8(4) provides that ONI's leadership role is supported by directions given and guidelines issued by the Director-General under clauses 20 and 21.

***Clause 9 – Evaluating matters relating to the national intelligence community***

41. Clause 9 sets out ONI's evaluation functions which are based on ONA's existing evaluation functions with some modifications to reflect the Review's recommendations, including that the Director-General have responsibility for new arrangements for agency and NIC evaluation that make practical assessments of progress in relation to prioritisation, effectiveness, resource allocation, capability development and coordination.

42. Paragraph 9(1)(a) is based upon ONA's current evaluation function under paragraph 5(1B)(a) of the ONA Act and reflects the Review's recommendation that ONI report on the overall effectiveness of the NIC in implementing the Government's intelligence priorities.

43. Paragraph 9(1)(b) is based upon ONA's current evaluation function under paragraph 5(1B)(b) of the ONA Act.

44. Paragraph 9(1)(c) supports ONI's evaluation of other aspects of NIC agencies for the purposes of its other functions. This may include for example, the evaluation of the existing workforce management practices of NIC agencies as part of a benchmarking exercise in order to develop strategic policies on workforce planning as part of ONI's leadership function under paragraph 7(1)(a).

45. Paragraph 9(1)(d) will enable ONI to undertake an evaluation in relation to a NIC agency or agencies to assess the NIC's effectiveness in relation to specific matters, in accordance with a direction from the Prime Minister. An example of such a direction might be for the Prime Minister to direct ONI to undertake an evaluation, within defined terms of reference, into a specific intelligence failure. This will be subject to the restrictions on ONI's functions in clause 10(2), including that ONI's functions do not include conducting inquiries into individual complaints about the activities of other NIC agencies or inquiring into the legality, propriety or integrity of activities undertaken by another NIC agency.

46. Paragraph 9(1)(e) is based upon paragraph 5(1B)(c) of the ONA Act and also reflects the recommendation of the Review that ONI should be responsible for recommending ways to close intelligence gaps, should they arise.

47. Subclause 9(2) provides that ONI may have regard to certain matters when undertaking its evaluation functions, including any failure by a NIC agency that is the subject of an evaluation to comply with a guideline or direction given by the Director-General under clauses 20 or 21 of the ONI Act. This is not intended to limit the matters to which ONI may have regard.

48. Subclause 9(3) provides that ONI must consult with any affected agency or agencies to which an advice given to the Prime Minister under clause 9 relates, before providing advice to the Prime Minister. Any comments made by the affected agency or agencies that are relevant to the advice must be included in any advice provided to the Prime Minister. 'Affected agency or agencies' is defined in subclause 9(4).

***Clause 10 – Matters that are not part of ONI's functions***

49. This clause sets out matters that are not part of ONI's functions and reflects the recommendations of the Review that the Director-General (supported by ONI) would not control the operational activities of the other NIC agencies nor infringe on their statutory responsibilities. In addition, although the Director-General and ONI should be able to influence and shape the balance of resources across the NIC, promote shared capability development, and provide advice to the Prime Minister on intelligence-related new policy proposals and Cabinet submissions from a whole of Community perspective, the Director-General (and ONI) would not have control over, or responsibility for, individual agency appropriations.

50. Subclause 10(1) places an obligation on the Director-General to ensure that ONI performs its functions in ways that do not inappropriately impact on, or encroach on the functions, powers and responsibilities of the other NIC agencies, a department in relation to the NIC agencies within their portfolio or statutory office holders whose office relates to a NIC agency or the NIC more generally. This would include the IGIS, and heads of the NIC agencies who are appointed under statute.

51. The same obligation is imposed on the Director-General in respect of the performance of his or her functions and powers (clause 16(5)).

52. To avoid any doubt, the functions of ONI or the Director-General do not extend to or override the powers, functions and responsibilities of Ministers in relation to their portfolio Departments and agencies.

53. This is intended to capture both statutory and non-statutory roles and responsibilities. For example, the responsibilities of an agency or their agency head to their Minister under their enabling Act or other legislation, such as section 19 of the *Public Governance, and Public Accountability Act 2013*.

54. The note to this subclause refers to additional obligations that apply to the Director-General under clause 19.

55. Subclause 10(2) sets out examples of activities that do not fall within ONI's functions. This includes directing an intelligence agency or agency with an intelligence role or function to carry out operational activities reflecting the recommendations of the Review that the other NIC agencies would maintain control over their operational activities. For example, ONI's functions would not extend to directing the Australian Border Force (as part of the Department of Home Affairs) to intercept a particular vessel for the purposes of collecting intelligence or directing ASIS to collect intelligence through a particular operational method.

56. This is not intended to provide an exhaustive list of the activities that would fall outside of ONI's functions under subclause 10(1). Whether ONI is performing its functions in ways that inappropriately impact on or encroach on the functions, powers and responsibilities for the purposes of subclause 10(1) will depend on the nature of those functions, powers and responsibilities and also needs to be considered in the context of ONI's functions as set out in clause 7 of the Act.

57. Other examples of ways in which ONI may be considered to be performing its functions in ways that inappropriately impact on or encroach on the functions, powers and responsibilities of other NIC agencies include:

- requesting an agency to perform its statutory functions in a particular manner. For example, requesting ASIO to prepare a security assessment on a particular matter; ASD to provide advice or other assistance relating to information security to another agency; or the AFP to re-prioritise its criminal intelligence collection efforts away from operational priorities; or

- performing their leadership function under paragraph 7(1)(a) in ways that have the practical effect of preventing another NIC agency from performing their functions, powers or responsibilities.

58. To avoid any doubt, ONI's functions (and the Director-General's functions) do not include the undertaking of activities that would have the practical effect of requiring a NIC agency to undertake activities that would not otherwise fall within that agency's functions, powers or responsibilities. For example, reflecting their focus on criminal intelligence and policing, the AFP would not be required to undertake activities, including intelligence collection where that would be inconsistent with its policing functions.

59. Subclause 10(3) provides that the references to directing in paragraphs 10(2)(a) and (c) are not limited to directions given by the Director-General under clause 20. This reflects the recommendations of the Review that the other NIC agencies would maintain control over their operational activities.

***Clause 11 – Powers of ONI***

60. This clause gives ONI the power to do all things necessary or convenient to be done for, or in connection with the performance of its functions. For example, ONI would have the power to purchase equipment to support the performance of its functions.

***Clause 12 – Prime Minister may give directions***

61. This clause deals with the ability of the Prime Minister to give directions to the Director-General concerning the performance of ONI's functions or the exercise of ONI's powers. The clause is intended to enable the Prime Minister to issue general directions to the Director-General relating to his or her expectations in respect of ONI. For example, the Prime Minister may issue a direction relating to evaluations undertaken by ONI under clause 9, such as the manner in which advice is to be provided under paragraph 9(1)(e).

62. Consistent with the current situation under subsection 5(4) of the ONA Act, subclause 12(1) provides that the Director-General is not subject to direction in respect of the content of, or any conclusions to be reached in, any advice given, or report or assessment prepared, by ONI under the Bill.

63. This reflects the statutory independence of ONI and the Director-General. Consistent with the current situation for ONA, it is proposed that ONI's statutory independence may be the subject of an inquiry undertaken by the IGIS. ONI's compliance with directions issued under this clause may also be the subject of IGIS inquiry. To facilitate this oversight role, amendments to the *Inspector-General of Intelligence and Security Act 1986* contained in the C&T Bill will require the Prime Minister to give a copy of a direction to the IGIS as soon as practicable after it is given.

64. Subclause 12(3) provides that the Director-General will also not be required to comply with a direction to the extent that compliance with the direction would be inconsistent with his or her performance of functions or exercise of powers under the *Public Governance, Performance and Accountability Act 2013* in relation to ONI, or the direction relates to his or her performance of functions or exercise of powers under the *Public Service Act 1999* in relation to ONI.

65. Subclause 12(5) is intended to operate as a substantive exemption from the requirements of the *Legislation Act 2003* (Legislation Act). Given the nature of ONI's functions, directions given to the Director-General are likely to contain information relating to national security that is not suitable for public dissemination. An exemption for these reasons would be consistent with exemptions for Ministerial directions issued under the *Intelligence Services Act 2001* (Intelligence Services Act).

**Division 3 – Cooperation**

***Clause 13 –Cooperation with entities in connection with performance of ONI's functions***

66. This clause deals with ONI's ability to cooperate for the purposes of the performance of its functions.

67. ONI will have a broad ability to cooperate with other entities, both within or outside Australia, subject to certain requirements being met in respect of cooperation with authorities of another country.

68. Subclause 13(2) provides that the Director-General (or his or her delegate) will be required to authorise ONI's cooperation with an authority from another country before such cooperation takes place. Once an authorisation has been given, it will remain in place until amended or revoked by the Director-General or cancelled by the Prime Minister under subclause 13(5).

69. Subclause 13(3) provides that the Director-General (or his or her delegate) must notify the Prime Minister on a monthly basis of each approval given during the month, and each variation or revocation made during the month.

70. These requirements are based upon existing requirements that apply to ASIO and agencies under the Intelligence Services Act in respect of their cooperation with foreign authorities, with some

modification to reflect ONI's cooperation is much less likely to be operational in nature than is the case with these agencies.

71. The statement in subclause 13(7) that approvals and cancellations are not legislative instruments is merely declaratory of the law, rather than providing a substantive exemption for the purposes of the Legislation Act.

***Clause 14 – Cooperation with intelligence agencies etc. in connection with performance of their functions***

72. Clause 14 deals with ONI's ability to cooperate with certain agencies in connection with the performance of the other agencies' functions. This clause is not intended to limit ONI's ability to cooperate with other bodies under clause 13 in the course of performing its own functions.

73. Under subclause 14(2) ONI's cooperation with and assistance to other agencies will be subject to any arrangements made or directions given by the Prime Minister. This will ensure that the Prime Minister has appropriate oversight of cooperation and assistance arrangements and is able to give directions or make arrangements as he or she considers appropriate.

74. ONI will only be able to cooperate with and assist other agencies under this clause at the request of the head of that other agency. The decision to provide cooperation or assistance will be a discretionary matter for ONI.

75. Cooperation and assistance is intended to cover a range of scenarios and may include, for example, the provision of ONI staff and resources to multi-agency teams and taskforces or the provision of ONI staff or other resources to assist another agency carry out its functions.

76. The statement in subclause 14(4) that an arrangement or direction is not a legislative instrument is merely declaratory of the law, rather than providing a substantive exemption for the purposes of the Legislation Act.

**Part 3 – Director-General of National Intelligence and staff of ONI**

**Division 1 – Functions and powers of the Director-General**

***Clause 15 – Director-General of National Intelligence***

77. This clause establishes the position of the Director-General of National Intelligence.

78. Subclause 15(2) reflects the recommendation of the Review that the Director-General be the 'head of the national intelligence community' and provides that the Director-General's leadership role may include providing advice relating to the appointment or engagement of persons in senior leadership roles within the NIC. However, this is not intended to amount to a requirement to obtain advice from the Director-General before such appointments.

79. The Director-General will be supported in their leadership role through the ability to give directions under clause 20 or issue guidelines under clause 21.

***Clause 16 – Functions of the Director-General***

80. This clause sets out the functions of the Director-General in addition to the functions of ONI which include ensuring the proper, efficient and effective performance of ONI's functions and to manage ONI.

81. Similar to existing requirements under subsection 5(2) of the ONA Act, the Director-General is required to endeavour to respond to requests under clause 22 for reports or assessments.

82. Paragraph 16(1)(d) provides that the Director-General's functions also include deciding whether an ONI assessment is a national assessment and therefore subject to the formal process in Division 1 of Part 5 of the Bill. If the Director-General decides that an assessment is not to be a national assessment (contrary to the position taken on this issue by the National Assessments Board under clause 47), subclause 16(2) provides that he or she must inform the Prime Minister of this decision. The Director-General must also advise the Prime Minister of the matters on which there was a difference of opinion on the issue of whether an assessment should be a national assessment.

83. Subclause 16(3) provides that the Director-General has the power to do all things necessary or convenient to be done for or in connection with the performance of their functions. This does not confer any immunities or other special legal status on the Director-General.

84. Subclause 16(4) provides that the Director-General is subject to the same restrictions when performing his or her functions and powers to those that apply to ONI under clause 10. This will include in relation to the giving of directions under clause 20, the issuing of guidelines under clause 21 and requests for information under clause 37.

85. Examples of ways in which the Director-General may be considered to be performing their functions in ways that inappropriately impacting on or encroaching on the functions, powers and responsibilities of other NIC agencies include:

- requiring an agency to provide information under clause 37 in circumstances where this was likely to have a detrimental impact on the agency's ongoing ability to access information from a third party under a contract, arrangement or understanding; or

- issuing guidelines under clause 21 which would have the practical effect of preventing another NIC agency from performing their functions, powers or responsibilities.

***Clause 17 – Prime Minister to be kept informed on matters relating to the national intelligence community***

86. This clause provides that the Director-General must keep the Prime Minister informed on matters relating to the NIC. This reflects the recommendation of the Review that the Director-General be the Prime Minister's principal advisor on intelligence matters. This is intended to complement the existing roles and responsibilities of other senior officials in relation to the Prime Minister, including the Secretary of the Department of the Prime Minister and Cabinet; and the Director-General of Security's direct and exclusive contact with the Prime Minister on sensitive counter-espionage and foreign interference cases.

***Clause 18 – Leader of Opposition to be kept informed on significant intelligence matters***

87. This clause provides that the Director-General must consult regularly with the Leader of the Opposition in the House of Representatives for the purpose of keeping him or her informed on matters relating to intelligence that the Director-General considers significant.

88. This is consistent with similar requirements for other agency heads in the NIC, including the Director-General of Security and the Director-General of ASIS.

***Clause 19 – Special responsibilities of the Director-General***

89. This clause is based upon similar provisions in the *Australian Security Intelligence Organisation Act 1979* (ASIO Act) and Intelligence Services Act and supports ONI's statutory independence in relation to its assessment functions.

***Clause 20 – Director-General may give directions***

90. This clause enables the Director-General to give directions to the NIC as a whole, a class of NIC agencies or a particular NIC agency where he or she considers it necessary to do so to enable ONI to perform its leadership function.

91. This reflects the Review's recommendations that the Director-General be able to direct the coordination of the NIC without directing the specific activities of agencies. This will require equipping the Director-General with appropriate tools to carry out his or her role effectively, while recognising the statutory responsibilities and independence of agencies.

92. It is intended that directions would be used in limited circumstances as a last-resort tool, to address significant inadequacies or a consistent and unjustified failure of a particular agency or agencies to adhere to an enterprise approach. Examples of circumstances where the Director-General may consider it appropriate to give a direction include:

(a) an agency consistently allocating its resources in a way that did not accord with its responsibilities as allocated through the national intelligence prioritisation process;

(b) an agency regularly failing to provide information to ONI required for the performance of its leadership functions, without providing a reasonable excuse for such failure; or

(c) in circumstances where the Director-General has received feedback from the Prime Minister that the NIC was significantly underperforming in a particular area.

93. Subclause 20(2) provides that the Director-General is required to consult with the head of a NIC agency that would be affected by the proposed direction, before giving a direction. In the case of directions affecting AGO or DIO, the Director-General will also be required to consult with the Secretary of the Department of Defence, reflecting that those agencies constitute a part of the Department, rather than being statutorily independent.

94. This will ensure that agencies are given the opportunity to raise concerns regarding the nature of the proposed direction, including the extent to which it would be captured within one of the circumstances outlined in subclause 20(3).

95. Subclause 20(3) sets out the circumstances in which a direction has no effect, including where compliance with the direction would be directly inconsistent with obligations imposed on the agency or the head of the agency by any other law of the Commonwealth.

96. These restrictions are in addition to those set out in clauses 10 and 16 of the Bill.

97. Subclause 20(4) provides that neither a NIC agency nor the head of a NIC agency can be the subject of any sanction or penalty for a failure to comply with a direction. However, ONI may have regard to compliance with a direction issued under this clause in carrying out its evaluation functions under clause 9 of the Bill.

98. The power to issue directions cannot be delegated by the Director-General.

99. The statement in subclause 20(5) that a direction given under this clause is not a legislative instrument is merely declaratory of the law, rather than providing a substantive exemption for the purposes of the Legislation Act.

***Clause 21 – Director-General may issue guidelines***

100. This clause enables the Director-General to issue guidelines to assist ONI in the performance of its functions or the performance of the Director-General's functions, to be followed in relation to matters relevant to, or affecting the NIC as a whole or a class of NIC agencies.

101. Unlike directions issued under clause 20, it is intended that high-level guidelines, providing guidance on intelligence community matters such as workforce management, ICT connectivity and intelligence capability development, will be issued by the Director-General on a relatively frequent basis.

102. Guidelines would not be directed at individual agencies.

103. Examples of the types of matters that might be covered in guidelines issued by the Director-General include guidance on:

(a) the kinds of information that should be provided to ONI for the purposes of their evaluation functions under clause 9 (e.g. a copy of a classified annual report, statistics on various measures of interest, or workforce information);

(b) factors for agencies to consider when prioritising intelligence requirements and activities;

(c) principles to be observed in developing new capabilities (engagement with industry, procurement, or enhancing consideration of joint capability needs); or

(d) ways to improve ICT connectivity and data sharing.

104. Subclause 21(2) provides that the Director-General is required to consult with the head of a NIC agency that would be affected by the proposed guidelines, before issuing guidelines. In the case of guidelines affecting AGO or DIO, the Director-General will also be required to consult with the Secretary of the Department of Defence, reflecting that those agencies constitute a part of the Department, rather than being statutorily independent.

105. The Director-General is subject to the restrictions in clauses 10 and 16 of the Bill when issuing guidelines.

106. Subclause 21(2) provides that neither a NIC agency nor the head of a NIC agency can be the subject of any sanction or penalty for a failure to comply with guidelines. However, ONI may have regard to compliance with guidelines issued under this clause in carrying out its evaluation functions under clause 9 of the Bill.

107. The power to issue guidelines cannot be delegated by the Director-General.

108. The statement in subclause 21(4) that guidelines issued under this clause are not legislative instruments is merely declaratory of the law, rather than providing a substantive exemption for the purposes of the Legislation Act.

***Clause 22 – Requests for reports or assessments***

109. This clause enables a Minister or prescribed Commonwealth officer (as defined in clause 4 of the Bill) to request that ONI prepare a report or make an assessment in accordance with paragraph 7(1)(c) or (d). The Director-General is required to endeavour to respond to such requests.

110. This clause replicates subsection 5(2) of the ONA Act. Additional Commonwealth officers have been added to the definition of prescribed Commonwealth officer, including the Commissioner of the AFP, the Australian Border Force Commissioner, the Chief Executive Officer of the ACIC, and the AUSTRAC CEO, reflecting the expansion of ONI's assessment functions.

***Clause 23 – Consultation with National Assessments Board***

111. This clause provides that the Director-General must consult the National Assessments Board in relation to each national assessment made by ONI, and if practicable, before providing the assessment.

112. Subclause 23(2) provides that if there is a significant difference of opinion between the Director-General and the Board in relation to a national assessment, the Director-General and the Board must endeavour to reach agreement.

113. Subclause 23(3) provides that if the Director-General and the Board are unable to reach agreement, the Director-General must give a statement to each person to whom the national assessment is provided that sets out the matter on which there is a difference of opinion.

**Division 2—Appointment of the Director-General**

***Clause 24 – Appointment***

114. This clause provides that the Director-General is to be appointed by the Governor-General by written instrument, on a full-time basis. This clause is to be read in accordance with section 33AA of the *Acts Interpretation Act 1901*, which provides that the power to make an appointment is taken to include a power of reappointment.

115. Before a recommendation is made to the Governor-General for the appointment of a person as the Director-General, the Prime Minister must consult with the Leader of the Opposition in the House of Representatives.

***Clause 25 – Term of appointment***

116. This clause provides that the Director-General holds office for the period specified in the instrument of appointment which must not exceed 5 years.

***Clause 26 – Acting appointments***

117. This clause provides for the appointment of an acting Director-General on a similar basis to the appointment of an acting Director-General of Security under section 14 of the ASIO Act.

118. Subclause 26(1) enables the Prime Minister to appoint an acting Director-General during a vacancy in the office or any period when the Director-General is absent from duty or from Australia, or is, for any reason, unable to perform the duties of the office.

119. Section 33A of the *Acts Interpretation Act 1901* applies in relation to acting appointments. This section provides how an appointment may be expressed, what conditions the appointer may determine and confers upon the appointee the powers, duties and functions of the holder of the office. Section 33A limits the period in which an appointee may act in an office which is vacant, or becomes vacant, while the appointee is acting.

120. Subclause 26(2) provides that the Prime Minister must consult with the Leader of the Opposition in the House of Representatives, before appointing an acting Director-General, unless it is impracticable to do so.

**Division 3 – Terms and conditions of appointment**

***Clause 27 – Remuneration and allowances***

121. This clause sets out the remuneration arrangements for the Director-General. Subclause 27(1) provides that the Director-General is to be paid the remuneration that is determined by the Remuneration Tribunal. If no determination of that remuneration by the Tribunal is in operation, the Director-General is to be paid the remuneration that is prescribed by the general rules. Subclause 27(2) provides that the Director-General is to be paid the allowances that are prescribed by the general rules. Subclause 27(3) stipulates that this clause has effect subject to the *Remuneration Tribunal Act 1973*.

***Clause 28 – Leave of absence***

122. This clause provides that the Director-General has the recreation leave entitlements that are determined by the Remuneration Tribunal. The Prime Minister may grant the Director-General leave of absence, other than recreation leave, on the terms and conditions as to remuneration or otherwise that the Prime Minister determines.

***Clause 29 – Outside employment***

123. This clause provides that the Director-General must not engage in paid work outside the duties of the Director-General's office without the Prime Minister's approval.

***Clause 30 – Resignation***

124. Subclause 30(1) provides that the Director-General may resign his or her appointment by giving the Governor-General a written resignation. Subclause 30(2) provides that the resignation takes effect on the day it is received by the Governor-General or, if a later day is specified in the resignation, on that later day.

***Clause 31 – Termination of appointment***

125. This clause provides the grounds for termination of the appointment of the Director-General by the Governor-General. These are based on the standard grounds for termination for statutory office holders.

126. Under subclause 31(1), the Governor-General may terminate the appointment of the Director-General for misbehaviour or if the Director-General is unable to perform the duties of his or her office because of physical or mental incapacity.

127. Under subclause 31(2), the Governor-General may terminate the appointment of the Director-General for reasons related to bankruptcy, or being absent for 14 consecutive days or for 28 days in any 12 months, without leave of absence.

128. The Governor-General may also terminate the appointment of the Director-General if he or she engages, except with the Prime Minister's approval, in paid work outside the duties of the Director-General's office as set out in clause 29.

129. The Governor-General may also terminate the appointment of the Director-General if he or she fails, without reasonable excuse, to comply with section 29 of the *Public Governance, Performance and Accountability Act 2013* (which deals with the duty to disclose interests) or rules made for the purposes of that section.

***Clause 32 – Other terms and conditions***

130. This clause provides that the Director-General holds office on the terms and conditions (if any) in relation to matters not covered by this Act that are determined by the Governor-General.

**Division 4 – Staff of ONI**

***Clause 33 – Staff***

131. This clause deals with the employment of staff. Subclause 33(1) provides that the staff of ONI are to be persons engaged under the *Public Service Act 1999* and such other persons, if any, as the Director-General considers necessary for the performance of ONI's functions.

132. This is based upon paragraph 17(1)(c) of the ONA Act. Enabling ONI to engage staff under the Public Service Act and under other arrangements is intended to provide flexibility and give the Director-General a similar ability to set the terms and conditions of employment of ONI staff as other heads of agencies in the NIC (who are not Public Service Act agencies) have in relation to their employees.

133. It is anticipated that most of ONI's staff will be engaged under the Public Service Act. Subclause 33(3) ensures that a person not engaged under the Public Service Act will not be disadvantaged by requiring that the principles of the Public Service Act must be adopted by the Director-General to the extent to which the Director-General considers they are consistent with the effective performance of ONI's functions.

134. For the purposes of the Public Service Act, the Director-General and the APS employees assisting the Director-General will together constitute a Statutory Agency and the Director-General is the Head of that Statutory Agency.

***Clause 34 – Consultants***

135. This clause provides that the Director-General may, on behalf of the Commonwealth, engage consultants to assist in the performance of ONI's functions.

***Clause 35 – Secondment of ONI employees***

136. Clause 35 enables the Director-General to arrange for a member of ONI's staff to be seconded for a specified period to a body or organisation whether within or outside Australia.

137. While an ONI employee would remain an ONI employee for the duration of the secondment, his or her duties would be those assigned by the body or organisation to which the employee has been seconded (or as specified in the written agreement with the Director-General) and would be performed in accordance with the body or organisation's legal or legislative requirements.

138. Subclause 35(2) provides that the Director-General may terminate the secondment of an ONI staff member at any time. However, the Director-General would be required to give notice to the other agency or employer.

***Clause 36 – Secondment of persons to ONI***

139. Subclause 36(1) allows the Director-General, by written agreement with a body or organisation (whether inside or outside Australia), to arrange for a person who is an officer, employee or other member of staff of the body or organisation to be made available to ONI to perform services in connection with the performance of its functions or the exercise of its powers. The terms and conditions (including remuneration and allowances) applicable to a person performing services under an agreement are those specified in the agreement (subclause 36(2)).

140. It is intended that a person who is seconded to ONI would cease to perform the functions of the person's 'home' agency or employer while they are on secondment (noting that a secondment may be arranged on a part-time basis).

141. It is anticipated that secondments between ONI and other agencies will be common. While these secondments will generally be with other agencies within the NIC (which include a number of non-Public Service Act agencies), arrangements could also be made to second staff to and from the ADF, other Commonwealth and State and Territory government agencies or other bodies and organisations within and outside Australia.

**Part 4 – Provisions relating to information**

**Division 1—Information gathering**

***Clause 37 – Requirement to provide information, documents or things to ONI relating to international matters***

142. Subclause 37(1) gives the Director-General an ability to ask a Commonwealth agency for information in its possession that relates to international matters of political, strategic or economic significance to Australia, or domestic aspects of those matters. This ability reflects ONA's 'entitlement' to access information under section 9 of the ONA Act. The ability to request information is limited to ONI's international assessments function under paragraph 7(1)(c), and reflects the importance of ensuring that ONI's assessments are based on all relevant information in the possession of the Australian government. It is intended that the majority of information provided to ONI will be provided voluntarily, and that this power will be exercised rarely.

143. Senior policy-makers within the Australian Government rely on ONI's assessments to inform decisions relating to Australia's national security, economy, defence and foreign policy. It is critical that ONI's assessments are comprehensive and rigorous for these purposes, which requires ONI to have access to all relevant information in preparing its assessments.

144. Subclause 37(2) requires the Director-General to consult with the relevant Commonwealth authority, and consider any concerns that the authority raises. In particular, the Director-General must consider concerns the authority raises about any contract, arrangement or understanding to which the authority is party that places restrictions on the authority's ability to share the information requested, and any concerns raised about the need to provide personal information in response to the request.

145. It is intended that the Director-General consider the implications of making a request that would require the authority to act in a manner that was inconsistent with their obligations under a contract, arrangement or understanding (for example, a restriction on disclosure without the consent of the other party). The Director-General should only make such a request where he or she considers that the importance of the obtaining the information is so significant as to outweigh the potential consequences for the authority of acting in a manner that would be inconsistent with the contract, arrangement or understanding. The Director-General would also be required to consider whether making the request would inappropriately impact on, or encroach on the functions, powers and responsibilities of another NIC agency for the purposes of clauses 10 and 16. It is intended that, where appropriate, the Director-General will tailor a request to enable Commonwealth authorities to redact sensitive operational or investigative information from documents provided in response to a request.

146. Further, while it is important to give ONI the ability to access information, it is also important to ensure that existing protections for particularly sensitive types of information remain in place. Subclause 37(3) provides that a request under 37(1) does not override secrecy provisions or other legislative protections for sensitive information. Where a secrecy provision contains a discretionary element (such as a requirement to form an opinion), clause 37 is not intended to override that provision unless the discretionary element is satisfied. However, it is intended that 37(1) will constitute a requirement under law for the purposes of the *Privacy Act 1988*, including Australian Privacy Principle 6. The reference to a law that 'prohibits' the provision of information, documents or things is intended to provide an equivalent standard to the reference to a disclosure that would 'contravene' a law in section 9 of the ONA Act, and has been updated to reflect modern drafting

practices.

147. Limits apply to ONI's use of information, documents or things obtained under subclause 37(1) (see clause 40).

***Clause 38 – Ability to provide information, documents or things to ONI relating to international or other matters***

148. Subclause 38(1) provides that a Commonwealth authority may provide ONI information, documents or things that the head of the authority considers relates to matters of political, strategic or economic significance to Australia.

149. In order to perform its functions, ONI will need access to information held by agencies that might not clearly be within that agency's functions to share. Without provisions in this Bill to enable agencies to share, there may be some uncertainty about the ability of some agencies to share all of the information ONI needs to perform its functions. The intention of this provision is to make clear on the face of the legislation that agencies can give ONI information that it needs to perform its assessment functions under paragraphs 7(1)(c) and (d), despite not having an express statutory function to do so, as provided for under subclause 38(2).

150. This provision will not compel a Commonwealth authority to share information and is subject to existing protections for specific types of information (such as secrecy provisions). Following the amendments in this Bill and the C&T Bill, all NIC agencies will be exempt from the application of the Privacy Act when they disclose personal information to ONI. However, this exemption will not apply to all Commonwealth authorities when providing information to ONI. Clause 38 is intended to constitute an authorisation for the purposes of the Privacy Act.

151. Further, this provision does not expand any authority's functions to undertake collection of information in support of ONI's functions or give agencies any additional ability to gather or collect information for the purposes of sharing it with ONI.

152. The note to this clause provides that a Commonwealth authority may be required to provide the same information, documents or things under clause 37 as may be voluntarily provided under clause 38. This is intended to clarify that a Commonwealth authority is not restricted in its ability to voluntarily provide information, documents or things under clause 38 that may be required under clause 37.

***Clause 39 – Ability of agencies to provide information, documents or things to ONI relating to its functions***

153. In order to perform its leadership, evaluation and coordination functions, as well as its assessment functions, ONI will need access to information held by agencies that might not clearly be within that agency's functions to share. This might include information such as workforce and staffing details; information about the capabilities agencies possess; administrative and expenditure information including details of resourcing, contractual arrangements and training information; details of relationships with foreign partners; operational information; and agency policies, such as policies on workforce recruitment or data handling policies.

154. The intention of this clause is to make clear on the face of the legislation that agencies can give to ONI information that relates or may relate to any of ONI's functions, despite not having an express statutory function to do so.

155. This clause will not compel a NIC agency to share any information, and it will not override existing protections for specific types of information (such as secrecy provisions). While a limited number of amendments are being made by the C&T Bill to agency-specific secrecy provisions,

secrecy provisions that protect particularly sensitive information – such as information gained through telecommunications interception, or information relating to an ASIO special intelligence operation – will remain in place, and this provision will not give ONI any additional access to this information.

156. Further, this clause does not expand any NIC agency's functions to undertake collection of information in support of ONI's functions or give agencies any additional ability to gather or collect information for the purposes of sharing it with ONI.

157. The note to this clause provides that an intelligence agency or agency with an intelligence role or function may be required to provide the same information, documents or things under clause 37 as may be voluntarily provided under clause 39. This is intended to clarify that an agency is not restricted in its ability to voluntarily provide information, documents or things under clause 39 that may be required under clause 37.

***Clause 40 – Use of information, document or things***

158. This clause applies to information, documents or things provided to ONI under clause 37.

159. Subclause 40(1) places an obligation on the Director-General to ensure that the information, document or things are only used for the purpose of ONI performing its assessment function under paragraph 7(1)(c), unless the head of the relevant Commonwealth authority has authorised the subsequent use of the information, document or things for other purposes.

160. Subclause 40(2) clarifies that this does not prevent ONI from mentioning or referring to such information, documents or things in an assessment or report prepared under paragraph 7(1)(c) or doing other things in relation to an assessment or report that is authorised under the Bill or the general rules.

161. It is considered appropriate that ONI's entitlement to information under clause 37 for the purposes of its assessment function under paragraph 7(1)(c) be counter-balanced with a restriction on the use of that information for other purposes.

162. This clause should be read in conjunction with clause 41. Any disclosures made under 40(2) (for instance, referring to information in an assessment or report) must be consistent with any protections that apply under clause 41. However, clause 41 is subject to clause 40 in the sense that the restrictions in clause 40 apply to restrict use of information obtained under clause 37, even where the protections in clause 41 are more liberal. For example, if an agency head enters into an arrangement with ONI relating to information provided for the purposes of ONI's assessment functions under 7(1)(c) and 7(1)(d), clause 40 will still apply to such information if it is provided under clause 37.

***Clause 41 – Protection of information, documents or things***

163. Subclause 41(1) requires the Director-General to make arrangements with the head of an intelligence agency or agency with an intelligence role or function for the protection of that information, documents or things provided by that agency to ONI. Given the increased volume of information and, potentially, the increased sensitivity of information that ONI will receive from other NIC agencies, it is considered appropriate to require the Director-General to make such arrangements.

164. This is intended to enable another NIC agency to place reasonable limitations on ONI's handling of sensitive information originating from that agency.

165. It is envisaged that such arrangements may be made on an individual agency basis (where an agency has particular requirements in relation to the protection of their information, documents or things) or through the common arrangements that apply to one or more agencies.

166. Subclause 41(2) provides that if arrangements have not been made for the purposes of subclause 41(1), then ONI must take all reasonable steps to ensure the appropriate storage, access, use or further disclosure of information, documents or a thing, according to their sensitivity or classification.

167. It is envisaged that this clause will encourage sharing of information with ONI by providing agencies (and third parties who provide NIC agencies with information) with an additional level of assurance.

168. This clause is closely related to clause 40. Clause 40 is intended to limit clause 41, so that information provided under clause 37 is protected by the restrictions in clause 40 even if the protections in clause 41 are more liberal. However, where the restrictions in clause 41 are more restrictive than those in clause 40, any disclosure done under subclause 40(2) must still comply with the protections in clause 41 – for example, mentioning information in an assessment or report must be done in a way consistent with any arrangements made between agency heads under 41(1) or in a way that is appropriate under 41(2).

**Division 2 – Secrecy**

***Clause 42 – Offence – communicating certain information***

169. This clause provides for an offence substantially the same as section 40A of the Intelligence Services Act in respect of the unauthorised communication of information or matters prepared or acquired by or on behalf of ONI in connection with its functions.

170. Section 40A will be repealed by the C&T Bill. It is considered appropriate to move the secrecy provisions relating to ONA from the Intelligence Services Act to the Bill.

171. The policy justification applying to this offence is the same as that for section 40A of the Intelligence Services Act: namely, that it is considered appropriate that persons who place at risk information pertaining to the functions of intelligence agencies are liable to a criminal sanction that specifically targets this wrongdoing, given the significant risk to national security that such conduct presents.

*Physical elements 1 and 2 – communication of information or matter relating to ONI's functions: paragraph (1)(a)*

172. Paragraph (1)(a) of subclause 42(1) requires that a person must not communicate any information or matter that was acquired or prepared by or on behalf of ONI in connection with its functions, or relates or related to the performance by that agency of its functions except as provided in the section.

173. The term 'acquired' is intended to cover information that has come into the possession of ONI by any means. This includes information or matter that has come into ONI's possession upon its request, and that which has come into ONI's possession without any action on ONI's part. For example, ONI's receipt of any information or matter pursuant to standing information-sharing arrangements with another entity. This is consistent with the usage of the term 'acquired by' elsewhere in the Commonwealth statute book, and the ordinary meaning of the term 'acquire' in respect of any information or matter, being to come into a person's possession.

174. There are two physical elements in paragraph (1)(a), with the result that discrete fault elements apply to each physical element. In particular, the prosecution must prove that the person intentionally communicated any information or matter (by reason of subsection 5.6(1) of the Criminal Code). The prosecution must also prove that the information or matter was acquired or prepared by, or

on behalf of, ONI in connection with its functions, or related to the performance by ONI of its functions. The prosecution must prove that the person was reckless as to this circumstance (by reason of subsection 5.6(2) of the Criminal Code).

*Physical element 3 – reason by which the information or matter came into the person's knowledge or possession: paragraph (1)(b)*

175. Paragraph 42(1)(b) requires the prosecution to prove that the information or matter came into the person's knowledge or possession by reason of one of the matters set out in subparagraphs (b)(i)-(iii). These are that the person is or was a staff member of ONI, that the person has entered into any contract, agreement or arrangement with ONI or that the person has been an employee or agent of a person who has entered into a contract, agreement or arrangement with ONI.

176. As paragraph (1)(b) is a circumstance, the prosecution must prove that the person was reckless in relation to one of the matters in subparagraphs (b)(i)-(iii), by reason of subsection 5.6(2) of the Criminal Code. This means that the prosecution must prove that the person was aware of a substantial risk that one of the circumstances in subparagraphs (b)(i)-(iii) existed, and nonetheless and unjustifiably in the circumstances took that risk.

*Physical element 4 – unauthorised nature of communication: paragraph (1)(c)*

177. Paragraph 42(1)(c) requires the prosecution to prove that the relevant communication was not made under any of the forms of authority set out in subparagraphs (i)-(iv).

178. As the physical element in paragraph (1)(c) is a circumstance, the standard fault element of recklessness applies by reason of subsection 5.6(2) of the Criminal Code. The prosecution must prove that a person was aware of a substantial risk that the relevant conduct was not authorised in accordance with any of the matters specified in subparagraphs (c)(i)-(iv), and that he or she nonetheless, and unjustifiably in the circumstances known to him or her, took that risk by engaging in the relevant form of conduct specified in paragraph (1)(a). The fault element of recklessness as to a circumstance may also be satisfied by proof of a person's knowledge, pursuant to subsection 5.4(4) of the Criminal Code. Hence, the prosecution may alternatively prove that a person was aware that the conduct was not authorised in accordance with any of the matters specified in subparagraphs (c)(i)-(iv).

*(i) Communication to the relevant agency head or another agency staff member, in the course of the person's duties as a staff member of the agency*

179. Subparagraph 42(1)(c)(i) requires the prosecution to prove that the communication was not made to the Director-General or another ONI staff member in the course of a person's duties as a staff member.

*(ii) Communication to the agency head or another agency staff member in accordance with a contract, agreement or arrangement*

180. Subparagraph 42)(1)(c)(ii) requires the prosecution to prove that the communication was not made to the Director-General or another ONI staff member by the person in accordance with a contract, agreement or arrangement.

*(iii) Communication by the person in the course of the person's duties as a staff member, within the limits of authority conferred on the person by the agency head*

181. Subparagraph 42(1)(c)(iii) requires the prosecution to prove that the communication was not made by the person in the course of his or her duties as a staff member, within the limits of authority conferred upon him or her by the Director-General. For example, the agency head may authorise a person, as part of his or her duties, to communicate certain information to certain persons.

*(iv) Communication with the approval of the agency head or another authorised staff member*

182. Subparagraph (c)(iv) requires the prosecution to prove that the person did not make the communication with the approval of the relevant agency head or another staff member having the authority of the relevant agency head.

183. This subparagraph covers instances in which the relevant agency head or another authorised staff member specifically approves a particular communication as distinct from a staff member's general authorisation in the course of his or her duties as provided for in subparagraph (c)(iii).

*Maximum penalty: subsection (1)*

184. The offence in subclause 42(1) carries a maximum penalty of 10 years' imprisonment, consistent with the maximum penalty applying to identical offences under the Intelligence Services Act.

*Exception – information or matter lawfully available: subsection (2)*

185. Subclause 42(2) sets out an exception to the offence in subclause (1). The exception provides that the offence in subclause (1) does not apply to information or matter that has already been communicated or made available to the public with the authority of the Commonwealth. This is consistent with the exception contained in the existing provision under subsection 40A(2) of the Intelligence Services Act.

186. This matter is a defence as it is far more reasonable to require a defendant to point to evidence that information is in the public domain, where the defendant would have had this in mind at the time of disclosure, than to require the Commonwealth to prove beyond reasonable doubt that the information is not in the public domain.

187. This exception does not apply to the unauthorised public communication or disclosure of information or matter, such as that in the nature of a 'leak'. Similarly, the exception does not apply to exculpate a person who makes an unauthorised communication of information or matter which is subsequently made public with the authority of the Commonwealth.

*Exception – communication to IGIS officials*

188. Subclause 42(3) provides that the offence in subclause (1) does not apply if the person communicates the information or matter to an IGIS official, for the purpose of the IGIS official exercising a power, or performing a function or a duty, as an IGIS official. This is to ensure that the IGIS is able to provide effective oversight and that ONI employees and others can make disclosures of wrongdoing, including public interest disclosures, to the IGIS and IGIS officials.

*Extended geographical jurisdiction*

189. Subclause 42(4) provides that an offence against subclause 42(1) is subject to Category D extended geographical jurisdiction under section 15.4 of the Criminal Code. This replicates the situation that applies in respect of an offence against 40A of the Intelligence Services Act.

190. The application of Category D extended geographical jurisdiction means that the offence applies whether or not the relevant conduct occurs in Australia, and whether or not the person alleged to have committed the offence is an Australian citizen, and whether or not there is an equivalent offence in the law of the local jurisdiction in which the conduct constituting the offence is said to have occurred.

191. Category D extended geographical jurisdiction is necessary to ensure the effective operation of the offence. Persons captured by this offence may potentially include foreign officials or other persons who are based outside Australia. Given the risks to national security interests presented by any unauthorised dealing with intelligence information by any person to which such information has been entrusted, it is appropriate that flexibility is retained to bring such persons to justice, should they deal with records or information acquired or prepared by ONI in connection with its functions, or which relates to the performance by ONI of its functions, in a manner that contravenes the terms on which access was provided.

***Clause 43 – Offence – subsequent communications of certain information***

192. Clause 43 provides for a new secrecy offence for the secondary disclosure of certain ONI information. This provision is modelled on the updated section 35P of the ASIO Act, which implemented the recommendations of the Independent National Security Legislation Monitor.

193. This offence will apply if the relevant information came to the knowledge or into the possession of the person other than in one of the capacities set out in subparagraphs 43(1)(a)(i) to (iii): these are that the person is or was a staff member of ONI, that the person has entered into any contract, agreement or arrangement with ONI or that the person has been an employee or agent of a person who has entered into a contract, agreement or arrangement with ONI.

194. The prosecution must prove that the person intentionally communicated any information or matter (by reason of subsection 5.6(1) of the Criminal Code). The prosecution must also prove that the information or matter was acquired or prepared by, or on behalf of, ONI in connection with its functions, or related to the performance by ONI of its functions. The prosecution must prove that the person was reckless as to this circumstance (by reason of subsection 5.6(2) of the Criminal Code).

195. Unlike the offences that apply to ONI 'insiders', or those who obtained the information other than through their pre-existing relationship with ONI, these offences will only apply where the disclosure of the information will or is likely to cause harm to national security or to the health or safety of an individual, and the person intends or knows that this is the case. This means that a person who has no existing relationship with ONI will only commit an offence where they have a culpable state of mind, and means that those who come across information otherwise than through an existing relationship with ONI – such as journalists engaged in legitimate news reporting – will only commit an offence where they know or intend that their disclosure will cause harm.

196. National security has the same meaning as in the *National Security Information (Criminal and Civil Proceedings) Act 2004*. National security is defined in section 8 of that Act as Australia's defence, security, international relations or law enforcement interests.

197. The maximum penalty of five years imprisonment is lower than the penalty that applies to the 'insider' offences, reflecting the higher standard to which insiders are held.

198. Similar exceptions apply here as to the 'insider' disclosure offence in section 42.

199. Subclause (4) provides that an offence against subclause 43(1) is subject to Category D extended geographical jurisdiction under section 15.4 of the Criminal Code. This form of extended geographical jurisdiction is necessary to ensure the effective operation of the offence. Prosecutions of

non-Australians in relation to conduct outside Australia is subject to the safeguard in clause 45, which requires the Attorney-General to consent to the commencement of such prosecutions.

***Clause 44 – Offences – dealing with and making records***

200. This clause provides for offences substantially the same as sections 40J and 40K of the Intelligence Services Act.

201. Sections 40J and 40K will be repealed by the C&T Bill. It is considered appropriate to move the secrecy provisions relating to ONA from the Intelligence Services Act to the Bill.

*Unauthorised dealing with records*

202. Subclause 44(1) provides for an offence in respect of the unauthorised dealing with records that were acquired by or prepared by or on behalf of ONI in connection with its functions, or records which relate to the performance by ONI of its functions.

*Physical element 1 – dealing with a record: paragraph (1)(a)*

203. Paragraph 44(1)(a) requires the prosecution to prove that the person engaged in a form of conduct specified in subparagraphs (1)(a)(i)-(v) (the 'relevant conduct'): that is, copying, transcribing, retaining, removing or dealing in any other manner with a record. By reason of subsection 5.6(1) of the Criminal Code, the fault element is intention.

*Physical element 2 – reason by which record was obtained by the person: paragraph (1)(b)*

204. Paragraph 44(1)(b) requires the prosecution to prove that the record was obtained by the person by reason of one of the circumstances set out in subparagraphs (i)-(iii). These are that the person is, or was, a staff member of ONI, the person has entered into any contract, agreement or arrangement with ONI or the person has been an employee or an agent of a person who has entered into a contract, agreement or arrangement with ONI.

205. As the physical element in paragraph 44(1)(b) is that of a circumstance, the prosecution must prove that the person was reckless in relation to that circumstance by reason of subsection 5.6(2) of the Criminal Code. This means that the prosecution must prove that the person was aware of a substantial risk that he or she obtained the record by reason of one of the circumstances in subparagraphs (b)(i)-(iii), and that he or she nonetheless and unjustifiably in the circumstances took the risk that the circumstance existed. The fault element of recklessness may also be satisfied by proof of a person's knowledge of the relevant circumstances. Hence, the prosecution may alternatively prove that the person was aware of one of the circumstances set out in subparagraphs (b)(i)-(iii).

*Physical element 3 – connection of the record to the agency's functions: paragraph (1)(c)*

206. Paragraph 44(1)(c) requires the prosecution to prove that the record was either: acquired or prepared by or on behalf of ONI in connection with its functions or relates to the performance by ONI of its functions.

207. As the physical element in paragraph 44(1)(c) is that of a circumstance, the prosecution must prove that the person was reckless in relation to that circumstance (by reason of subsection 5.6(2) of the Criminal Code). Recklessness may be alternatively satisfied by proof of a person's knowledge.

*Physical element 4 – relevant conduct was not authorised: paragraph (1)(d)*

208. Paragraph 44(1)(d) requires the prosecution to prove that the relevant conduct under paragraph 44(1)(a) was not engaged in pursuant to one of the forms of authorisation in subparagraphs (1)(d)(i)-(iv).

209. As the physical element in paragraph 44(1)(d) is a circumstance, the prosecution must prove that the person was reckless in relation to that circumstance (per subsection 5.6(2) of the Criminal Code). Recklessness may alternatively be satisfied by proof of a person's knowledge.

*Maximum penalty*

210. The offence in subclause 44(1) carries a maximum penalty of three years' imprisonment. It is considered appropriate that this offence applies a higher maximum penalty than other secrecy offences of general application due to the sensitive nature of the information placed at risk, which may jeopardise Australia's national security.

*Unauthorised recording of information or matter*

211. Subclause 44(2) provides for an offence in respect of the unauthorised recording of information or matter that was acquired by, or prepared for by, or on behalf of, ONI in connection with its functions, or information or matter which relates to the performance by ONI of its functions.

*Physical element 1 – making a record of any information or matter – paragraph (2)(a)*

212. Paragraph 44(2)(a) requires the prosecution to prove that the person has made a record of any information or matter. The fault element of intention applies to this element by reason of subsection 5.6(1) of the Criminal Code. The term 'record' is defined in clause 4 of the Bill.

213. The making of a record may include, for example, the conduct of a person who hears a conversation or sees a written report in the course of his or her employment by ONI or in accordance with a contract, agreement or arrangement, and later writes down a note of the contents of the conversation or report based on his or her recollection.

*Physical element 2 – reason by which the information or matter has come to the knowledge or into the possession of the person – paragraph (2)(b)*

214. Paragraph 44(2)(b) requires the prosecution to prove that the information or matter has come into the knowledge or into the possession of the person by reason of one of the circumstances in subparagraphs (i)-(iii). These are that the person is or has been a staff member of ONI, the person has entered into any contract, agreement or arrangement with ONI, or the person has been an employee or an agent of a person who has entered into a contract, agreement or arrangement with ONI.

215. As the physical element in paragraph 44(2)(b) is a circumstance, the prosecution must prove that the person was reckless as to the existence of one of the circumstances in subparagraphs (b)(i)-(iii), by reason of subsection 5.6(2) of the Criminal Code. The prosecution may alternatively prove that the person knew of one of these circumstances.

*Physical element 3 – connection of information or matter to the agency's functions or performance of its functions: paragraph (2)(c)*

216. Paragraph 44(2)(c) requires the prosecution to prove that the information or matter was acquired or prepared by, or on behalf of, ONI in connection with its functions, or relates to the performance by ONI of its functions. As this element is a circumstance, the fault element of

recklessness applies pursuant to subsection 5.6(2) of the Criminal Code, which may alternatively be satisfied by proof of a person's knowledge as to the existence of the circumstance.

*Physical element 4 – unauthorised making of record: paragraph (2)(d)*

217. Paragraph 44(2)(d) requires the prosecution to prove that the person made a record of the information or matter without one of the forms of authorisation under subparagraphs (d)(i)-(iv).

218. As the physical element in paragraph (2)(d) is a circumstance, the fault element of recklessness applies by reason of subsection 5.6(2) of the Criminal Code. Proof of recklessness can also be satisfied by proof of a person's knowledge of one of the circumstances in subparagraphs (2)(d)(i)-(iv).

*Maximum penalty*

219. The offence in subclause 44(2) carries a maximum penalty of three years' imprisonment. As with the offence in subclause 44(1), this is considered appropriate due to the sensitive nature of the information placed at risk, which may jeopardise Australia's national security.

*Exceptions – record, information or matter lawfully available; and dealing with or making record for IGIS officials: subclauses (3) and (4)*

220. Subclause 44(3) sets out an exception to the offences in subclauses (1) and (2). The exception provides that the offence in subclause (1) does not apply to a record, and the offence in subclause (2) does not apply to information or matter, that has been communicated or made available to the public with the authority of the Commonwealth. It is intended that this subclause is to be interpreted in identical terms to the corresponding exception to the offence in subclause 42(2).

221. Subclause 44(4) contains an exception to the offence in subclause (1) for persons who deal with the record for the purpose of an IGIS official exercising a power or performing a function or duty, as an IGIS official. Subclause 44(4) also contains an exception to the offence in subclause (2) for persons who make the record of information or matter for the purpose of an IGIS official exercising a power, or performing a function or duty, as an IGIS official.

222. These elements are defences, placing the evidential burden on the defendant, as it is far more reasonable for the defendant to point to evidence that they would have had in mind at the time of disclosure, than for the Commonwealth to prove that the information is not in the public domain, or that the defendant did not deal with a record for the purpose of an IGIS official exercising their powers or functions.

*Extended geographical jurisdiction*

223. Subclause 44(5) provides that an offence against clause 44 is subject to Category D extended geographical jurisdiction under section 15.4 of the Criminal Code. This replicates the situation that applies in respect of offences against section 40J and section 40K of the Intelligence Services Act.

224. The application of Category D extended geographical jurisdiction means that the offence applies whether or not the relevant conduct occurs in Australia, and whether or not the person alleged to have committed the offence is an Australian citizen, and whether or not there is an equivalent offence in the law of the local jurisdiction in which the conduct constituting the offence is said to have occurred.

225. Category D extended geographical jurisdiction is necessary to ensure the effective operation of the offence. Persons captured by this offence may potentially include foreign officials or other

persons who are based outside Australia. Given the risks to national security interests presented by any unauthorised dealing with intelligence information by any person to which such information has been entrusted, it is appropriate that flexibility is retained to bring such persons to justice, should they deal with records or information acquired or prepared by ONI in connection with its functions, or which relates to the performance by ONI of its functions, in a manner that contravenes the terms on which access was provided.

*Alternative verdict provisions: subclauses (6) and (7)*

226. Subclauses 44(6) and (7) set out alternative verdict provisions. Subclause 44(6) provides that a person who is prosecuted with an unauthorised dealing offence under subclause 44(1) may be convicted of an offence in respect of the unauthorised recording of information or matter under subclause 44(2). Subclause 44(7) provides that a person who is prosecuted for an offence of unauthorised recording of information or matter under subclause 44(2) may be convicted of an offence in respect of the unauthorised dealing offence under subclause 44(1).

227. These provisions enable an efficient and procedurally fair means of dealing with persons who engage in unauthorised conduct in relation to information, which the trier of fact considers would satisfy the elements of an offence in respect of the unauthorised dealing with a record of that information.

228. An alternative verdict provision is appropriate given that the offences concerning the unauthorised recording of information or matter, and the unauthorised dealing with a record, carry an identical maximum penalty. Their elements are also similar because they are directed to closely related forms of wrongdoing.

***Clause 45 – Instituting prosecutions for offences against this Division***

229. Subclause 45(1) requires the prior consent of the Attorney-General (or a person acting under his or her direction) to the institution of a prosecution of an offence under Division 2 of Part 4. Subclause 45(2) clarifies that such consent need not be obtained before a person charged with an offence under Division 2 of Part 4 is arrested, or a warrant is issued or executed. Such a person may also be remanded in custody or released on bail in the absence of the Attorney-General's consent to a prosecution. Subclause 45(3) further clarifies that subclauses (1) and (2) do not prevent an accused person from being discharged if proceedings are not continued within a reasonable time.

***Clause 46 – Offences against this Division – IGIS officials***

230. Subclause 46(1) provides that a person does not commit an offence if the person is an IGIS official and the relevant conduct that would otherwise constitute an offence against Division 2 of Part 4 of the Bill is performed by the person for the purpose of exercising powers or performing functions or duties as an IGIS official. Subclause (2) provides that in a prosecution for an offence against the Division, the defendant does not bear an evidential burden in relation to the matter in subclause 46(1).

231. It is considered appropriate that the prosecution bears the evidential burden in relation to the matter in subclause 46(1). An IGIS official is under strict secrecy obligations, and disclosures by an IGIS official required to discharge a reversed burden could potentially breach that obligation (set out in section 34 of the *Inspector-General of Intelligence and Security Act 1986*).

## Part 5—Administration

### Division 1—National Assessments Board

***Clause 47 – National Assessments Board***

232. This clause provides that the National Assessments Board (the Board) which existed under the ONA Act continues in existence.

233. The Review recommended that the Board should continue to operate in relation to ONI national assessments in the same way as it has in relation to ONA.

234. The Board will continue to consider which assessments made by ONI should be national assessments and therefore subject to the formal process set out in Division 1 of Part 5 of the Bill, which includes consideration of national assessments by the Board.

235. The Director-General ultimately decides whether an ONI assessment is a national assessment for the purposes of this Division (see paragraph 16(1)(d)).

***Clause 48 – Constitution***

236. This clause provides that mandatory membership of the National Assessments Board consists of the Director-General, a member of the ADF, an official from each of the following departments - the Department of the Prime Minister and Cabinet, the Department of Foreign Affairs and Trade, the Department of Defence, the Department of Home Affairs and the Department of the Treasury; and such other persons as the Prime Minister directs.

237. This reflects the current constitution of the Board, with the addition of representatives from the Department of Home Affairs and Treasury. It is considered appropriate to add representatives from these policy departments to the mandatory list of members given their responsibility for matters of relevance to the work of the Board including border protection, law enforcement and economic matters.

238. As is currently the case under the ONA Act, the Director-General will have the ability to add one or more persons to the membership of the Board for the purposes of a particular national assessment.

***Clause 49 – Holding of meetings***

239. This clause provides that the Director-General must hold such meetings as are necessary for the efficient performance of the Board's functions and that the Director-General may convene a meeting at any time.

***Clause 50 – Presiding at meetings***

240. This clause provides that the Director-General presides at all meetings of the Board and may direct the procedure to be followed at a meeting.

***Clause 51 – Officials to attend meetings***

241. This clause provides that when a national assessment is under consideration by the Board at a meeting, the Director-General must take reasonable steps to ensure that representatives of departments and agencies appropriate to the subject matter of the national assessment are present.

242. This may include for example, representatives from other NIC agencies who have relevant subject matter expertise.

**Division 2—Committees**

***Clause 52 – Committees***

243. This clause will enable the Director-General (or his or her delegate) to establish committees to advise or assist in the performance of ONI's functions.

244. The statement in subclause 52(4) that a determination is not a legislative instrument is merely declaratory of the law, rather than providing a substantive exemption for the purposes of the Legislation Act.

**Division 3 – Privacy rules**

***Clause 53 – Privacy rules to protect Australians***

245. Like ONA, it is proposed that ONI will be exempt from the operation of the Privacy Act. This exemption extends to actions or activities of other agencies in relation to a record originating or received from ONI. The proposed amendments to the Privacy Act included in the C&T Bill will provide an additional exemption for the provision of personal information to ONI by an agency with an intelligence role or function (AUSTRAC, the AFP, the Department of Home Affairs and the Department of Defence).

246. While ONA has administratively developed guidelines relating to privacy, ONI will be legislatively required to comply with privacy rules to ensure the privacy of Australian persons or entities in relation to identifiable information dealt with by ONI. However, while the Prime Minister must make rules regarding identifiable information, the provision does not limit the matters in relation to which the Prime Minister may make rules. It remains open to the Prime Minister to extend these rules, or to make additional rules, to protect the personal information of others, including foreign nationals.

247. Clause 53 is based upon section 15 of the Intelligence Services Act which requires the Ministers responsible for ASIS, ASD and AGO to make rules regulating the communication and retention by the relevant agency of intelligence information concerning Australian persons.

248. Subclause 53(1) provides that the Prime Minister must make rules regulating the collection of identifiable information mentioned in clause 7(1)(g) and the communication, handling and retention by ONI of identifiable information generally.

249. Identifiable information is defined in clause 4 in a similar way as personal information in the Privacy Act, except that it is limited to the information of Australian citizens and permanent residents. The definition of permanent resident for the purposes of this definition includes Australian bodies corporate as well as natural persons.

250. In making the privacy rules, the Prime Minister must have regard to the need to ensure that the privacy of Australian citizens and permanent residents is preserved so far as is consistent with the proper performance by ONI of its functions.

251. The Prime Minister is also required to consult with the Director-General, the IGIS and the Attorney-General before making the privacy rules, including by providing them with a copy of the proposed rules.

252. Subclause 53(6) provides that the IGIS must brief the Parliamentary Joint Committee on Intelligence and Security on the content and effect of the privacy rules if required to do so by the Committee or the privacy rules change.

253. Amendments to the Inspector-General of Intelligence and Security Act contained in the C&T Bill will require the IGIS to include comments in their annual report on the extent of ONI's compliance with the privacy rules.

254. Subclause 53(8) is intended to operate as a substantive exemption from the requirements of the Legislation Act. Although it is anticipated that privacy rules given to the Director-General under this clause will generally be made public, given the nature of ONI's functions, such rules may also contain information relating to national security that is not suitable for public dissemination. An exemption for these reasons would be consistent with the privacy rules issued under the Intelligence Services Act.

**Part 6 – Miscellaneous**

***Clause 54 - Delegation***

255. Subclause 54(1) allows the Director-General to delegate his or her functions or powers under this Bill or the general rules (other than those listed in subclause 54(2)) to a person who holds or performs the duties of an SES position, or an equivalent position, in ONI.

256. This will include staff at the SES level from other agencies seconded to ONI under clause 36 of the Bill.

257. This includes:

- the approval of authorities of another country with which ONI may cooperate;
- presiding at meetings of the National Assessments Board;
- the addition of persons to the National Assessments Board;
- the establishment of Committees; and
- the making of arrangements for the purposes of clause 41.

258. Allowing the Director-General to delegate these matters to a person in an SES position provides for more timely and effective action under the Bill.

259. Subclause 54(2) provides that the Director-General cannot delegate the following functions and powers:

- the power to give directions under clause 20;
- the power to issue guidelines under clause 21; or
- the power to request information under clause 37.

260. Given the nature of these powers, it is considered appropriate that they should only be exercisable by the Director-General.

***Clause 55 – General rules***

261. This clause provides for the making of rules by the Prime Minister by legislative instrument. Providing for a general instrument-making power under a Bill is a long-standing practice. This is to allow certain matters to be provided for in subordinate legislation where appropriate.

262. Subclause 55(1) provides that the rules may prescribe matters required or permitted by this Act to be prescribed by the rules, or matters necessary or convenient to be prescribed for carrying out or giving effect to the ONI Act.

263. This includes rules prescribing a Commonwealth authority or State authority as a body that ONI may cooperate with for the purposes of clause 14 of the Act.

264. The 'necessary or convenient' power provided in this subclause ensures that the Commonwealth is able to incorporate additional matters that arise following the establishment of ONI to support the effective operation of the Bill. However this power cannot be used to extend the scope or general operation of the Bill.

265. Subclause 55(2) sets out what the rules may not provide for, including the creation of an offence or civil penalty or directly amending the text of the Bill. This reflects the types of matters that, by way of policy, should not be prescribed in rules, and include creating an offence or imposing a tax.

266. As rules made under this Bill are a legislative instrument for the purposes of the Legislation Act, they must be tabled in both Houses of the Parliament and are subject to the same level of parliamentary scrutiny as regulations.