What we know so far about the new Home Affairs portfolio: a quick guide

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Foreign Affairs, Defence and Security

On 18 July 2017, the Prime Minister announced that the Government would establish a Home Affairs portfolio that will bring together Australia’s immigration, border protection, law enforcement and domestic security agencies in a single portfolio. As outlined in the recent Library paper, *A Quick Guide to the History of Proposals for an Australian Department of Homeland Security*, Australian governments of different persuasions have considered the establishment of something like the US Department of Homeland Security or the UK Home Office on several occasions since the early 2000s. The Prime Minister stated that the new Home Affairs portfolio will be more similar to the UK model, as opposed to the US model—‘a federation, if you will, of border and security agencies’, under which the various agencies would retain their statutory independence (see also the Minister for Immigration and Border Protection’s comments).

This quick guide outlines what the Government has said about the creation of the new portfolio and some of the changes that will (or might) be involved in establishing the portfolio, and provides links to some responses and reactions to the announcement.

All hyperlinks in this Bills Digest are correct as at August 2017.

**Ministerial arrangements**

There are currently two ministers in the Attorney-General’s portfolio (the Attorney-General and the Minister for Justice—who is also the Minister Assisting the Prime Minister on Counter-Terrorism) and two in the Immigration and Border Protection portfolio (the Minister for Immigration and Border Protection and the Assistant Minister for Immigration and Border Protection).

The Prime Minister stated that the Minister for Home Affairs will be supported by two ministers, one assisting on domestic security and another on immigration. He also stated that the current Minister for Immigration and Border Protection, Peter Dutton, was the ‘Minister-designate for Home Affairs’, and that Michael Keenan, currently Minister for Justice, would continue as a security-focused minister (but within the Home Affairs portfolio). Comments made by the Minister for Immigration and Border Protection indicate that Alex Hawke will also retain his role as a junior minister in the portfolio, with responsibility for immigration.
Affected agencies and departments
The Home Affairs portfolio will comprise:

- a central department to oversee policy and strategic planning (henceforth referred to as the Department of Home Affairs)
- the Australian Border Force (ABF)
- the Australian Security Intelligence Organisation (ASIO)
- the Australian Federal Police (AFP)
- the Australian Criminal Intelligence Commission (ACIC)
- the Australian Transaction Reports and Analysis Centre (AUSTRAC) and
- the Office of Transport Security (OTS), currently a division of the Department of Infrastructure and Regional Development.

The OTS and the agencies above would be moved into the Home Affairs portfolio in their entirety. However, it is possible that some of the non-operational or administrative parts of the agencies (such as those relating to corporate governance) could be subsumed into the Department of Home Affairs instead of remaining parts of the agencies. The Prime Minister stated that the establishment of the portfolio would ‘identify opportunities for streamlining back office and other support functions’.

The Prime Minister also announced the movement of several oversight agencies into the Attorney-General’s portfolio, namely the Inspector-General of Intelligence and Security (IGIS), the Independent National Security Legislation Monitor (INSLM) and the Commonwealth Ombudsman. In this sense, the Australian arrangements will differ from the UK model, under which equivalent agencies (such as the Intelligence Services Commissioner, Interception of Communications Commissioner, Independent Reviewer of Terrorism Legislation and HM Inspectorate of Constabulary) are part of the Home Office portfolio.

The Minister for Justice is currently responsible for five agencies within the Attorney-General’s portfolio. The only one not mentioned in the Prime Minister’s press conference was the Australian Institute of Criminology (AIC). It is unclear what the future arrangements for that agency will be. A Bill that would merge the AIC into ACIC was reintroduced in September 2016 after having lapsed when Parliament was prorogued in April 2016. As noted in the Bills Digest, the Australian Labor Party has expressed reservations about the merger, and it is opposed by the Australian Greens.

The Prime Minister’s announcement focused mainly on changes affecting agencies, rather than departments. It appears that the new central department will be an expanded version of what is currently the Department of Immigration and Border Protection (DIBP). The Attorney-General’s Department (AGD) is currently responsible for policy, strategy and legislation relating to national security and criminal justice, and for many of the affected agencies. It is therefore likely that some parts of AGD will be moved to the new Department of Home Affairs. However, it is unclear at this stage what the extent of those changes will be.

The Attorney-General will retain responsibility for issuing warrants for ASIO’s use of powers (see further below under ‘Accountability arrangements’), and continue to administer the Criminal Code Act 1995 (which includes key Commonwealth offences such as those relating to terrorism, human trafficking and slavery and drug trafficking) and the Crimes Act 1914 (which, among other matters, provides the basis for most of the AFP’s investigative powers). These factors make it more difficult to determine how parts of AGD responsible for national security and criminal justice policy and legislation might be split across the Attorney-General’s and Home Affairs portfolios. It is also unclear where other parts of AGD, such as emergency management and international crime cooperation, will be placed. It would appear that some or all of the staff working in the Criminal Justice Group and the National Security and Emergency Management Groups will be moved into the Department of Home Affairs.

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1. All of the affected agencies are statutory agencies; that is, they have specific functions set by legislation. Departments are established by the Governor-General through Administrative Arrangements Orders, and have responsibility for particular areas of policy and administration of particular legislation.
The table below outlines the existing arrangements for affected departments and agencies, and the revised arrangements that will apply when the new portfolio is established, based on the Prime Minister’s announcement and the above-mentioned assumptions about departments. It is possible that there will be other changes identified in the coming months.

<table>
<thead>
<tr>
<th>Current department/agency</th>
<th>Current portfolio (minister)</th>
<th>Changes</th>
<th>Revised portfolio (minister)²</th>
</tr>
</thead>
<tbody>
<tr>
<td>DIBP</td>
<td>Immigration and Border Protection (Immigration and Border Protection and Assistant Minister)</td>
<td>Expanded into the Department of Home Affairs</td>
<td>Home Affairs (Home Affairs and two junior ministers (security; immigration))</td>
</tr>
<tr>
<td>AGD</td>
<td>Attorney-General’s (Attorney-General; Minister for Justice)</td>
<td>Parts of the department will be moved to the Department of Home Affairs</td>
<td>Attorney-General’s (Attorney-General)</td>
</tr>
<tr>
<td>Department of Infrastructure and Regional Development</td>
<td>Infrastructure and Regional Development (Infrastructure and Transport; Regional Development)</td>
<td>Will lose the OTS</td>
<td>As per current</td>
</tr>
<tr>
<td>ABF</td>
<td>Immigration and Border Protection (Immigration and Border Protection)</td>
<td>Unclear if there will be any change. While the ABF is part of the DIBP, the ABF Commissioner already reports directly to the minister on operational matters.</td>
<td>Home Affairs (Home Affairs)</td>
</tr>
<tr>
<td>ASIO</td>
<td>Attorney-General’s (Attorney-General)</td>
<td>Will move portfolios but retain statutory independence</td>
<td>Home Affairs (Home Affairs, but warrants/authorisations will remain with the Attorney-General—see further below under ‘Accountability arrangements’)</td>
</tr>
<tr>
<td>AFP</td>
<td>Attorney-General’s (Minister for Justice)</td>
<td>Will move portfolios but retain statutory independence</td>
<td>Home Affairs (Home Affairs)</td>
</tr>
<tr>
<td>ACIC</td>
<td>Attorney-General’s (Minister for Justice)</td>
<td>Will move portfolios but retain statutory independence</td>
<td>Home Affairs (appears it will be the junior minister responsible for security)</td>
</tr>
<tr>
<td>AUSTRAC</td>
<td>Attorney-General’s (Minister for Justice)</td>
<td>Will move portfolios but retain statutory independence</td>
<td>Home Affairs (appears it will be the junior minister responsible for security)</td>
</tr>
<tr>
<td>OTS</td>
<td>Infrastructure and Regional Development (Infrastructure and Transport)</td>
<td>Will move from the Department of Infrastructure and Regional Development to the Department of Home Affairs</td>
<td>Home Affairs (appears it will be the junior minister responsible for security)</td>
</tr>
</tbody>
</table>

2. The Prime Minister’s announcement explicitly stated that the ABF, AFP and ASIO would report directly to the Minister for Home Affairs. This appears to suggest the other agencies, which are all security-focused, will report to the junior minister responsible for security.
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<td>IGIS</td>
<td>Prime Minister and Cabinet</td>
<td>Will move portfolios but retain statutory independence</td>
<td>Attorney-General’s (appears it will be the Attorney-General)</td>
</tr>
<tr>
<td>INSLM</td>
<td>Prime Minister and Cabinet</td>
<td>Will move portfolios but retain statutory independence</td>
<td>Attorney-General’s (appears it will be the Attorney-General)</td>
</tr>
<tr>
<td>Ombudsman</td>
<td>Prime Minister and Cabinet</td>
<td>Will move portfolios but retain statutory independence</td>
<td>Attorney-General’s (appears it will be the Attorney-General)</td>
</tr>
<tr>
<td>Australian Commission for Law Enforcement Integrity (ACLEI)</td>
<td>Attorney-General’s (Minister for Justice)</td>
<td>Appears it will remain in the same portfolio but report to a different minister</td>
<td>Attorney-General’s (appears it will be the Attorney-General)</td>
</tr>
<tr>
<td>Australian Institute for Criminology</td>
<td>Attorney-General’s (Minister for Justice)</td>
<td>Unclear</td>
<td>Unclear. If it is merged into ACIC, it would fall under the Home Affairs portfolio and would likely report to the junior minister responsible for security.</td>
</tr>
</tbody>
</table>

**Accountability arrangements for agencies being brought under Home Affairs**

ASIO is currently overseen by the IGIS, which reviews the activities of all six intelligence agencies that currently comprise the Australian Intelligence Community for legality, propriety and compliance with human rights. No changes would be required for the IGIS to continue performing that oversight role following the establishment of a Home Affairs portfolio.

ACLEI has integrity oversight of the DIBP (including the ABF), ACIC, the AFP, and AUSTRAC. The Government may decide to extend ACLEI’s jurisdiction to include the whole of the Department of Home Affairs (including the OTS) as part of implementing the new portfolio. Legislative amendments would be required for any change to ACLEI’s jurisdiction. This could be achieved by amending the Law Enforcement Integrity Commissioner Act 2006 or the associated regulations.3

The Ombudsman is responsible for overseeing the use of certain covert and intrusive powers by law enforcement agencies, including the AFP, ACIC and the DIBP. It also oversees the operation of the AFP’s professional standards framework, including the handling of complaints about the conduct of AFP appointees. No changes would be required in order for the Ombudsman to continue performing these functions other than minor consequential amendments if the ABF becomes a standalone agency.

The Senate Standing Committees on Legal and Constitutional Affairs currently oversee the Attorney-General’s and Immigration and Border Protection portfolios. As most of the changes associated with establishing the Home Affairs portfolio involve movement of agencies and functions from the Attorney-General’s portfolio to what is currently the Immigration and Border Protection portfolio, the committees’ role would remain substantially the same. If the allocation of portfolios remains as it is currently, oversight of the IGIS, INSIM, and the Ombudsman (currently overseen by the Senate Standing Committees on Finance and Public Administration and the OTS (currently overseen by the Senate Standing Committees on Rural and Regional Affairs and Transport) would be added to their responsibilities. While House of Representatives standing committees are

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3. The Act gives ACLEI oversight responsibilities for law enforcement agencies. ‘Law enforcement agency’ is defined in subsection 5(1) to include, as well as those specifically listed, any other Commonwealth government agency that has a law enforcement function and is prescribed by regulations for the purpose of that definition.
organised slightly differently, the jurisdiction of the House of Representatives Standing Committee on Social Policy and Legal Affairs would be similarly affected.

The responsibilities of other relevant committees—specifically the Parliamentary Joint Committees on the Australian Commission for Law Enforcement Integrity, Law Enforcement (which oversees the AFP and ACIC), and Intelligence and Security (which oversees ASIO, several other intelligence agencies (see below) and the AFP’s performance of its counter-terrorism functions)—are set by legislation and based on agencies and functions, rather than portfolios. It would not be necessary to amend their mandates to account for the establishment of the Home Affairs portfolio. However, the creation of the new portfolio presents an opportunity to consider the roles of these committees and whether any adjustments might be desirable.

Changes recommended by the Independent Intelligence Review

The Prime Minister released the 2017 Independent Intelligence Review on the same day that he announced the establishment of a Home Affairs portfolio. The Review, completed by Michael L’Estrange (Reviewer), Stephen Merchant (Reviewer) and Sir Iain Lobban (Adviser), included several recommendations for changes to the oversight of Australia’s intelligence agencies. If accepted and implemented, they would affect agencies in the new Home Affairs portfolio. The Review recommended:

- the IGIS and the Parliamentary Joint Committee on Intelligence and Security (PJCIS), both of which currently oversee ASIO, the Australian Secret Intelligence Service, the Australian Signals Directorate, the Australian Geospatial-Intelligence Organisation, the Defence Intelligence Organisation and the Office of National Assessments, also be given responsibility for overseeing:
  - AUSTRAC (in its entirety) and
  - the intelligence functions of the AFP, ACIC and the DIBP
- the PJCIS be given the ability to request that the IGIS conduct an inquiry into the legality and propriety of particular operational activities of any of the ten above-mentioned agencies and report to the PJCIS, the Prime Minister and the responsible minister and
- the PJCIS be given the ability to initiate its own inquiries into the administration and expenditure of the ten above-mentioned agencies.

The functions of the IGIS and the PJCIS are set by statute. Implementation of these recommendations would require amendments to the Inspector-General of Intelligence and Security Act 1986 and the Intelligence Services Act 2001.

Warrants and authorisations

Most of ASIO’s powers under the Australian Security Intelligence Organisation Act 1979 and the Telecommunications (Interceptions and Access) Act 1979 are exercised under warrants issued by the Attorney-General. Under the Intelligence Services Act 2001, the ministers responsible for the Australian Secret Intelligence Service (the Minister for Foreign Affairs) and the Australian Signals Directorate and Australian Geospatial-Intelligence Organisation (both the Minister for Defence) must obtain the agreement of the minister responsible for ASIO before authorising any activities that would affect, or would be likely to affect, an Australian citizen or permanent resident. The Prime Minister stated that the Attorney-General would continue to be the minister issuing those warrants and giving such agreement (even though ASIO will report to the Minister for Home Affairs).

Implementation

The Minister for Immigration and Border Protection has been tasked with overseeing the development of the governance structures, legislative changes and operational planning necessary to establish the Home Affairs portfolio in cooperation with the Attorney-General, the Minister for Justice and the Department of the Prime Minister and Cabinet (PM&C).

The Prime Minister asked the head of PM&C to establish a taskforce to consider the recommendations of the 2017 Independent Intelligence Review and manage the implementation of those that will be adopted (the Prime
Minister has already accepted some of the key recommendations. The Prime Minister stated that he had instructed the head of his department to:

... ensure that the arrangements to create the Home Affairs portfolio are prepared with a unity of purpose and fully coordinated with changes to the intelligence community. The taskforce will develop the necessary governance, legislative and other changes to effect the Government’s objectives. And it will ensure that the changes to the intelligence community, and the establishment of a Home Affairs portfolio, are aligned.

He also stated that during the transition period, ‘our operational agencies will continue to report to their current ministers, pending the finalisation of new arrangements’.

**Timing**

The Prime Minister stated that the National Security Committee of Cabinet would approve the ‘portfolio implementation plan’ later this year, and that the transition was expected to be completed by 30 June 2018.

**Select responses and reactions**

- A Bergin and D Woolner, ‘Blank canvas: creating a Home Affairs portfolio’, The Strategist, blog, 1 August 2017
- J Blaxland, ‘The new Department of Home Affairs is unnecessary and seems to be more about politics than reform’, The Conversation, blog, 18 July 2017
- Community and Public Sector Union (CPSU), Home Affairs portfolio a threat to core immigration functions, media release, 19 July 2017
- A Dupont, ‘Home Affairs change driven by manifest need’, The Interpreter, blog, 26 July 2017
- A Garnier, ‘Australia’s new “Home Office” is a worry for immigration policy’, The Conversation, blog, 20 July 2017
- A Gyngell, The Australian Intelligence tradition, The Interpreter, blog, 24 July 2017
- D Irvine, ‘Australian intelligence reforms: “ain’t broke” can still be improved’, The Interpreter, blog, 21 July 2017
- P Jennings, ‘The good and not so good of policymaking’, The Strategist, blog, 21 July 2017
- J Kelly, ‘“Courage” to repair a working system’, The Australian, 31 July 2017, p. 6
- P Leahy, ‘Home affairs department: security demands a fresh approach’, The Australian, 29 July 2017
- G Sheridan, ‘Rushed decision on home affairs could very quickly turn out to be a mistake’, The Australian, 22 July 2017, p. 15
- N Stuart, ‘Why a bigger Home is not always better’, The Canberra Times, 26 July 2017, p. 17
- R Woolcott, ‘Government policies have made us less safe’, Pearls and Irritations, blog, 25 July 2017
- M Wordsworth, ‘“There are a number of questions of detail to answer”, says former Defence Secretary’, PM, transcript, ABC Radio Canberra, Australian Broadcasting Corporation (ABC), 18 July 2017