Law Council
OF AUSTRALIA

Inspector-General of Intelligence and Security and Other Legislation Amendment (Modernisation) Bill 2022 (Cth)

Parliamentary Joint Committee on Intelligence and Security

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The Law Council advises governments, courts, and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession internationally, and maintains close relationships with legal professional bodies throughout the world. The Law Council was established in 1933 and represents its Constituent Bodies: 16 Australian State and Territory law societies and bar associations, and Law Firms Australia. The Law Council's Constituent Bodies are:

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- Law Society of the Australian Capital Territory
- New South Wales Bar Association
- Law Society of New South Wales
- Northern Territory Bar Association
- Law Society Northern Territory
- Bar Association of Queensland
- Queensland Law Society
- South Australian Bar Association
- Law Society of South Australia
- Tasmanian Bar
- Law Society of Tasmania
- The Victorian Bar Incorporated
- Law Institute of Victoria
- Western Australian Bar Association
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The Chief Executive Officer of the Law Council is Dr James Popple. The Secretariat serves the Law Council nationally, and is based in Canberra.

The Law Council's website is www.lawcouncil.asn.au.

Acknowledgements

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Executive summary

1. The Law Council of Australia welcomes the opportunity to provide a submission to the Parliamentary Joint Committee on Intelligence and Security's (**Joint Committee's**) inquiry into the Inspector-General of Intelligence and Security and Other Legislation Amendment (Modernisation) Bill 2022 (Cth) (**IGIS Bill**).

2. In the limited time available, the Law Council has not had an opportunity to consider in detail each aspect of the IGIS Bill. While reserving its position on the majority of the proposed measures within the Bill, the Law Council provides in this submission observations on the following general issues:

   - the appointment of the Inspector-General of Intelligence and Security (**Inspector-General**);
   - the Inspector-General's statutory functions;
   - the safeguards needed to adequately protect those who are required to provide privileged information to the Inspector-General, especially in relation to the privilege against self-incrimination; and
   - consistency with comparable legislative schemes' approaches to legal professional privilege.

3. As set out in this submission, the Law Council makes the following recommendations to improve the IGIS Bill:

   - consideration should be given to whether eligibility and selection criteria for the role of Inspector-General should be included in the *Inspector-General of Intelligence and Security Act 1986* (Cth) (**IGIS Act**);
   - eligibility criteria for the role of Inspector-General could include that the candidate has:
     - previously been a judge of a federal court or a court of a State or Territory, or been enrolled as a legal practitioner for at least five years; and
     - suitable experience or knowledge of the Australian intelligence community;
   - consideration should be given to Inspectors-General being appointed by the Governor-General based on ministerial recommendations that have been approved by the Joint Committee;[1]
   - to preserve an explicit and direct institutional link between the Inspector-General and Australian Human Rights Commission (**AHRC**), the IGIS Bill should provide for investigations to be conducted by the Inspector-General on the basis of referrals made by the AHRC;
   - the proposed prosecution immunity for those who voluntarily provide information and documents to the Inspector-General should not be limited to offences under Commonwealth law, and should apply, for completeness, to offences under federal, State and Territory law;

[1] For the avoidance of doubt, the Joint Committee referred to in this recommendation is the Parliamentary Joint Committee on Intelligence and Security.

- the IGIS Bill should:
    - include a provision that requires the Inspector-General, before he or she compels an individual to provide information or documents with a tendency to incriminate that person, to consider:
        - the nature and gravity of the specific issue under inquiry;
        - the substance and importance of the information or documentation sought and the weight likely to be attached to it as part of a fact-finding determination; and
        - whether any other information or documentation concerning the issues to which the material is said to relate is reasonably available to the Inspector-General from another source; and
    - include a prohibition in the IGIS Act on the derivative-use of self-incriminatory material provided by persons compelled to give information or documents to the Inspector-General.
- with the exception of proceedings concerning prescribed offences set out in the IGIS Bill:
    - information or documents provided or made available to the Inspector-General as part of inspections, complaints, preliminary inquiries and inquiries under the IGIS Act must not be used against the person who provided the information or document in any court or in any proceedings before a person authorised to hear evidence; and
    - no evidence obtained as a direct or indirect consequence of the voluntary giving of information or documentation to the Inspector-General by a person must be used against that individual;
- consideration should be given to amending item 86 of schedule 1 to the IGIS Bill to read:

    Paragraph 18(6)(b)

    After "agency", insert "or would disclose a communication between an officer of a Commonwealth agency and another person or body, being a communication protected against disclosure by legal professional privilege"; and
- a provision should be inserted into the IGIS Act to prohibit the derivative-use of material subject to legal professional privilege against persons compelled to provide that material to the Inspector-General.

Appointment of the Inspector-General

4. It is vital for the maintenance of public confidence in government agencies, particularly oversight and integrity bodies, that the appointment of public officials is governed by appropriate eligibility and selection criteria and is the result of transparent and rigorous nomination processes.[2]

5. To that end, the Law Council suggests, below, additional provisions regarding the eligibility of candidates for the office of Inspector-General and for appointments to that office.

6. The Law Council emphasises that there is no suggestion that the current Inspector-General or previous occupants of that office were unsuited to the role or were appointed for ulterior reasons. Nevertheless, in line with the Law Council's general position regarding appointments to key Commonwealth integrity roles,[3] Inspectors-General must be seen to have been selected on merit, to meet clear eligibility and selection criteria, and to be independent of both institutional and political influence.

Eligibility

7. If enacted, the IGIS Bill will prevent a person from being appointed to the office of Inspector-General 'if the person is, or the person's most recent position was, the head or a deputy head (however described) of an intelligence agency'.[4]

8. This proposal is intended to assure the public of the Inspector-General's institutional independence from the intelligence agencies that he or she has oversight of, and implements recommendation 172 of the Attorney-General's Department's *Comprehensive Review of the Legal Framework of the National Intelligence Community* (December 2019).[5]

9. The *Inspector-General of Intelligence and Security Act 1986* (Cth) (**IGIS Act**) does not, however, currently specify eligibility or selection criteria for the Inspector-General, merely imposing on the Prime Minister a duty to consult the Opposition Leader in the Lower House on appointments to the office.

10. The absence of any eligibility or selection criteria for the role of Inspector-General contrasts with the mechanisms that govern the appointment of analogous integrity officers such as the Law Enforcement Integrity Commissioner,[6] National

[2] See Wood D, Griffiths K and Stobart A, *New politics A better process for public appointments*, Grattan Institute, (July 2022); Burton, T, 'Labor vows to end 'jobs for mates' culture of government boards', *Australian Financial Review*, February 5, 2023. See also Attorney-General, 'Albanese Government to abolish Administrative Appeals Tribunal', Media Release, December 16, 2022; Guidelines for appointments to the Administrative Appeals Tribunal (AAT), 15 December 2022.

[3] Law Council of Australia, *2022 Federal Election Call to Parties: Improvements to laws and the administration of justice in a post-pandemic society* (2022), 10.

[4] The IGIS Bill, sch 1[19] (new s 6(3)(2) of the IGIS Act).

[5] Recommendation 172 of the *Report of the Comprehensive Review of the Legal Framework of the National Intelligence Community* (2019): 'The Inspector-General of Intelligence and Security Act should be amended to preclude the appointment to the Office of the IGIS of a person whose immediate prior role was as head or deputy head of an agency within the IGIS' oversight remit'. NB: there are new termination provisions (see sch 1[121] and [124] (new subs 1 and 2A) of the IGIS Act); both appear anodyne.

[6] Who must be either a judge or legal practitioner who has been enrolled for at least five years: *Law Enforcement Integrity Commissioner Act 2006* (Cth), s 175(2).

Anti-Corruption Commissioner,[7] the Independent National Security Legislation Monitor,[8] and Freedom of Information Commissioner.[9]

11. The Inspector-General's function is analogous to that of the Law Enforcement Integrity Commissioner or National Anti-Corruption Commissioner, both of whom must have held judicial office or have been a legal practitioner for a fixed period to be eligible for to hold their respective office.[10] It is also important that those selected as eligible candidates for the role of Inspector-General are able to demonstrate an appropriate experience or knowledge of the Australian intelligence community.

Recommendation:

- **Consideration be given to whether eligibility and selection criteria for the role of Inspector General should be included in the IGIS Act. Eligibility criteria could include:**
  - **having previously been a judge of a federal court or a court of a State or Territory, or be enrolled as a legal practitioner for at least five years; and**
  - **having suitable experience or knowledge of the Australian intelligence community.**

Appointment

12. A model for a more transparent mechanism for the appointment of the Inspector-General is provided by the recently enacted process for the nomination of National Anti-Corruption Commissioners (**NACCs**).

13. NACCs are appointed by the Governor-General on the basis of a ministerial recommendation that has either been approved by, or deemed to have been approved by, the Parliamentary Joint Committee on the National Anti-Corruption Commission.[11]

14. In the Law Council's view, accountability for, and transparency of, the Inspector-General's appointment would be enhanced if the Joint Committee were to be required to approve nominees for the office.

Recommendation:

- **Consideration should be given to Inspectors-General being appointed by the Governor-General based on ministerial recommendations that have been approved by the Joint Committee.**[12]

[7] Who must be either (i) a retired judge of a federal court or a court of a State or Territory; or (ii) be enrolled as a legal practitioner (however described) of a federal court or the Supreme Court of a State or Territory and has been so enrolled for at least five years: *National Anti-Corruption Commission Act 2022* (Cth), s 241(3).
[8] Who is required to be suitable for appointment because of his or her qualifications, training or experience: *Independent National Security Legislation Monitor Act 2010* (Cth), s 11(3).
[9] Who must have obtained a degree from a university, or an educational qualification of a similar standing, after studies in the field of law: *Australian Information Commissioner Act 2010* (Cth), s 14(3).
[10] See *Law Enforcement Integrity Commissioner Act 2006* (Cth), s 175(2); *National Anti-Corruption Commission Act 2022* (Cth), s 241(3).
[11] *National Anti-Corruption Commission Act 2022* (Cth), s 241(2).
[12] For the avoidance of doubt, the Joint Committee referred to in this recommendation is the Parliamentary Joint Committee on Intelligence and Security.

Amendments to the functions of the Inspector-General

15. The IGIS Bill's amendments to the functions of the Inspector-General will, amongst other matters, allow the Inspector-General to investigate acts by, or practices of, ASIO, ASIS, AGO, ASD, DIO and ONI that may violate human rights, constitute discrimination, or be unlawful under the federal discrimination laws[13] without the need for a referral from AHRC.[14]

16. The Law Council welcomes the empowerment of the Inspector-General to investigate violations of human rights or discriminatory actions of the ASIO, ASIS, AGO and ASD without requiring a referral from the AHRC.

17. However, the aim of freeing the Inspector-General from the need to receive a referral from the AHRC before inquiring into human rights and discrimination matters could be achieved while still expressly preserving the AHRC's referral role.

Recommendation:

- **To preserve an explicit and direct institutional link between the Inspector-General and AHRC, the IGIS Bill should provide for investigations to be conducted by the Inspector-General on the basis of referrals made by the AHRC.**

Abrogation of the privilege against self-incrimination

18. The Inspector-General is currently empowered to require a person to provide information or documents or to appear in person before him on written notice.[15] Any individual required to provide information or documents, or to appear before the Inspector-General, may be required to disclose information that might tend to incriminate that person or make that person liable to a penalty.[16]

19. However, information or documents provided by a person in response to a written notice from the Inspector-General may not be admitted in evidence in proceedings against that person, except in proceedings concerning:

    - an offence relating to the Inspector-General's powers of compulsion (for instance, a refusal to provide information/documents in response to a written notice to do so);[17]

    - an offence contrary to subsection 137.1 of the *Criminal Code Act 1995* (Cth) (**Criminal Code**) (an offence of providing false or misleading information) that relates to the Inspector-General's investigative functions; or

    - an offence under section 6 of the *Crimes Act 1914* (Cth) (accessory after the fact) or subsections 11.1, 11.4 or 11.5 of the Criminal Code (attempt, incitement and conspiracy) relating to the Inspector-General's investigative functions.[18]

[13] *Viz*. the *Age Discrimination Act 2004* (Cth), *Disability Discrimination Act 1992* (Cth), *Racial Discrimination Act 1975* (Cth) and *Sex Discrimination Act 1984* (Cth).
[14] The Bill, sch 1[16], [18] and [20] (new s 8(1)(a)(v), (2)(a)(iv) and (3)(b) of the IGIS Act).
[15] IGIS Act, s 18(1) and (3).
[16] IGIS Act, s 18(6)(a).
[17] See IGIS Act, s 18(7).
[18] IGIS Act, s 18(6).

20. If enacted, the IGIS Bill would extend the exceptions on the prohibition on the use of self-incriminating information and documentation against the person compelled to disclose the incriminatory information/documentation to the following offences:

- offences contrary to subsections 137.2 (false or misleading information and documents), 145.1 (using a forged document) or 149.1 (obstruction of Commonwealth public officials) of the Criminal Code that relate to the Inspector-General's investigative functions; and

- an offence against Division 3 of Part III of the *Crimes Act 1914* (Cth) (offences relating to evidence and witnesses) that relates to the IGIS's investigative functions.[19]

21. The IGIS Bill would also extend protections on the use of self-incriminatory information and documents provided to the Inspector-General voluntarily during inspections and inquiries and provides immunities from prosecution 'for any offence *under Commonwealth law* [emphasis added]' to persons who voluntarily disclose information and documents during inspections and inquiries.[20]

22. The Law Council supports the granting of immunity from prosecution to those who willingly furnish the Inspector-General with material. However, the Law Council is concerned that the scope of the proposed immunity is confined to offences '*under Commonwealth law*'.

23. Unless a clear constitutional impediment exists, the rationale for limiting the proposed immunity from prosecution to offences under Commonwealth law is unclear. No such jurisdictional limitations exist in analogous immunities in other federal laws.[21]

Recommendation:

- **The proposed prosecution immunity for those who voluntarily provide information and documents to the Inspector-General should not be limited to offences under Commonwealth law, and should apply, for completeness, to offences under federal, State and Territory law.**

24. The IGIS Bill does not:

- provide a derivative-use immunity to those who are compelled to incriminate themselves by the Inspector-General; or

- require the Inspector-General to consider whether less coercive methods to obtain information and documentation are available before compelling a person to give information in circumstances which would abrogate the privilege against self-incrimination.[22]

25. The privilege against self-incrimination is an internationally recognised pillar of a fair trial.[23] So significant is the privilege that, as a fundamental common law right, it is assumed to be 'in the last degree improbable that the legislature would overthrow' the

[19] The Bill, sch 1
[20] The Bill, sch 1[131] (new s 32AC(2) and (3) of the IGIS Act).
[21] See, for instance s 10 of the *Public Interest Disclosure Act 2013* (Cth), which renders individuals who make a public interest disclosure immune from '*any* civil, *criminal* or administrative liability (including disciplinary action) for making the public interest disclosure [emphasis added]' without any apparent jurisdiction limit.
[22] Both matters were raised in Scrutiny Digest 1 of 2023, [1.63].
[23] See, for instance, the *International Covenant on Civil and Political Rights* (1966), art 14(3)(g).

prohibition on compelling individuals to incriminate themselves 'without expressing its intention with irresistible clearness'.[24]

26. Permitting an executive investigative body to require persons on pain of criminal punishment to answer questions, provide information or produce documents that have a tendency to incriminate them should:

- represent a last resort to respond to a pressing fact-finding need in inquiries into especially grave matters; and
- include adequate safeguards that limit the direct and indirect use of information and documents obtained under compulsion.

27. The Inspector-General's power to compel the giving of information, the providing of documents and the answering of questions abrogates the privilege of self-incrimination.[25] The exercise of that power is subject to only two requirements:

- that the Inspector-General has 'reason to believe' that a person has information or documents 'relevant' to a matter that he is inquiring into; and
- that a written notice pertaining to the information or documents is provided.

28. There is no requirement that the Inspector-General, for instance, must balance the importance of the privilege against self-incrimination against the necessity of receiving the information or documentation. A person may be required to incriminate himself or herself simply because material is 'believed' to be 'relevant' without regard to:

- the nature and gravity of the specific issue under inquiry;
- the substance and importance of the information or documentation sought and the weight likely to be attached to it as part of a fact-finding determination; or
- whether any other information or documentation concerning the issues to which the material is said to relate is reasonably available to the Inspector-General from another source.

29. Moreover, while the IGIS Act prohibits the use of information, documents and answers given under compulsion in proceedings against the person to whom a notice to provide information or documents is given ('direct-use immunity'),[26] there is no limit on the indirect use that such material can be put to after the Inspector-General has completed his inquiries ('derivative-use immunity').

30. Derivative-use immunity is wider than direct-use immunity because it prevents evidence or information gathered as a consequence of a person being compelled to give information or documents from subsequently being used against that person in criminal proceedings or civil proceedings that may result in the imposition of a penalty.

31. Derivative-use immunities guard against investigatory bodies' misuse of their powers and ensure that an appropriate balance is struck between the interests of executive bodies and individual rights. In addition, immunities from the derivative use of information or documents obtained under coercive powers are not alien to Australian law. Derivative-use immunities were included, for instance, in:

[24] *Potter v Minahan* (1908) 7 CLR 277, 304, per O'Connor J.
[25] IGIS Act, s 18(1), (3) and (6).
[26] IGIS Act, s 18(6).

- subsection 16(2) of the *Inspector-General of Taxation Act 2003* (Cth), which until its repeal in 2015 rendered inadmissible against an individual in subsequent proceedings material 'obtained as a direct or indirect consequence of giving the information or answer or producing the document';[27] and

- subsection 68(3) of the *Australian Securities Commission Act 1989* (Cth), which similarly prevented 'any information, document or other thing obtained as a direct or indirect consequence of' the use of coercive powers being thereafter used against an individual in criminal proceedings and civil proceedings that may result in a penalty.

32. The Law Council is troubled by the number of Commonwealth statutes that now abrogate the privilege against self-incrimination and neither include adequate procedural limitations on the use of coercive powers nor sufficiently recognise the vital importance of the privilege as a guarantee of fair trials. The IGIS Act is one such statute in its failure to include provisions that:

- confine the abrogation of the privilege to situations that necessitate the use of compulsion to obtain information or documents; and,

- prevent the direct and indirect use of material obtained under compulsion in subsequent proceedings.

Recommendation:

- **The IGIS Bill should:**
  - **include a provision that requires the Inspector-General, before he or she compels an individual to provide information or documents with a tendency to incriminate that person, to consider:**
    - **the nature and gravity of the specific issue under inquiry;**
    - **the substance and importance of the information or documentation sought and the weight likely to be attached to it as part of a fact-finding determination; and**
    - **whether any other information or documentation concerning the issues to which the material is said to relate is reasonably available to the Inspector-General from another source; and**
  - **include a prohibition in the IGIS Act on the derivative-use of self-incriminatory material provided by persons compelled to give information or documents to the Inspector-General.**

33. The Law Council supports the proposed direct-use immunity conferred on persons who voluntarily provide information or documents to the Inspector-General.

34. However, the Law Council's position is that the immunity should extend to cover both direct uses and derivative uses of material against a person who voluntarily discloses information or documentation to the Inspector-General.

[27] See *Tax and Superannuation Laws Amendment (2014 Measures No. 7) Act 2015* (Cth), sch 2[11].

Recommendation:

- **With the exception of proceedings concerning prescribed offences set out in the IGIS Bill:**
  - **information or documents provided, or made available, to the Inspector-General as part of inspections, complaints, preliminary inquiries and inquiries under the IGIS Act must not be used against the person who provided the information or document in any court or in any proceedings before a person authorised to hear evidence; and**
  - **no evidence obtained as a direct or indirect consequence of the voluntary giving of information or a documentation to the Inspector-General by a person must be used against that individual.**

Legal professional privilege

35. At present, individuals may be compelled by the Inspector-General to provide information or documents that would disclose legal advice given to a Minister or a Commonwealth agency.[28]

36. If enacted, the IGIS Bill would:

- extend the current exceptions to the use-immunity that covers legal professional privilege (**LPP**) material coercively obtained by the Inspector-General to cover the following proceedings against persons compelled to provide the privileged information or documentation:
  - proceedings for offences contrary to subsections 137.2 (false or misleading information and documents), 145.1 (using a forged document) or 149.1 (obstruction of Commonwealth public officials) of the Criminal Code that relate to the Inspector-General's investigative functions; and
  - proceedings for an offence against Division 3 of Part III of the Crimes Act 1914 (Cth) (offences relating to evidence and witnesses) that relates to the Inspector-General's investigative functions;[29]
- remove 'legal advice' and replace those terms with: 'any other information that is, or may be, the subject of a claim of legal professional privilege by the Commonwealth or a Commonwealth agency';[30]
- clarify that legal profession privilege is preserved where documents have been coercively obtained by the Inspector-General;[31] and,
- ensure that claims of LPP are not affected where an individual voluntarily provides information to the Inspector-General during inspections and inquiries.[32]

[28] IGIS Act, s 18(6)(b).
[29] IGIS Bill, sch 1[87] (new s 18(6)(ca) of the IGIS Act).
[30] IGIS Bill, sch 1[86].
[31] IGIS Bill, sch 1[89] (new s 18(6A) of the IGIS Act)
[32] IGIS Bill, sch 1[91] (new s 32AC(4) of the IGIS Act).

37. The replacement of 'legal advice' with 'legal professional privilege' is purportedly to resolve an 'anomaly' in the IGIS Act's current abrogation of LPP.[33] 'Legal advice' does not cover all 'communications that are made for the dominant purpose of giving legal advice'. The amendment ensures that the IGIS Act is consistent with the wording of sections 118 and 119 of the *Evidence Act 1995* (Cth) and intends to avoid situations 'where technical argument[s]' about whether material represented 'legal advice' or was a privileged communication for the dominant purpose of legal advice or litigation.[34]

38. If enacted, the IGIS Bill will amend paragraph (b) of subsection 18(6) of the IGIS Act so that the latter reads:

> *would disclose legal advice given to a Minister or a Commonwealth agency or would disclose any other information that is, or may be, the subject of a claim of legal professional privilege by the Commonwealth or a Commonwealth agency.*[35]

39. The Law Council notes that the extension of the abrogation of LPP to cover 'communications' proposed in the IGIS Bill is broadly consistent with abrogative provisions in analogous statutes.

Abrogation of LPP	
Statute	**Abrogative provision**
Ombudsman Act 1976 (Cth) s 9(4)(ab)	(i) a legal advice given to a Minister, a Department or a prescribed authority
	(ii) a communication between an officer of a Department or of a prescribed authority and another person or body, being a communication protected against disclosure by legal professional privilege
Law Enforcement Integrity Commissioner Act 2006 (Cth) s 96(5)(c)	(i) legal advice given to a Minister or a Commonwealth government agency
	(ii) a communication between an officer of a Commonwealth government agency and another person or body, being a communication protected against disclosure by legal professional privilege

40. Noting that the IGIS Act's abrogative provision and its proposed extension will not apply to private entities that seek legal advice about their rights or liabilities in their dealings with a Commonwealth agency,[36] the Law Council is neutral as to the policy rationale behind the amendment of paragraph (b) of subsection 18(6) of the IGIS Act.

41. However, to ensure drafting consistency with analogous provisions in other statutes, the Law Council suggests that the wording of the amendment be altered (*mutatis mutandis*).[37]

[33] Explanatory Memorandum, [163].
[34] *Ibid*.
[35] IGIS Bill, sch 1[86].
[36] Explanatory Memorandum, [165].
[37] Noting that 'Commonwealth agency' is defined by the IGIS Act, s 3(1).

Recommendation:

- **Consideration should be given to amending item 86 of schedule 1 to the IGIS Bill to read:**

  Paragraph 18(6)(b)

  After "agency", insert "or would disclose a communication between an officer of a Commonwealth agency and another person or body, being a communication protected against disclosure by legal professional privilege".

42. The Law Council supports the proposed insertion of a provision in the IGIS Act that clarifies that LPP is preserved notwithstanding the Inspector-General's coercive obtaining of documents.

43. The Law Council also supports the insertion of a provision in the IGIS Act that confirms that LPP is deemed not to have been waived where information or a document has been voluntarily provided to the Inspector-General.

44. However, for the reasons given above in respect of the privilege against self-incrimination, the Law Council is concerned that the IGIS Act does not currently prohibit the derivative use of material that is subject to LLP against a person.

Recommendation:

- **A provision should be inserted into the IGIS Act to prohibit the derivative-use of LPP material against persons compelled to provide that material to the Inspector-General**.