



Australian Government

Parliamentary Joint Committee on Intelligence and Security

Review of Administration and Expenditure No. 8 - Australian Intelligence Agencies

Tabled 21 June 2010

Government's Response to Committee's Recommendations

Recommendation 1: The Committee recommends that the *Intelligence Services Act 2001* be amended to include AFP counter-terrorism elements in the list of organisations that the Committee reviews.

The Government does not support this recommendation. The Government has previously considered whether the PJCIS should extend its oversight to include Australian Federal Police (AFP) counter-terrorism elements, and most recently advised the PJCIS in 2010 that the Government was not proposing to extend the mandate of the PJCIS to include oversight of the AFP's counter-terrorism functions. This is to avoid duplication with existing, extensive oversight mechanisms and to avoid placing an additional burden on the AFP requiring extra resources to meet PJCIS oversight requirements.

The AFP is not part of the Australian Intelligence Community (AIC) and, as a law enforcement agency (not a hybrid law enforcement and intelligence agency), is subject to different oversight mechanisms to the AIC. It is important that the PJCIS does not duplicate existing oversight mechanisms which already include a range of Parliamentary committees. The AFP is subject to statutory reporting on individual powers including telecommunications interception, controlled operations, control orders and surveillance devices. Significant external oversight of AFP activities is also provided by the legal system. In fact, oversight by the courts during prosecution and other processes is a key difference between the AFP and the AIC.

Specific parliamentary oversight is provided by the Parliamentary Joint Committee on Law Enforcement, which has the following functions concerning the AFP:

- to monitor and to review the performance by the AFP of its functions;
- to report to both Houses of the Parliament, with such comments as it thinks fit, upon any matter appertaining to the AFP or connected with the performance of its functions to which, in the opinion of the Committee, the attention of the Parliament should be directed;
- to examine each annual report on the AFP and report to the Parliament on any matter appearing in, or arising out of, any such annual report;
- to examine trends and changes in criminal activities, practices and methods and report to both Houses of the Parliament any change which the Committee thinks desirable to the functions, structure, powers and procedures of the Australian Crime Commission (ACC) or the AFP; and
- to inquire into any question in connection with its functions which is referred to it by either House of the Parliament, and to report to that House upon that question.

As well, the AFP's Professional Standards area provides internal oversight and is responsible for all organisational professional standards matters. The Commonwealth Law Enforcement Ombudsman maintains an oversight role in relation to conduct

issues, public complaints and has the power to initiate investigations into AFP practices and procedures. Further, the Australian Commission for Law Enforcement Integrity is an independent and proactive agency established to detect and prevent serious and systemic corruption by the AFP and the ACC. The Independent National Security Legislation Monitor (INSLM) will conduct independent reviews of Commonwealth counter-terrorism and national security legislation and provides another oversight mechanism. The PJCIS may refer a matter to the INSLM for it to consider as part of its functions.

Recommendation 2: The Committee recommends that the Government agree to amending the *Intelligence Services Act 2001* to enable specific material which does not affect current operational activity to be provided to the Committee. A small working group drawn from relevant departments, agencies and the Committee should be set up to prepare this amendment for consideration by the Government.

The Government does not support this recommendation. The current accountability framework supports the provision of candid and impartial advice to government. Expanding the role of the PJCIS by amending the *Intelligence Services Act 2001*, as proposed, would create ambiguity in accountability and oversight arrangements as well as duplication between the roles of the PJCIS and the Inspector-General of Intelligence and Security (IGIS). The PJCIS and the IGIS are the two primary, and complementary, pillars of external accountability arrangements for the AIC.

The Government believes the existing division of labour between the Committee and IGIS remains sound and does not want to alter this longstanding and successful arrangement. The IGIS role is to ensure that the agencies act legally and with propriety, comply with ministerial guidelines and directives and respect human rights. IGIS provides independent assurance for the Prime Minister, senior ministers and Parliament as to whether Australia's intelligence and security agencies act legally and with propriety by inspecting, inquiring into and reporting on their activities.

For more specific and operational issues, IGIS is well positioned to oversee agencies' activities. The independence of the Office of the IGIS and the scope of its powers ensure that operational decisions, intelligence assessments and information to aid government decision making are not subject to public or partisan contention. The Government notes that the importance of the IGIS role is recognised in Recommendation 8, concerning the resources for that Office.

Under the current arrangements, the PJCIS notes that the AIC provides it with 'significant and meaningful information' to support the Committee's review of the AIC's administration and expenditure in the Government's view. The current practices for briefing the PJCIS on delicate matters work well to facilitate this.

Recommendation 3: The Committee recommends that the Australian Government monitor resources allocated to e-security to ensure they are adequate.

The Government supports this recommendation. The Government considers cyber security to be one of Australia's top national security priorities, as recognised in the 2008 National Security Statement. Australia's ever increasing dependence on information and communications technology means the Government must remain vigilant to emerging online threats. Cyber security threats pose a range of challenges to Australian Internet users, business and Government – and all systems connected to the Internet are potential targets. Australia's national security, economic prosperity and social wellbeing are critically dependent upon the availability, integrity and confidentiality of a range of information and communications technology.

Australia's security and intelligence agencies have stated publicly that they are experiencing increasingly sophisticated attacks on systems in the public and private sectors. As the quantity and value of information has increased so too have the efforts of malicious actors. For example, ASIO's mandate includes working with domestic stakeholders in government and private enterprise to counter all aspects of foreign nation state espionage - including electronic espionage. ASIO has expressed concerns about the scale and reach of electronic espionage against Australian interests, both in government and commercial computer systems, as it presents resource challenges.

The Government has allocated resources for cyber security across portfolios and agrees it would be prudent to keep this matter under review. Any proposals brought forward for additional funding would need to comply with the Budget Process and Operational Rules. A number of relevant mechanisms have been initiated since the release of the Committee's Review. These mechanisms are intended to ensure adequate consideration is given to resources aspects, including distribution among relevant agencies:

- The Department of the Prime Minister and Cabinet (PM&C) undertakes a Coordinated National Security Budget as part of the annual Budget cycle. This is informed annually by the Department of Finance and Deregulation's National Security Funding Compendium, a self-reporting stocktake of national security funding across the Commonwealth; and
- In addition to these annual processes, PM&C is developing a Cyber White Paper, scheduled for release in mid-2012, which will outline how government, industry and the community can work together to address the challenges and risks that arise from greater digital engagement. The White Paper will consider the entire spectrum of cyber issues including consumer protection, cyber safety, cyber crime, cyber security and cyber defence. Part of the White Paper process will be an analysis of the current rate of effort and resources allocated to cyber-related activities, which the

Government believes will further assist in fulfilling the requirements of this recommendation.

Recommendation 4: The Committee recommends that the Australian Government review the medium and long term accommodation requirements of those members of the Australian Intelligence Community presently housed in multiple locations in Canberra. Where multiple locations for a single agency diminish operational effectiveness or efficiency, consideration should be given to planning alternative longer term accommodation at the one site.

The Government, in principle, supports this Recommendation, however, believes that many of the accommodation issues identified at the time of the report have now been resolved. This was achieved through the establishment of a dedicated ASIO building (due for completion in 2012), as well as provision for the leasing of a new building for ONA.

Recommendation 5: The Committee recommends that, should the proposal to amend the open access period of the *Archives Act 1983* proceed, consideration should be given to special provisions for AIC documents to be exempted, on a case by case basis, from release at 20 years.

The Government notes this recommendation.

The 'open access' period in the *Archives Act 1983* (Archives Act) has been amended since the release of the Committee's Review by the *Freedom of Information Amendment (Reform) Act 2010*. These amendments reduced the open access period for most Commonwealth records from 30 years to 20 years. While the amendments do not contain special provision for AIC documents, there are exemptions in the Archives Act available for sensitive information which warrants protection from public disclosure, including exemptions for information concerning security, defence and international relations and information communicated in confidence. The changes to the open access period began on 1 January 2011 and will be phased in over a 10-year period.

An Access Examination Working Group formed in 2008 has supported ongoing formal and informal consultation between the National Archives of Australia and agencies about the release of information concerning security, defence and international relations and information communicated in confidence. The working group is chaired by the National Archives and its membership is made up of representatives from the Department of the Prime Minister and Cabinet, Department of Defence, Department of Foreign Affairs and Trade, the Australian Federal Police and security agencies.

Recommendation 6: The Committee recommends that the Australian Government review the potential adverse effects of the efficiency dividend on the Australian Intelligence Community having particular regard to the Joint Committee of Public Accounts and Audit report *The efficiency dividend and small agencies: Size does matter*.

The Government does not support this recommendation. The efficiency dividend is an integral part of the devolved financial management framework where agencies are provided with the flexibility and autonomy to spend the funds appropriated directly to them by the Parliament. Successive governments have used the efficiency dividend as an effective mechanism to secure public service efficiencies, thus allowing the Australian taxpayer to share in these gains. It is also important to recognise the significant funding growth in the AIC over the last decade, which materially outweighs the size of the efficiency dividend for these agencies.

In relation to the Joint Committee of Public Accounts and Audit report '*The efficiency dividend and small agencies: Size does matter*', it should be noted that the Government did not agree to a blanket exemption for small agencies but, rather, stated that it continued to consider it appropriate that all Commonwealth entities continue to operate efficiently and make further productivity gains, irrespective of their size. It did accept that, from time to time, circumstances may arise in individual entities that magnify the impact of the efficiency dividend, and it concluded that such situations should be addressed individually on their merits by seeking additional funding through the budget process.

The subsequent review '*Report of the Review of the Measures of Agency Efficiency*', which was commissioned by the Government to examine the best way of promoting efficiency in government on a continuing basis, was released in April 2011. In its response to this review, the Government agreed to allow flexibility in the application of the efficiency dividend by enabling Portfolio Ministers to reallocate the efficiency dividend between agencies within their portfolio with effect from the 2011-12 Budget.

Recommendation 7: The Committee recommends that the *Intelligence Services Act 2001* be amended to include a provision requiring the ANAO to report to the Committee on its review of the AIC.

The Government does not support this recommendation. As the Committee will be aware, the *Auditor-General Act 1997* sets out the responsibility of the Auditor-General to report to the Parliament. The Act also provides the Auditor-General with discretion in the conduct of his or her functions or powers (Section 8 of the Act refers). Successive Auditors-General have been responsive to requests by the Parliament and Parliamentary Committees, including to appear and discuss issues of importance to Committees. The Auditor-General supports the continuation of this practice.

Against this background, the Auditor-General would prefer the current arrangements, which involve the Auditor-General responding to a request from the Committee, remain in place in lieu of a legislative approach, for which there is no direct precedent. The Government agrees with the Auditor-General's view.

Recommendation 8: The Committee recommends that, due to the increased activities of the Australian Intelligence Community and the additional functions required of the IGIS, the budget of the Office of the Inspector General of Intelligence and Security be increased.

The Government does not support this recommendation. The Inspector-General of Intelligence and Security, Dr Vivienne Thom, has advised that the resources (including staff) currently available to her are sufficient to ensure that her Office can provide effective oversight of the activities of the AIC. She is able to prioritise and reallocate resources when inquiries arise.

The Inspector-General regularly reviews the resourcing of her office, especially as and when new inquiries are commenced. Supplementary funding may be requested if the Inspector-General considers that any particular inquiry requires resources additional resources. Dr Thom has advised that, in her experience, when such supplementary funding is requested, the Government has made it available. For example, funding for the office was supplemented to the value of:

- \$434,000 for the conduct of the inquiry into the actions of actions of relevant Australian agencies in relation to the arrest and detention overseas of Mr Mamdouh Habib from 2001 to 2005, which commenced in January 2011; and
- \$40,000 for the conduct of the inquiry allegations of inappropriate vetting practices by the Defence Security Authority, which commenced in June 2011.