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Submission - Review of the Intelligence Services Legislation Amendment Bill 2023

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Thank you to the Parliamentary Joint Standing Committee on Intelligence and Security (PJCIS) for the invitation to make a submission this important inquiry concerning the Review of the Intelligence Services Legislation Amendment Bill 2023. The views conveyed in this submission are mine alone and should not be taken to represent an institutional position on behalf of the National Security College, nor the Australian National University. This submission makes the following key observations and recommendations:

- The Bill's proposal to empower the PJCIS to request the Inspector-General for Intelligence and Security (IGIS) to undertake reviews and investigations will deepen oversight of Australia's expansive national security and intelligence ecosystem and improve Parliament's trust and understanding of operational agencies.
- The Bill should be amended to include specific provision that PJCIS members be provided with at least one security-cleared adviser with whom they can share classified Committee information.
- The Bill is right to leave untouched the composition of the PJCIS, as the existing structure goes towards supporting the Committee's 'convention of consensus'.
- Adjacent to the core focus of this Review, the PJCIS could consider whether the important task of intelligence oversight and governance would be improved and supported by the appointment of a dedicated Minister for Intelligence.

Should it benefit the Committee's further consideration of this submission, I would be happy to make myself available to attend any in-person hearings the Committee may wish to convene.

Thank you for taking the time to consider my submission.

Sincerely,



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Strengthening Parliament's Role

The PJCIS, as it is currently constituted, was formed in 2005 following the recommendations of the Flood Inquiry,¹ which suggested all the agencies of the then Australian Intelligence Community should fall under the scrutiny of a single, dedicated joint committee of Parliament. However, the Committee's direct lineage goes back at least to the 1980's. Prior to the Flood Inquiry, the Parliamentary Joint Committee on ASIO, ASIS and DSD (PJCAAD) as it was, exercised a discreet remit over Australia's two primary foreign intelligence collection agencies² and Australia's domestic security agency ASIO. This composition was a product of the *Intelligence Services Act 2001* which added ASIS and DSD to the Committee's work as part of the rapid reform of following the strategic shock of 9/11.

From 1988 to 2001, the Parliamentary Joint Committee on ASIO had exercised much narrower oversight.³

In other words, the Committee was being pragmatically given ever-larger tasks for exercising scrutiny and oversight over Australia's shifting and expanding national security ecosystem. This expansion of the Committee's work was historically a prudent and logical adjustment to the expanding power of security institutions. Yet given existing resources we have arguably reached the limit to which the Committee can reasonably consider such a varied agenda of work whilst still effectively holding agencies and their leadership to account. This makes a number of the Bill's amendments prudent and timely.

The PJCIS has an impressive remit for inquiring into the activities and powers of national security agencies. In this regard it is similar to the Senate Select Committee on Intelligence and House Permanent Select Committee on Intelligence of the US Congress or the Intelligence and Security Committee at Westminster. However, the PJCIS differs from these bodies in some important ways that make it practically less powerful. For one, the PJCIS has less of a role than its American and UK counterparts to oversee or authorise the operational decisions of intelligence agencies. Its influence over agency budgets is minimal.

Further, the PJCIS comprises regular parliamentarians, many of whom sit on other committees and who must use their small staffing contingent to manage multiple committee commitments as well as essential electorate matters. Upon joining the PJCIS, none of their staff are given high level security clearances to support them, meaning committee members cannot consult their own advisers in forming their assessments of Parliamentary business. For example, members regularly receive classified briefings, but they cannot involve their own staff in considering such briefings. Indeed, the IS Act makes it an offence for members to disclose classified

¹ Philip Flood, *Report of the Inquiry into Australian Intelligence Agencies* ([Canberra: Dept. of the Prime Minister and Cabinet, 2004]).

² The Australian Secret Intelligence Service and the Defence Signals Directorate (now the Australian Signals Directorate).

³ Commonwealth Parliament, Parliament House, 'History of the Intelligence and Security Committee', Australia, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Intelligence_and_Security/History_of_the_Intelligence_and_Security_Committee.

Committee information, even to their own staff.⁴ Addressing this impracticality would be an easy way to bolster the support available to PJCIS members and to improve the Bill. Accordingly, **the Bill should be amended to specify that members should be allocated at least one security-cleared national security adviser and the *Intelligence Services Act* should be amended to allow members to consult with this adviser on all Committee information they receive, including classified information.**

Additionally, while not necessarily a matter of legislative change, National Intelligence Community (NIC) agencies should be encouraged to second staff to the small PJCIS Secretariat within the Department of the House of Representatives that serves the Committee. The limited support currently available to the PJCIS is an acute problem given the remit of the Committee's work. The PJCIS is now dealing with arguably the most complex and arcane aspects of government business, especially for members who have had limited previous exposure to law enforcement, security or intelligence issues. For example, recently the Committee has been simultaneously considering inquiries into extremism and radicalisation, foreign intelligence collection, access to telecommunications data, the listing of terrorist organisations, the security of critical infrastructure, criminal use of the dark web, oversight reforms, and agencies' expenditure.

To ensure Parliamentary representatives receive more information about intelligence activities than what agencies tell them, the Bill is right to finally be implementing the 2017 L'Estrange Review's recommendation that the PJCIS be given the remit to commission the Inspector-General of Intelligence and Security to undertake special reviews and investigations so that Parliament can gain access to operational insights on its own terms.⁵

Such support would not be unprecedented, as the PJCIS has increasingly turned to the Independent National Security Legislation Monitor (INSLM) to support its reviews of particularly thorny legislative questions; for example on Australia's regime for telecommunications companies assisting law enforcement and intelligence agencies.⁶ However, the INSLM is typically only a part-time appointee, usually a former judge, and not resourced to undertake more than a handful of reviews at once. Empowering the PJCIS to also call on the IGIS to inquire into operational issues will ensure Parliament has the independent advice it requires to confidently scrutinise national security matters. Strengthening the PJCIS in this way could also reassure non-government members that they have satisfactory avenues to understand and contend government security policies.

A strength of the PJCIS is that its decisions are made by consensus between all members, helping to shield its work from the partisan theatrics that can derail other Parliamentary business. However, the government of the day cannot be guaranteed of this good will convention if non-government members don't feel as well appraised of the Committee's business. For this reason, access to independent advice from the IGIS and INSLM as outlined in the Bill could reassure Opposition members on the PJCIS that they are getting the information

⁴ Section 9, Schedule 1, *Intelligence Services Act 2001*.

⁵ '2017 Independent Intelligence Review', Commonwealth of Australia 2017.

⁶ James Renwick, Australia, and Independent National Security Legislation Monitor, *Trust but Verify: A Report Concerning the Telecommunications and Other Legislation Amendment (Assistance and Access) Act 2018 and Related Matters*, 2020.

they need. This is no trivial concern. As ASIO has warned, Australia's politicians and institutions are increasingly being targeted by foreign actors hoping to discredit Australia's model of democratic governance and undermine Australia's solidarity on security issues by sewing discord and confusion.⁷

Composition of the Committee

As mentioned, one of the enduring virtues of the PJCIS is that it has maintained a tradition – albeit a delicate one – of producing recommendations and findings supported by a unanimous consensus of the Committee membership. This convention has been supported by the decision of successive prime ministers to only draw members from one of the two major parties of government and the requirement that the Committee draw a majority of members from the Government. This convention, of building a unified Committee consensus despite members' differing party affiliations, has been essential to minimising unnecessary politicisation of delicate national security matters. Given Australia's acutely hostile strategic outlook, this tempered approach to managing the parliamentary contest of ideas around national security has perhaps never been more important. It is therefore prudent that this Bill does not propose to alter the composition of the Committee.

As the only two parties of government in Australia's parliamentary system, the Labor Party and the Liberal-National Coalition have had an interest in sustaining an informed and constructive relationship with the nation's national security community given they both seek to regularly hold government.

The convention of consensus has had the effect of sustaining trust from the NIC that classified information, including from Australia's friends and allies, can be divulged to the Committee without fear that members will mobilise this information for partisan politicking. Altering the Committee's membership to include crossbench parliamentarians and therefore altering this convention, could immediately impact the level of insight agencies provide the Committee if they believe a new member would be unbound by this tradition and the principles of party discipline that apply to other members. This is why, aside from one exception,⁸ that crossbench members have not been appointed to the Committee by the Prime Minister.

To formalise the convention of consensus and to offset the risks associated with a disunited Committee, the Parliament could consider subjecting prospective members to a special form of security clearance that validates the members' fitness to be exposed to the classified material that is shared with the Committee. This process could help reassure agency heads and other potential witnesses before the Committee that their sensitive evidence will not be disclosed. However, the downside of this is that it would lead to effects that could be considered undemocratic; namely making a member's prospective activities within the Parliament subject to the determination of an external, unelected security vetting official.

⁷ 'Director-General's Annual Threat Assessment', 17 March 2021, <https://www.asio.gov.au/publications/speeches-and-statements/director-generals-annual-threat-assessment-2021.html>.

⁸ Andrew Wilkie MP was a member of the PJCIS from November 2011 to August 2013.

For these reasons, **on balance any apparent benefit that might be derived from the addition of crossbench parliamentarians to the Committee, would be unlikely to outweigh the negative repercussions arising from a disruption to the status quo.** Accordingly, the composition of the Committee should not be varied.

Improving the Executive's Strategic Control of Security and Intelligence

Australia's primary decision-making forum on intelligence and security is the National Security Committee of Cabinet (NSC), which has existed in various forms since the Fraser Government created the National and International Security Committee.⁹ Supported by a gallery of senior bureaucrats, today's ministerial membership of the NSC includes the Prime Minister, Deputy PM, the Treasurer and Finance Minister, the Foreign Minister, Defence Minister, Home Affairs Minister and Attorney-General.

While the intent of the NSC is for the executive to guide Australia's security policies in an informed, concerted fashion, the reality is that much of the enterprise and operational decision-making concerning Australia's intelligence and security is diffused across ministerial offices and an expanding community of agencies and departments with influence over intelligence resources and security.

Outside NSC meetings, the Treasurer and Finance Minister have great impact on Australia's immense national security budget, while the Attorney-General can exercise close influence over the legislative and oversight mechanisms affecting agencies' day-to-day operations. Concerning agencies' use of their often-extraordinary powers, the Defence Minister, Home Affairs Minister and Foreign Minister exercise great authority. This is particularly the case for the Home Affairs and Foreign Ministers who under law must sign-off on intelligence operations. Transcending all these decisions is the Prime Minister, who can exercise their imprimatur to shape any ministerial decisions.

This diffusion of executive decision-making outside of the NSC is in part a practical response to the proliferation of agencies and departments with national security and intelligence equities. In 2017 the Turnbull Government formed the NIC in recognition that the agencies at the core of Australia's intelligence enterprise had expanded from six traditional foreign and domestic collection and assessment agencies¹⁰ to include those with a focus on transnational, serious and organised crime, money-laundering and terrorism financing.¹¹ The creation of the NIC was also accompanied by the creation of the Home Affairs Portfolio, which drew the Australian Border Force, Emergency Management Australia and relevant policy units from other into a new homeland security community led by the Department of Home Affairs.

⁹ Allan Gyngell and Michael Wesley, *Making Australian Foreign Policy* (Cambridge: Cambridge University Press, 2007), 146.

¹⁰ The Australian Secret Intelligence Service (ASIS), Australian Security Intelligence Organisation (ASIO), the Office of National Intelligence (ONI), the Australian Signals Directorate (ASD), Defence Intelligence Organisation (DIO) and the Australian Geospatial-Intelligence Organisation (AGO).

¹¹ The Australian Criminal Intelligence Commission (ACIC), Australian Transaction Reports and Analysis Centre (AUSTRAC) and the Australian Federal Police (AFP).

So, if we include the behemoth Defence Portfolio alongside the NIC and Home Affairs Portfolio, since 2017 Australia's leaders have had to contend with three tribes representing similar and overlapping portions of the nation's security and intelligence enterprise and totalling at least 16 agencies and departments.¹² Considering that the NIC contains agencies that are also resident in the Defence (DIO, ASD, AGO) and Home Affairs (ASIO, ACIC, AFP, AUSTRAC) portfolios, the task of planning the capabilities and direction of Australia's security and intelligence enterprise has become a vexed and time-consuming one, even for the most capable Cabinet member.

New shocks and risks in Australia's strategic environment have broadened further still the scope of issues – and agencies – pertinent to Australia's security. The COVID-19 pandemic and emergent biosecurity threats, have made Australia's Health portfolio profoundly relevant to national security and intelligence planning. Next generation internet-connectivity and the urgent technological development needs of Australia's Pacific neighbours has reinforced the security role of Australia's communications, infrastructure, and industry departments. So too have concerns over foreign interference, social cohesion, and societal resilience brought departments of education and social services into the security domain. This dynamic expansion of security issues is reflected in part by the Bill's broaden of the intelligence functions subject to the Committee's oversight.

Australia's leaders must now navigate a bureaucratic maze when it comes to deliberations on what intelligence capabilities to invest in and what legislative reforms to prioritise. Critical intelligence capabilities, enabling services and relationships now intersect and stretch across the public service but with no single minister positioned to view and understand it all and help adjudicate between powerful, occasionally competing, public servants. Consider too that all of the senior ministers responsible for national security activities, including the PM, also have extensive responsibilities for other non-security aspects of government, so their attention can be greatly restricted.

The Committee should therefore consider the utility of the Government appointing an assistant or junior Minister for Intelligence to improve the ability of Cabinet to exercise informed, strategic leadership over Australia's modern intelligence and security enterprise. Positioned under the PM, the remit of a Minister for Intelligence should not necessarily include exercising any of the existing operational authorities of senior national security ministers, like approving intelligence collection activities. Rather, their responsibility should be to advise NSC and senior ministers on strategic issues transcending Australia's intelligence and security enterprise, such as the preparation of agency budgets, capability investments, and the consideration of legislative reforms affecting the powers and oversight of agencies.

¹² Including: ASIO, ASIS, ONI, DIO, AGO, ASD, ACIC, AUSTRAC, AFP, the Australian Defence Force, Australian Border Force, Australian Government Security Vetting Agency, the Department of Defence, the Department of Home Affairs, the Department of Foreign Affairs and Trade, and the Department of Prime Minister & Cabinet.

It is necessary that a ministerial appointee perform this function, as opposed to a public servant like the Director-General National Intelligence or a statutory National Security Adviser, because only a Minister for Intelligence under the PM would have the effective standing to gain access to the multitude of portfolios now comprising Australia's intelligence and security enterprise. Further, a Minister for Intelligence as an elected official would be able to engage with their parliamentary party room, the opposition, crossbench, and the public to advocate reforms and changes in a way a public servant simply could not. This is a much-needed role when one considers the range of complex security laws and investments the Cabinet, the Parliament, and the public are being regularly asked to understand and support.

Conclusion

The Bill presented makes a number of practical and overdue improvements to the *Intelligence Services Act*. It would be improved by making greater provision for PJCS members to access the advice of a dedicated national security adviser. Review of this Bill is also an opportunity for the PJCS to reaffirm the importance of critical conventions surrounding the effectiveness of the Committee – namely the convention of consensus – and to reflect on opportunities for the Government to make wider improvements concerning intelligence governances, such as by appointing a Minister for Intelligence.