

Dissenting Report by Senator Rex Patrick

'For Executive Eyes Only'

Introduction

1.1 In rejecting support for the *Intelligence Services Amendment (Enhanced Parliamentary Oversight of Intelligence Agencies) Bill 2018* (the Bill) the Committee's report, endorsed by Government Senators, seeks to delay, potentially by at least another two years, much needed enhancement of parliamentary scrutiny of Australia's rapidly expanding national security and intelligence agencies.

1.2 Australia's ten national security and intelligence agencies employ more than 7,000 people and spend well over \$2 billion each year while they accumulate massive amounts of data at home and abroad.

1.3 This enlarged community, through a number of pieces of legislation that have passed through the Parliament, have also been granted significant new powers over the years. Many of these powers are exercised in secret.

1.4 Despite this rapid growth in resourcing and power the mechanisms of accountability and review overseeing the intelligence community have received much less attention, resources and authority.

Inadequacies of the PJCIS

1.5 The purpose of the Bill is to amend the *Intelligence Service Act 2001* to extend parliamentary scrutiny over the activities of Australia's national security and intelligence agencies, including scrutiny and reviews of intelligence operations.

1.6 At present the Parliamentary Joint Committee on Intelligence and Security (PJCIS) is explicitly prohibited from reviewing the intelligence-gathering priorities and operations of Australian intelligence agencies, or the assessments and reports they produce. The PJCIS is further barred from examining sources of information, operational activities and methods, or any operations that have been, are being or are proposed to be undertaken by intelligence and national security agencies. The PJCIS is also prohibited from reviewing the privacy rules made by Ministers that regulate the communication and retention by agencies of intelligence information concerning Australian persons. The PJCIS is empowered to review the expenditure and administration of Australia's intelligence agencies, but not their performance.

1.7 These limitations on parliamentary scrutiny have reflected a historical reluctance of past governments and intelligence agency officials to trust Members of Parliament outside the executive with the most sensitive intelligence information. Ministers are responsible to parliament for the activities and operations of these agencies, but no members of parliament outside the executive government are allowed to review those operations and other activities. In these circumstances, Ministerial accountability to Parliament is, at best, highly limited.

1.8 The PJCIS cannot properly hold these agencies or their ministers properly accountable for their activities if the Parliament continues to ban its own committee

from reviewing their operations and other activities. Nor can expenditure and administration be adequately examined without consideration of operational performance.

1.9 In contemporary circumstances, in which intelligence operations may impact heavily on the liberties and privacy of citizens and may have highly significant diplomatic and other policy consequences, this is a most unsatisfactory state of affairs.

Overseas Best Practice

1.10 The complete exclusion of intelligence operations, assessments and performance from parliamentary committee scrutiny is not an approach followed by some of Australia's closest intelligence partners.

1.11 In the United States, Congressional oversight of the intelligence community is spread across several committees, including specialised committees on intelligence in the House of Representatives and the Senate. While each Congressional committee has some limits on what it may examine, taken collectively committees have long enjoyed the ability to inquire into all of the intelligence-related activities of the US Government, including highly sensitive operational matters. Wide ranging Congressional inquiries are accepted by the US intelligence community as necessary and appropriate.

1.12 In the United Kingdom, the Intelligence and Security Committee of the British Parliament is empowered by the *Justice and Security Act 2013* to oversee the expenditure, administration, policy and operations of the Security Service, the Secret Intelligence Service and the Government Communications Headquarters. The Intelligence and Security Committee can consider operational matters when requested by the Prime Minister and where they do not involve ongoing operations and it is in the national interest.

1.13 Canada's National Security and Intelligence Committee of Parliamentarians (NSICP) have a broad government-wide mandate to examine and review any national security or intelligence matter.

1.14 Under section 8 of Canada's *National Security and Intelligence Committee of Parliamentarians Act 2017* the Canadian parliament's intelligence committee can review: "*any activity carried out by a department that relates to national security or intelligence, unless that activity is an ongoing operation and the appropriate Minister determines that the review would be injurious to national security*".

1.15 Section 8 of the Canadian legislation further provides that if the appropriate Minister determines that a review of an ongoing intelligence operation would be injurious to national security, he or she must inform the Committee of his or her determination and the reasons for it. In such circumstances the NSICP may not proceed with its review.

1.16 The Canadian NSICP has already conducted a major review relating to operational intelligence matters concerning the security of the Canadian Prime Minister, allegations of foreign interference in Canada and inappropriate use of intelligence.

1.17 The Committee is currently examining how the Canadian Government establishes national intelligence collection and analysis priorities.

1.18 The Committee is also conducting a review of the intelligence operations of the Canadian Department of National Defence and the Canadian Armed Forces.

1.19 A NSICP media release summarising the committee's recent activities is attached to this dissenting report.

1.20 In contrast the Australian PJCIS is explicitly precluded from inquiries into operational matters as well as collection/assessment priorities.

1.21 It is possible, given the very close collaboration between the "5-eyes" intelligence partners, that the Canadian NSICP could inquire into intelligence operations that involve cooperation between Canadian and Australian agencies and as a consequence learn of Australian intelligence operations that are explicitly excluded from scrutiny by Australia's PJCIS. The same can be said with regard to the wide mandate of United States Congressional intelligence committees – a state of affairs with obvious potential relevance to the operations of the Australia-US Joint Defence Facility Pine Gap.

The Bill's Proposed Approach

1.22 Canada's intelligence and national security community is broadly comparable to that of Australia. Like Australia, Canada has a Westminster-style system of responsible government in which Ministers are responsible to parliament for all aspects of their agencies.

1.23 The Intelligence Services Amendment (Enhanced Parliamentary Oversight of Intelligence Agencies) Bill 2018 adapts the model of the Canadian parliamentary oversight legislation to extend the functions of the PJCIS to examine and review intelligence agency operations and other activities including intelligence policy and coordination, subject to the opinion of relevant Ministers concerning potential impacts on ongoing operations, national security and foreign relations.

1.24 In what would be a major enhancement of the PJCIS's mandate, the Bill removes most, though not all, of the current legislative constraints on the scope of PJCIS inquiries. This would bring the scope of the PJCIS's oversight role much more into line with its counterpart committees in Canada, the United Kingdom and the United States.

1.25 Specifically the Bill would remove the current restrictions on the scope of PJCIS reviews and inquiries that include

- exclusions on reviewing the intelligence gathering and assessment priorities of intelligence and security agencies;
- reviewing coordination and evaluation activities undertaken by ONA;
- reviewing particular operations that have been, are being or are proposed to be undertaken;
- reviewing activities that do not affect an Australian person;

- reviewing the content of, or conclusions reached in, assessments or reports made by Defence Intelligence Organisation or the Office of National Assessments (soon to become the Office of National Intelligence), or reviewing sources of information on which such assessments or reports are based;
- reviewing written rules regulating the communication and retention by the relevant agency of intelligence information concerning Australian persons (privacy rules); and
- reviewing operational information or operational methods available to the Australian Federal Police or reviewing particular operations or investigations that have been, are being or are proposed to be undertaken by the Australian Federal Police.

1.26 The Bill retains existing prohibitions on reviewing information provided by a foreign government where that government does not consent to the disclosure of the information. This exclusion is necessary in view of the sensitive nature of Australia's intelligence cooperation agreements with foreign countries which govern the sharing of intelligence information between Australia and the United States, United Kingdom, Canada and New Zealand, as well as other countries. However where there is no objection from a foreign partner, the PJCIS would be free to inquire into intelligence operations and other matters involving that partner.

1.27 The Bill also retains the prohibition on conducting inquiries into individual complaints about the activities of designated intelligence and national security agencies as those complaints are appropriately dealt with by the Inspector-General of Intelligence and Security. (Similarly, the Canadian NSICOP does not receive or deal with public complaints against national security and intelligence organisations.)

1.28 As is the case with Canada's legislation, the Bill recognises that there are details of intelligence operations involving sensitive and vulnerable sources that are best held by the smallest number of people with an absolute need to know. Accordingly, the relevant Minister may certify that a review by the PJCIS relates to an ongoing operation and that the review would interfere with the proper performance by the relevant body of its functions or otherwise prejudice Australia's national security or the conduct of Australia's foreign relations. If this is the case the Committee would be required to cease or suspend the review.

1.29 The Bill's proposed amendments do not affect other provisions within the *Intelligence Service Act* relating to the disclosure of information, power to obtain information and documents, the provision of information to the committee by agencies, the issue of ministerial certificates relation to the disclosure of operationally sensitive information, the publication of evidence or contents of documents including restrictions on disclosures to Parliament and secrecy offences relating to the work of the PJCIS.

1.30 The Bill also contains provisions for the PJCIS to refer a Ministerial certificate to the Inspector-General of Intelligence and Security (IGIS) who, within 30 days, would be required to review the matter and consider: whether the activity was an

ongoing operation; and whether it was reasonable to conclude that a review by the committee would interfere with the proper performance by the relevant body of its functions or otherwise prejudice Australia's national security or the conduct of Australia's foreign relations. Under this provision if the IGIS advised the committee that the activity was not an ongoing operation, or that the review would not cause interference with the proper functioning of the relevant body or otherwise prejudice Australia's national security or the conduct of Australia's foreign relations, the committee would be able proceed with the review, or commence a new review into the activity.

1.31 This provision was intended to provide a mechanism to resolve any deadlock between the PJCIS and a Minister over whether a review of an ongoing intelligence operation should proceed.

Concerns raised by the Inspector-General of Intelligence and Security

1.32 In her submission and evidence to the Committee, the Inspector-General of Intelligence and Security (IGIS), the Hon Margaret Stone, expressed some concerns about taking on an "arbitral" role between the executive and the parliament, as well as about hypothetical impacts on the independence of her office.

1.33 In view of the concerns expressed by the IGIS, it may be preferable to remove the provisions of the bill that relate to the IGIS and instead leave relevant Ministers with the ability to issue a certificate that would block the PJCIS from conducting a review of an ongoing intelligence operation when it is considered that such a review, conducted within to the strict secrecy provisions of the *Intelligence Services Act*, would still interfere with the proper performance by the relevant agency of its functions or otherwise prejudice Australia's national security or the conduct of Australia's foreign relations. This would in effect give ministers a potential veto over a PJCIS review of ongoing intelligence operations. The PJCIS would still be free, however, to review an operation once it concluded or was otherwise no longer ongoing.

1.34 If so amended, the Bill would effectively replicate the Canadian parliamentary oversight model without elaboration.

Other Executive Submissions on the Bill

1.35 Submissions by the Department of Foreign Affairs and Trade, the Department of Prime Minister and Cabinet and the Australian Signals Directorate made no substantive comment on the provisions of the Bill.

1.36 The Departments of the Prime Minister and Cabinet and Foreign Affairs and Trade highlighted the importance of the IGIS as an oversight body to ensure that intelligence agencies are acting within the law and in accordance with ministerial direction. The Committee's report also observes that "the IGIS has formidable powers equivalent to a standing royal commission to ensure the lawful conduct of intelligence and security agencies."

1.37 While the IGIS does play a vital oversight role, it cannot substitute for effective parliamentary scrutiny which inevitably must extend to matters beyond strict

compliance with legislation and ministerial directives. If Australia's intelligence community is to be subject to effective parliamentary scrutiny like all other parts of government, and responsible ministers are to be held accountable for the activities of intelligence agencies, then scrutiny must extend to questions of intelligence operations, effectiveness and higher-level policy.

1.38 The activities of our intelligence agencies are not just operational; they can involve matters of high policy, with both major domestic and major international implications. These are matters quite outside the mandate of the IGIS. For example, it is a reasonable question to ask whether the activities of the Australian Secret Intelligence Service (ASIS) are always consistent with our diplomatic objectives and interests. ASIS's pursuit of covert intelligence could, for example, potentially involve significant risk to diplomatic relations with a foreign power. Similarly, the Australian Security Intelligence Organisation's liaison relationship with foreign agencies, some of which may be subject to allegations of human rights abuse—perhaps the Iraqi National Intelligence Service or Saudi Arabia's General Intelligence Directorate to take two hypothetical examples—do not just involve questions of legality and compliance with ministerial direction; they also involve significant political and policy questions, including consideration of human rights issues. Australia's intelligence collection priorities and the focus of our assessment agencies are also contestable. Such questions are properly matters for the responsible minister, the Prime Minister and the National Security Committee of Cabinet, but these matters should also rightly be matters for review by members of the PJCIS, entrusted, in conditions of tight security, with overseeing the full range of national security and intelligence activities.

1.39 The Committee's report notes that the Independent Intelligence Review undertaken by former bureaucrats Mr Michael L'Estrange and Mr Stephen Merchant recommended a separate comprehensive review of legislative architecture governing the Australian Intelligence community. On 30 May 2018, the Attorney-General announced that the government had commissioned a comprehensive review, to be undertaken by Mr Dennis Richardson AO, a former Secretary of Defence, Director-General of Security and diplomat. Submissions to this review are due to close on 1 December 2018. Mr Richardson is to prepare a classified report for the government by the end of 2019.

1.40 The Government's position is to reject any proposals for enhancement of the role of the PJCIS as premature in advance of the Richardson review. In effect the Government seeks to outsource further decision making on parliamentary scrutiny to another former national security bureaucrat rather than make its own political decisions about the appropriate relationship between the Parliament and the Australia's intelligence and national security agencies.

1.41 During 2018 the Parliament has already debated and passed a wide range of national security and intelligence related legislation. In the case of new legislation dealing with espionage, government secrecy and foreign interference, the Senate was pressed to consider and pass very complex and important legislation within a highly truncated timetable. Yet the Government effectively argues that any consideration of enhancing parliamentary scrutiny of the Australia's intelligence agencies would be

premature prior to the completion of the Richardson review and presumably a Government response to that sometime in 2020 or even later.

Enhanced Parliamentary Oversight is Required

1.42 Despite the Executive's views, there is no reason why the Parliament should not give immediate consideration to enhancing its scrutiny of the Australian intelligence agencies without further delay. The issues are well known. Information and analysis are not lacking, only political on the part of the Government.

1.43 Australia's intelligence community agencies are not infallible. In the future their performance will be tested in a much more demanding security environment and the Australian Parliament will need to subject our intelligence agencies to much closer scrutiny than has been the case previously. This Bill provides a sensible and secure framework within which to extend parliamentary scrutiny to the operations of Australia's national security and intelligence agencies.

1.44 This Bill, with the amendment concerning the IGIS proposed in paragraphs 32 to 34, should be passed by the Senate. In those circumstances it would always be open to the Government or the Senate to refer the Bill to the PJCIS so that the members of that Committee can have the opportunity to consider how they might better perform their responsibility of overseeing the activities of the Australian intelligence community on behalf of the Parliament.

Recommendations


1.45 This Bill, with the amendment concerning the IGIS proposed in paragraphs 32 to 34, should be passed by the Senate. In those circumstances it would always be open to the Government or the Senate to refer the Bill to the PJCIS so that the members of that Committee can have the opportunity to consider how they might better perform their responsibility of overseeing the activities of the Australian intelligence community on behalf of the Parliament.

1.46 It is recommended:

- (a) The Bill be amended to remove reference to the proposed role of Inspector-General of Intelligence and Security.
- (b) The Senate pass the amended Bill.
- (c) That the amended Bill be referred to the Parliamentary Joint Committee on Intelligence and Security for consideration and report.

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Attachment


National Security and Intelligence Committee
of Parliamentarians (NSICOP)

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NSICOP announces two substantive reviews and provides an update on the Special Report

October 12, 2018

OTTAWA, October 12, 2018 – The National Security and Intelligence Committee of Parliamentarians (NSICOP) today announces two substantive reviews of government national security and intelligence activities. Its findings will be published in NSICOP's first annual report.

The Committee is examining how the Government of Canada establishes national intelligence priorities. The priorities provide direction to the intelligence organizations in the collection and analysis of intelligence. This process is the primary mechanism for the Prime Minister, Cabinet and senior officials to ensure the proper exercise of control, oversight and accountability for Canada's intelligence activities.

NSICOP is also conducting a separate review of the intelligence activities of the Department of National Defence and the Canadian Armed Forces. This review focuses on the structure and scope of defence intelligence activities, the legal authorities under which they are conducted, and the internal oversight and governance mechanisms in place for their control and accountability. Consistent with its mandate, NSICOP is conducting the first independent, external review of defence intelligence activities.

"Intelligence activities are critical for the effectiveness of government activities. They also have the potential to affect the rights and privacy of Canadians," said the Chair, the Honourable David McGuinty. "NSICOP's review of these two important programs will help ensure that our security and intelligence agencies continue to keep Canadians safe in a way that also safeguards our values, rights, and freedoms."

Relying on expert witness briefings and classified documentation, the Committee will submit its findings and recommendations to the Prime Minister by the end of this calendar year as part of the Committee's annual report. A declassified version of the report will be tabled in Parliament.

"Officials met all requests for information within the deadlines set, and readily complied with any follow-on requests. We are deeply grateful for their cooperation and for the insights they provided during the Committee's hearings," McGuinty said.

UPDATE ON SPECIAL REPORT: On May 31, 2018, NSICOP provided a special report to the Prime Minister addressing security concerns surrounding his February 2018 trip to India. NSICOP members have since held further deliberations on the report and today provided an updated version to the Prime Minister. A declassified version must be tabled in Parliament within 30 sitting days.

BACKGROUND: NSICOP was established under the *National Security and Intelligence Committee of Parliamentarians Act* on June 22, 2017.

The Committee serves as an independent, high-level reviewer of Canada's legislative, regulatory, policy, administrative and financial framework for national security and intelligence. It may review any national security or intelligence activity, unless it is an ongoing operation and the appropriate Minister determines that the review would be injurious to national security. Ministers may also refer any matter relating to national security or intelligence to the Committee.

The Committee's seven Members of Parliament and three Senators hold the highest level of security clearance, are bound by the *Security of Information Act* and meet in private.