

The Senate

Finance and Public Administration
Legislation Committee

Intelligence Services Amendment
(Enhanced Parliamentary Oversight
of Intelligence Agencies) Bill 2018

November 2018

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Secretariat

Ms Ann Palmer (Secretary)

Ms Kathryn Cochrane (Senior Research Officer)

Ms Michelle Macarthur-King (Administrative Officer)

Mr Max Stenstrom (Administrative Officer)

Ms Jo-Anne Holmes (Administration Officer)

The Senate

PO Box 6100

Parliament House

Canberra ACT 2600

Ph: 02 6277 3530

Fax: 02 6277 5809

E-mail: fpa.sen@aph.gov.au

Internet: www.aph.gov.au/senate_fpa

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Membership of the Committee

Members

| | |
|---|----------|
| Senator James Paterson (Chair) | LP, VIC |
| Senator Jenny McAllister (Deputy Chair) | ALP, NSW |
| Senator Kimberley Kitching | ALP, VIC |
| Senator Rachel Siewert | AG, WA |
| Senator Dean Smith | LP, WA |
| Senator Amanda Stoker | LP, QLD |

Participating Senators

| | |
|---------------------|---------|
| Senator Rex Patrick | CA, SA |
| Senator Nick McKim | AG, TAS |

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Recommendation

Recommendation 1

2.21 The committee recommends that the Senate does not pass the bill.

Chapter 1

Introduction

Referral

1.1 On 14 August 2018, the Intelligence Services Amendment (Enhanced Parliamentary Oversight of Intelligence Agencies) Bill 2018 (the bill) was introduced into the Senate by Senator Rex Patrick.¹

1.2 On 23 August 2018, pursuant to the Senate Selection of Bills Report, the bill was referred to the Senate Finance and Public Administration Legislation Committee for inquiry and report by 12 November 2018.²

Purpose of the bill

1.3 This private member's bill seeks to 'amend the *Intelligence Services Act 2001* (the Intelligence Security Act) to extend parliamentary scrutiny over the activities of Australia's national security and intelligence agencies, including scrutiny and reviews of intelligence operations'.³

1.4 The bill proposes to amend the powers of the Parliamentary Joint Committee on Intelligence and Security (PJCIS) which is specifically precluded from reviewing operational matters such as intelligence gathering and assessment of priorities of intelligence and security agencies, sources of information and operational methods.⁴

Conduct of the inquiry

1.5 Details of the inquiry, including links to the bill and associated documents were placed on the committee website at: www.aph.gov.au/senate_fpa.

1.6 The committee directly contacted a number of relevant organisations and individuals to notify them of the inquiry and invite submissions by 30 September 2018. Submissions received by the committee are listed at Appendix 1.

1.7 The committee held a public hearing in Canberra on 26 October 2018. A list of witnesses who gave evidence at the public hearing is available at Appendix 2. The Hansard transcript may be accessed through the committee's website.

1.8 The committee thanks those who made submissions and appeared at the hearing.

1 *Journals of the Senate*, No 107–14 August 2018, p. 3445.

2 *Journals of the Senate*, No 113–23 August 2018, pp. 3606–3608.

3 Intelligence Services Amendment (Enhanced Parliamentary Oversight of Intelligence Agencies) Bill 2018, Explanatory Memorandum (EM), p. 1.

4 Parliament of Australia, Parliamentary Library, Research Paper Series 2017–1, *Oversight of intelligence agencies: a comparison of the 'Five Eyes' nations*, 15 December 2017, pp. 11–12.

Provisions of the bill

1.9 The PJCIS was established by section 28 of the *Intelligence Services Act 2001* (the Act). Section 29 of the Act sets out the functions of the PJCIS. Those functions include to review the administration and expenditure, including the annual financial statements, of the following agencies:

- the Australian Security Intelligence Organisation (ASIO);
- the Australian Secret Intelligence Service (ASIS);
- the Australian Geospatial-Intelligence Organisation (AGO);
- the Defence Intelligence Organisation (DIO);
- the Australian Signals Directorate (ASD); and
- the Office of National Assessments (ONA).⁵

1.10 The bill proposes to amend section 29 of the Act to allow the PJCIS to review the 'activities' of Australia's national intelligence and security agencies, in addition to its current power to review the 'administration and expenditure' of those agencies. The Explanatory Memorandum (EM) details the types of additional activities that the PJCIS would be able to review pursuant to this amendment:

Activities subject to potential PJCIS review would cover operational matters relating to the collection of intelligence as well as the assessment of intelligence and the broader questions of control of intelligence and security agencies including cooperation or relations with foreign intelligence and security agencies.⁶

1.11 Subsection 29(3) of the Act excludes from the functions of the PJCIS the review of operations of intelligence agencies. The bill proposes that the current subsection 29(3) be repealed and replaced with a new provision. Proposed new subsection 29(3) would remove most of the current restrictions on the scope of reviews and inquiries by the PJCIS, but would retain the following exclusions on the PJCIS:

- reviewing information provided by, or by an agency of, a foreign government where that government does not consent to the disclosure of the information to the PJCIS;⁷ and
- conducting inquiries into individual complaints about intelligence and security agency activities.⁸

5 Paragraph 29(1)(a) of the *Intelligence Services Act 2001*.

6 Explanatory Memorandum (EM), Notes on Clauses, p. 1. However, the bill does not include a definition of 'activities'.

7 Proposed paragraph 29(3)(a) of the bill.

8 Proposed paragraph 29(3)(b) of the bill.

1.12 In relation to excluding the PJCIS from reviewing information provided by foreign governments, where that government does not consent to the disclosure of the information, the EM states:

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, in particular agreements between Australia and the United States, United Kingdom, Canada and New Zealand (the so-called "Five Eyes" countries), as well agreements with other countries.⁹

1.13 The EM notes that inquiries into individual complaints are more appropriately dealt with by the Inspector-General of Intelligence and Security (IGIS).¹⁰

Ceasing or suspending review of agency activities

1.14 The bill proposes a new section 29A, which establishes a mechanism allowing a relevant Minister to intervene to cause a PJCIS inquiry to be suspended or ceased.

1.15 Where the relevant Minister is of the opinion that a review by the PJCIS is of an ongoing operation and 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, the Minister may issue the PJCIS with a certificate in relation to the matter. The certificate states the Minister's opinion and the underlying reasons.¹¹

1.16 On receiving a certificate from the relevant Minister, the PJCIS must cease or suspend the review in question.¹²

1.17 The decision of a Minister to issue a certificate may not be questioned in any court or tribunal.¹³

Review by the Inspector-General of Intelligence and Security

1.18 The bill would also put in place provision for the PJCIS to refer the Minister's certificate to the IGIS.¹⁴ The IGIS has 30 days to review the certificate and consider whether the activity is:

- an ongoing operation; and
- whether it is reasonable to conclude that a review by the PJCIS would interfere with the proper performance by the relevant body of its functions or

9 EM, p. 5.

10 EM, p. 5.

11 Proposed subsection 29A(1) of the bill.

12 Proposed subsection 29A(4) of the bill.

13 Proposed subsection 29A(3) of the bill.

14 Proposed subsection 29A(6) of the bill.

otherwise prejudice Australia's national security or the conduct of Australia's foreign relations.¹⁵

1.19 The IGIS must then provide the PJCIS with written advice.¹⁶ If the IGIS provides advice that the activity is 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, then the PJCIS may continue with the review of the activity or start another review of the activity.¹⁷

Background to the bill

1.20 The EM to the bill sets the context for the bill, noting the size and budgets of Australia's security and intelligence agencies:

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. While Australia's intelligence community has grown rapidly over the past two decades, the mechanisms of accountability and review overseeing those agencies have received much less attention, resources and authority.¹⁸

1.21 The EM argues:

...the PJCIS can't...hold security and intelligence agencies 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.¹⁹

1.22 The EM draws comparisons with other jurisdictions contending:

The complete exclusion of intelligence operations from parliamentary committee scrutiny is not an approach followed by some of Australia's closest intelligence partners.²⁰

1.23 The bill 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.²¹

15 Proposed paragraph 29A(7)(a) of the bill.

16 Proposed paragraph 29A(7)(b).

17 Proposed subsection 29A(8).

18 Explanatory Memorandum (EM), p. 1.

19 EM, p. 1.

20 EM, p. 2.

21 EM, p. 2.

1.24 The EM states:

Overall, the Bill provides a framework for the proper exercise of parliamentary scrutiny while enabling the government to act to protect the security of particularly sensitive ongoing intelligence operations...

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.²²

Scrutiny of Bills Committee

1.25 The bill was reviewed by the Senate Standing Committee on the Scrutiny of Bills (Scrutiny of Bills Committee).²³ The Scrutiny of Bills Committee reported that the intention of proposed subsection 29A(3) of the bill would be to exclude judicial review in relation to a minister's decision to issue a certificate, and as such, proposed subsection 29A(3) appears to be inconsistent with section 75(v) of the Constitution.²⁴

1.26 The Scrutiny of Bills Committee recommended that in the event that the bill progresses further through the Parliament, further information on the proposed exclusion of judicial review would be sought from the proponent of the legislation.²⁵

Reviews of the intelligence framework

1.27 In November 2016, the then Prime Minister announced that Mr Michael L'Estrange AO and Mr Stephen Merchant PSM would undertake an independent intelligence review (IIR) of the Australian Intelligence Community (AIC). The AIC currently comprises ASIO, ASIS, ONA, DIO, ASD and AGO.²⁶ The broader National Intelligence Community (NIC) includes parts of the Australian Federal Police, the Department of Home Affairs (formerly the Department of Immigration and Border Protection) which perform intelligence related functions, Australian Criminal Intelligence Commission and the Australian Transactions Reports and Analysis Centre.²⁷

1.28 An unclassified version of the IIR was released in July 2017. As part of that review the oversight role of the PJCIS and the IGIS were considered.

22 EM, p. 3.

23 Senate Standing Orders, Standing Order 24(1)(a)(iii): 'whether the bill by express words or otherwise (iii) make rights, liberties or obligations unduly dependent upon non-reviewable decisions'.

24 Section 75(v) of the Constitution confers jurisdiction on the High Court for judicial review of decisions made by officers of the Commonwealth.

25 Senate Standing Committee on the Scrutiny of Bills, *Bills Digest 9/19, Chapter 1*, p. 1–2.

26 Department of the Prime Minister and Cabinet, *2017 Independent Intelligence Review*, p. 34, note 3, available at: <https://www.pmc.gov.au/national-security/2017-independent-intelligence-review> (accessed 9 October 2018).

27 Department of the Prime Minister and Cabinet, *2017 Independent Intelligence Review*, p. 115, note 3, available at: <https://www.pmc.gov.au/national-security/2017-independent-intelligence-review> (accessed 9 October 2018).

The IIR recommended that the oversight role of the PJCIS and the IGIS be expanded to apply to all ten agencies within the NIC, but the IIR did not recommend any change in the scope of the role of the PJCIS.²⁸

1.29 The IIR also recommended a separate comprehensive review of legislative architecture governing the AIC:

A comprehensive review of the Acts governing Australia's intelligence community be undertaken to ensure agencies operate under a legislative framework that is clear, coherent and contains consistent protections for Australians.²⁹

1.30 On 30 May 2018, the Attorney-General announced that the government had commissioned a comprehensive review of the legal framework governing the NIC. Mr Dennis Richardson AO, former Secretary of Defence and diplomat, has been appointed to undertake the review. Submissions are due to close on 1 December 2018. The review will prepare a classified report for the government by the end of 2019.³⁰

28 Department of the Prime Minister and Cabinet, *2017 Independent Intelligence Review*, p. 22, available at: <https://www.pmc.gov.au/national-security/2017-independent-intelligence-review> (accessed 9 October 2018).

29 Department of the Prime Minister and Cabinet, *2017 Independent Intelligence Review*, p. 19, available at: <https://www.pmc.gov.au/national-security/2017-independent-intelligence-review> (accessed 9 October 2018).

30 Attorney-General's Department, *Comprehensive review of the legal framework governing the National Intelligence Community*, available at: <https://www.ag.gov.au/NationalSecurity/Pages/Comprehensive-review-of-the-legal-framework-governing-the-national-intelligence-community.aspx> (accessed 1 November 2018).

Chapter 2

Key issues and committee view

Introduction

2.1 Two key issues were raised in written submissions. The Inspector General of Intelligence and Security (IGIS) expressed concern that by imposing a mandatory obligation on the IGIS to review a decision of the executive, the proposed bill jeopardised the independence of the IGIS.¹

2.2 The Department of the Prime Minister and Cabinet (PM&C) and the Department of Foreign Affairs and Trade (DFAT) each made the point that the government is currently considering its response to the 2017 Independent Intelligence Review (IIR), and until that process had been completed it was premature for the executive to comment on the bill.²

2.3 A further key issue raised during the committee hearing was the issue of the scrutiny of executive policy decisions in light of the current legislative prohibition on the PJCIS to review intelligence and security operations. The discussion also canvassed the unique role of the IGIS in the oversight of intelligence and security agencies.

The role of the Inspector-General of Intelligence and Security

2.4 The Hon. Margaret Stone, IGIS advised that her position is an independent statutory office established under the *Inspector-General of Intelligence and Security Act 1986* and located within the Attorney-General's portfolio. The IGIS is tasked to review the activities of intelligence and security agencies, and provide advice to the government. The IGIS advised that, as a statutory officer, the IGIS is not subject to any direction from any Minister on how she should carry out her responsibilities.³

2.5 The IGIS contended that the mandatory review function proposed by the bill would effectively confer an arbitral function on the IGIS to determine whether a Parliamentary committee may exercise its inquiry function in circumstances where the government opposes the conduct of the inquiry through the issuing of a Ministerial certificate.⁴

2.6 At the hearing, the IGIS, the Hon. Margaret Stone, explained that under the Constitution there are three arms of government—the parliament, the judiciary and the executive. Whereas the judiciary derived its independence from the Constitution,

1 *Submission 1*, p. 2.

2 Ms Kylie Bryant, First Assistant Secretary, National Security Division, Department of the Prime Minister and Cabinet, *Committee Hansard*, 26 October 2018, p. 7; Department of Foreign Affairs and Trade, *Submission 3*, p. 2.

3 *Submission 1*, p. 4.

4 *Submission 1*, p. 2.

Ms Stone advised that her office is a part of the executive.⁵ As such, Ms Stone emphasised that for her office to be the arbiter between the executive and the parliament would place her office in 'an invidious position', as the most important aspect of her office is its independence:

...The actual independence is very important there, but even more so, I think, is the perception of independence. If we were to arbitrate between a minister and a parliamentary committee it would be, 'Heads I win, tails I lose,' that we would be seen to be partisan. What we do would inevitably be able to be described as partisan and that would be the death knell for our independence.⁶

2.7 Ms Stone observed that capacity for her office to carry out its role derives from its independence:

We have to target what we do very carefully. We create a culture of compliance. One of the ways we get the intelligence agencies to trust us—so they can tell us about breaches, get anticipatory briefings with us and tell us what they're planning to do—is because they recognise our independence.⁷

2.8 The committee sought to address what may be perceived as an absence of an avenue of scrutiny of a government's policy decision on operational matters for which the PJCIS does not have a statutory right of review. Two alternative approaches were suggested to the IGIS. The first was that, rather than being the arbiter between the executive and the parliament, the IGIS could provide advice only on questions of fact, for example, whether there was a security operation on foot. The second was that the IGIS become an independent statutory officer akin to the Auditor-General.⁸

2.9 The IGIS, Ms Stone, agreed that for the IGIS to provide advice only would be very different to being an arbiter, however Ms Stone stated that both the suggested approach would change the whole status of her office. With respect to the provision on advice on specific questions of fact, Ms Stone said that for the advice to have any credibility, it would have to include information that would be difficult to disclose:

One of the problems is that as soon as you start going into that area you get into information that may well by itself compromise national security, or whatever—not all the intelligence agencies' operations are security based, but most of them are. But you would get into an area such that by merely confirming that an operation is in existence you'd give credence to one of the factors you were trying to decide.⁹

5 *Committee Hansard*, 26 October 2018, p. 1. *The Constitution*, s. 71: 'The judicial power of the Commonwealth shall be vested in a Federal Supreme Court, to be called the High Court of Australia...'

6 *Committee Hansard*, 26 October 2018, pp. 1–2.

7 *Committee Hansard*, 26 October 2018, p. 1.

8 *Committee Hansard*, 26 October 2018, p. 2.

9 *Committee Hansard*, 26 October 2018, p. 3.

2.10 As to the related suggestion that the role of the IGIS could be revamped to be more akin to that of the Auditor-General, Ms Stone stated that this was a matter for government policy, but noted:

...And I guess my view on that would really depend on what the provisions of a proposed bill were and the extent to which I think they might compromise the activities of my office—mainly its independence but also its own operational effectiveness.¹⁰

2.11 Ms Stone drew the committee's attention to other scrutiny mechanisms open to the PJCIS. She advised that her office regularly offered to brief the PJCIS. Ms Stone also noted that there is nothing in the IGIS empowering legislation that would prohibit the PJCIS from requesting, but not directing, the IGIS to undertake an inquiry. Ms Stone stressed that only the Prime Minister can 'direct' the IGIS to undertake an inquiry, but the Prime Minister cannot impinge on her office's independence:

Only the Prime Minister can direct my office to do an inquiry. That's been in the legislation for some time, and I have no difficulty with that. I think it's been exercised only three times. And 'request'—even when the Prime Minister directs, he or she is not entitled to say how we go about it, what priority we give it, what resources.¹¹

2.12 Ms Stone confirmed to the committee that the IIR had formally recommended that:

- The IGIS be required to brief the PJCIS at regular intervals on investigations; and,
- The Intelligence and Security Act be amended to enable the PJCIS to request the IGIS to conduct an inquiry and provide a report to the PJCIS, the Prime Minister and responsible Minister.¹²

Parliamentary oversight of security and intelligence operations

2.13 PM&C's submission to the inquiry focussed on the perspectives provided by the IIR on intelligence and security oversight. PM&C noted that the IIR had given considerable consideration to whether the role of the PJCIS should be expanded to directly oversee intelligence operations, but had ultimately declined to recommend this.¹³

2.14 At the hearing officials of PM&C advised the committee that their consideration of the bill was in the context of working within government policy. Ms Caroline Millar, Deputy Secretary, National Security and International Policy, PM&C commented:

10 *Committee Hansard*, 26 October 2018, p. 3.

11 *Committee Hansard*, 26 October 2018, p. 3.

12 *Committee Hansard*, 26 October 2018, p. 5.

13 *Submission 5*, p. 2.

...the government is still considering the integrity and oversight recommendations of the *Independent Intelligence Review*. While those issues are still before government, we're really not in a position to comment [on the bill].¹⁴

2.15 Ms Kylie Bryant, First Assistant Secretary, National Security Division, PM&C observed that the PJCIS currently has an extensive role in the oversight of intelligence and security agencies which operates within the overall institutional and legislative intelligence and security oversight framework.¹⁵

2.16 Mr Robert McKinnon, Assistant Secretary, National Security Strategy, Cyber and Intelligence Branch, DFAT, advised the committee that accountability for intelligence and security policy rests with the responsible Minister—and that ultimately the issue of the appropriateness of a policy is a matter for the executive and its broad accountability to parliament. Mr McKinnon advised:

There's no specific individual or function that would play into providing some sort of independent oversight of that particular relationship.¹⁶

2.17 However, Mr McKinnon placed the role of Ministerial responsibility for intelligence and security policy into its broader context:

That process [of ministerial responsibility] is also dealt with, in a broad policy sense, through the architecture that's built up around government national security decision-making—the National Security Committee of Cabinet, in particular, and its supporting instruments, the Secretaries Committee on National Security. Those processes are very well established to deal with overall policy determinations about the risks associated with various intelligence activities but not in a way that, in a sense, cuts across the traditional Westminster types of responsibilities and accountabilities that are vested in ministers.¹⁷

2.18 Mr McKinnon explained that the structure of Australia's intelligence and security arrangements is unique, being based on a legal structure authorisation:

So the legality of the types of activities that are undertaken by intelligence agencies, which are naturally difficult to accommodate in a democracy, are only lawful if they are authorised either by the legislation or by the minister acting under that legislation. To have an arrangement to ensure the compliance and propriety of that process, we've obviously got the IGIS function which, for all intents and purposes, is a standing royal commission. That's an incredibly powerful institution, in a sense, acting on behalf of the parliament and the public in terms of providing that very intrusive oversight of these processes to ensure compliance. So that in itself, I think, is the heart of the system. The challenge, of course, has always been what role parliament should play through the PJCIS...in this process. Clearly that's

14 *Committee Hansard*, 26 October 2018, p. 7.

15 *Committee Hansard*, 26 October 2018, p. 7.

16 *Committee Hansard*, 26 October 2018, p. 8, 9.

17 *Committee Hansard*, 26 October 2018, p. 8.

the issue that this bill addresses, but it's also the issue that each intelligence review since the establishment of our current architecture has addressed and seen some evolution in.¹⁸

Committee view

2.19 The committee noted that the IGIS has formidable powers equivalent to a standing royal commission to ensure the lawful conduct of intelligence and security agencies. The committee further noted the accountability of the executive to the Parliament through the institutions of ministerial responsibility and the separation of powers in the Westminster tradition.

2.20 Finally the committee notes the ongoing consideration by the executive of the 2017 Independent Intelligence Review, and the related comprehensive review of all legislation governing Australia's intelligence and security architecture. The committee considers these processes should be allowed to be completed, and on that basis considers the proposed bill to be premature, and should not be passed.

Recommendation 1

2.21 The committee recommends that the Senate does not pass the bill.

Senator James Paterson
Chair

18 *Committee Hansard*, 26 October 2018, p. 8.

Additional Comments by Labor Senators

1.1 Ensuring the safety of our nation and its people is the paramount responsibility of the Australian Parliament. It is the foundation upon which all other policies and priorities are built.

1.2 Over the past two decades, the Parliament has considered a number of bills that aim to equip our intelligence and security agencies with the powers and resources they need to protect Australian citizens and Australian interests.

1.3 This is an essential task in an age of serious and evolving threats to our national security. It is also essential to acknowledge, however, the potential of additional powers to impinge on the fundamental values and freedoms of Australian citizens.

1.4 It ultimately falls to Parliament to ensure a proper balance is struck. The Parliamentary Joint Committee on Intelligence and Security (PJCIS) plays an important role in doing this.

1.5 It is for this reason that Labor has a long standing interest in modernising the operation of the PJCIS. Labor believes that enhanced powers demand enhanced safeguards.

1.6 Strong and effective oversight does not undermine our national security community. It enhances it. Public trust and confidence in our security and intelligence agencies are best ensured through strong and rigorous oversight and scrutiny.

1.7 Australia has a unique configuration of oversight that spans the parliamentary, judicial, and executive branches of government. Institutions such as the PJCIS and the Inspector General of Intelligence and Security (**IGIS**) have complementary functions that operate in aggregate.

1.8 Labor's existing proposal for reform of the PJCIS recognises and maintains these arrangements. The proposal is embodied in the *Parliamentary Joint Committee on Intelligence and Security Amendment Bill 2015*, which is presently before the Senate. This bill arose out of work done by former senator John Faulkner and others, and contains a suite of measures designed to ensure the PJCIS has the powers it needs to acquit its duties to the parliament and the Australian people.

1.9 The substance of Labor's proposals has since largely been adopted in recommendations 21 and 23 of the *2017 Independent Intelligence Review* undertaken by Mr Michael L'Estrange AO and Mr Stephen Merchant PSM. Despite receiving the review well over a year ago, the government has yet to act on these two recommendations.

1.10 The bill that is the subject of this present inquiry, the *Intelligence Services Amendment (Enhanced Parliamentary Oversight of Intelligence Agencies) Bill 2018 (the Bill)*, contains a number of interesting and innovative measures. Labor believes that these measures merit further consideration, but appreciates the reservations expressed by the Inspector General of Intelligence and Security and other submitters to this inquiry.

1.11 It is our belief that reform of the PJCIS is best done holistically. Labor notes in this regard that the measures contained in this Bill address different aspects of the PJCIS' operation from those considered by Labor's bill and by the recommendations of the 2017 Independent Intelligence Review.

1.12 Finally, there are other processes currently underway that could likely affect intelligence and oversight. As noted in the main report, there is ongoing consideration by the government of the recommendations of the 2017 Independent Intelligence Review, and the Attorney-General has also announced that Dennis Richardson will lead a comprehensive review of the legal framework governing the National Intelligence Community. Labor considers that any holistic reform of the PJCIS should take into account these processes.

Senator Jenny McAllister
Deputy Chair
Senator for New South Wales

Senator Kimberley Kitching
Senator for Victoria

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.

Senator Rex Patrick
Senator for South Australia

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

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.

Australian Greens Dissenting Report

1.1 The Australian Greens acknowledge the extensive work of the Committee in this inquiry, and thank everyone who made a public submission and/or public representation.

1.2 The Australian Greens are in agreeance with Australian Lawyers for Human Rights and Liberty Victoria in their broad support for the bill, and the need for an increased oversight of intelligence agencies that corresponds with their significantly increased powers and activities over the past two decades.

Recommendation 1

1.3 The Australian Greens recommend that the Senate pass this bill, with amendments.

1.4 The Australian Greens share the concern raised by Australian Lawyers for Human Rights regarding the Bill's subsection 29A(3) that would exempt decisions of the Minister from review by the courts, noting:

such an exemption is "unnecessarily and unjustifiably contrary to the rule of law" which requires that government decisions must be open to judicial review . To the extent that relevant decisions of the Minister are exempted from review, the Bill fails to provide any adequate check on the exercise of executive power.¹

Recommendation 2

1.5 The Australian Greens also recommend the bill be amended to allow decisions of the relevant minister to prohibit investigations be open to scrutiny in Court.

1.6 The Australian Greens are also concerned about subsection 29(3) of this bill, which retains existing exemptions on information provided by foreign governments, and particular complaints regarding Australian security agencies, from being considered by PJCIS. Sharing this concern, Australian Lawyers for Human Rights argued:

it should be for the Committee, like the Inspector-General, to conduct such inquiries as it thinks fit, and to make such decisions about information provided by foreign governments or particular complaints as it thinks appropriate.²

1 *Submission 6*, pp. 2-3.

2 *Submission 6*, p. 3.

Recommendation 3

1.7 The Australian Greens further recommend the bill be amended to remove restrictions on information provided by foreign governments, and particular complaints regarding Australian security agencies, being considered by PJCIS.

**Senator Nick McKim
Senator for Tasmania**

Appendix 1

Submissions

Submissions

1. The Hon Margaret Stone, Inspector-General of Intelligence and Security
2. Liberty Victoria
3. Department of Foreign Affairs and Trade
4. Australian Signals Directorate's (ASD)
5. Department of Prime Minister and Cabinet
6. Australian Lawyers for Human Rights

Appendix 2

Public hearing

Friday 26 October 2018
Committee Room 2S1
Parliament House
Canberra, ACT

Witnesses

Inspector General of Intelligence and Security

The Hon Margaret Stone, Inspector General of Intelligence and Security

Mr Jake Blight, Deputy Inspector General of Intelligence and Security

Department of Foreign Affairs and Trade

Mr Robert McKinnon, Assistant Secretary, National Security Strategy, Cyber and Intelligence Branch

Department of Prime Minister and Cabinet

Ms Kylie Bryant, First Assistant Secretary, National Security Division

Ms Caroline Millar, Deputy Secretary, National Security and International Policy

