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## Intelligence Services Bill 2001

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No. 11 2001-02

Intelligence Services Bill 2001

Nathan Hancock  
Law and Bills Digest Group  
1 August 2001

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# Intelligence Services Bill 2001

**Date Introduced:** 27 June 2001

**House:** House of Representatives

**Portfolio:** Foreign Affairs

**Commencement:** 28 days after Royal Assent

## Purpose

To

- provide a legislative basis for the Australian Secret Intelligence Service (ASIS) and, to a more limited extent, the Defence Signals Directorate (DSD)
- establish a joint parliamentary committee to oversee both the Australian Security Intelligence Organisation (ASIO) and ASIS.

## Background

### The Australian Intelligence Community

The 'Australian Intelligence Community' comprises:

- the Australian Security Intelligence Organisation (ASIO)
- the Australian Secret Intelligence Service (ASIS)
- the Defence Signals Directorate (DSD)
- the Office of National Assessments (ONA)
- the Defence Intelligence Organisation (DIO), and
- the Defence Imagery and Geospatial Organisation (DIGO)

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Broadly, ASIO, ASIS and DSD collect intelligence which is analysed by ONA, DIO and DIGO. ASIS collects intelligence outside Australia whereas ASIO collects intelligence inside Australia. ASIS collects human intelligence (*humint*) while DSD collects signals or communications intelligence (*sigint*). While ASIS merely collects intelligence ASIO may also advise government(s) regarding security threats and take action to address those threats. DSD also advises government(s) regarding security of electronic information.

In layman's terms ASIO and ONA exist under the auspices of the Department of Prime Minister and Cabinet (PM&C), ASIS under the Department of Foreign Affairs and Trade (DFAT) whereas DSD, DIO and DIGO under the Department of Defence (DoD). In general terms, the activities of all these intelligence agencies are subject to scrutiny by the Inspector-General of Intelligence and Security (IGIS).

## ASIS

### History

The Australian Secret Intelligence Service (ASIS) was established on 13 May 1952 by an Executive Council Minute appointing Alfred Deakin Brookes. For twenty years, little was known within government or the community regarding the existence or operation of ASIS.

Its Charter of 15 December 1954 described ASIS's role as 'to obtain and distribute secret intelligence, and to plan for and conduct special operations as may be required'.<sup>1</sup> ASIS was expressly required to 'operate outside Australian territory'. A Ministerial Directive of 15 August 1958 indicated that its special operations role included conducting 'special political action'.<sup>2</sup> It also indicated that the organisation would come under the control and supervision of the Minister for External Affairs rather than the Minister for Defence.

At the time, ASIS was substantially modelled on the United Kingdom Secret Intelligence Service (UKSIS) also known as MI6. ASIS was at one time referred to as MO9.

On 1 November 1972 ASIS was sensationally exposed by *The Daily Telegraph*.<sup>3</sup> This paper ran an expose regarding recruitment of ASIS agents from Australian universities for espionage activities in Asia. This article was followed by a more in depth piece in *The Australian Financial Review* on the 'Australian intelligence community' (ASIO, ASIS, the Joint Intelligence Organisation (JIO), now the Defence Intelligence Organisation (DIO) and the Defence Signals Division (DSD), now the Defence Signals Directorate).

The article in *The Australian Financial Review* stated that '[t]he ASIS role is to collect and disseminate facts only. It is not supposed to be in the analytical or policy advising business though this is clearly difficult to avoid at times'.<sup>4</sup> The Ministerial Statement of 1977 stated that the 'main function' of ASIS was to 'obtain, by such means and subject to such conditions as are prescribed by the Government, foreign intelligence for the purpose of the protection or promotion of Australia or its interests'.<sup>5</sup>

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On 25 October 1977 the Prime Minister declared the existence of ASIS and its functions following a recommendation by the Hope Royal Commission (see below).<sup>6</sup>

### Hope Royal Commission(s)

On 21 August 1974 the Whitlam Government appointed Justice Robert Hope to conduct a Royal Commission into the structure of security and intelligence services, the nature and scope of the intelligence required and the machinery for ministerial control, direction and coordination of the security services. The Hope Royal Commission delivered eight reports, four of which were tabled in Parliament on 5 May 1977 and 25 October 1977. Aside from the observation that ASIS was 'singularly well run and well managed', the report(s) on ASIS were not released. Results from the other reports included the *Australian Security Intelligence Organisation Act 1979* and the establishment of the Office of National Assessments (ONA) and the passage of the *Office of National Assessments Act 1977*.

On 17 May 1983 the Hawke Government reappointed Justice Hope to conduct a second Royal Commission into ASIS, ASIO, ONA, DSD and JIO (now DIO). The inquiry was to examine progress in implementing the previous recommendations; arrangements for developing policies, assessing priorities and coordinating activities among the organisations; ministerial and parliamentary accountability; complaints procedures; financial oversight and the agencies' compliance with the law. As with the first Hope Royal Commission, the reports on ASIS and DSD, which included draft legislation on ASIS, were not made public.

### Sheraton Hotel

On 30 November 1983 ASIS was once again shot into the limelight following a bungled training exercise in the Sheraton Hotel in Melbourne. The exercise was to be a mock surveillance and hostage rescue of foreign intelligence officers. It involved junior officers who had undergone 3 weeks prior training and who were given considerable leeway in planning and executing the operation. Ultimately, in executing the operation, the trainees used considerable force, brandished semi-automatic assault weapons, distressed a number of the staff and guests and physically assaulted the Hotel Manager.

Within 2 days the Minister for Foreign Affairs announced that an 'an immediate and full investigation' would be conducted under the auspices of the Hope Royal Commission. A report was prepared and tabled by February 1984. It described the exercise as being 'poorly planned, poorly supervised and poorly run'<sup>7</sup> and recommended that measures be taken in training to improve planning and eliminate adverse impacts on the public.

Following the incident, *The Sunday Age* disclosed the names, or the assumed names, of five of the officers involved. The journalist noted that 'according to legal advice taken by *The Sunday Age* there is no provision that prevents the naming of an ASIS agent'.<sup>8</sup> While not included within the public version of the report, the Hope Royal Commission did

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prepare an appendix which would appear to have dealt with the possible security and foreign relations consequences of disclosure of participants names by *The Sunday Age*. Subsequently, in *A v Hayden*, the High Court held that the Commonwealth owed no enforceable duty to ASIS officers to maintain confidentiality of their names or activities.<sup>9</sup>

At the time of the Sheraton Hotel incident, the extant Ministerial Directive permitted ASIS to undertake 'covert action', including 'special operations' which, roughly described, comprised 'unorthodox, possibly para-military activity, designed to be used in case of war or some other crisis'.<sup>10</sup> Following the incident and the recommendations of the Hope Royal Commission, the covert action function was apparently abolished.<sup>11</sup>

## Internal Inquiries

Between 1989 and 1991 ASIS came under scrutiny following allegations relating to its role and activities in Papua New Guinea. It was alleged that ASIS had been involved in training Papua New Guinean troops to suppress independence movements in Irian Jaya<sup>12</sup> and Bougainville.<sup>13</sup> (In 1997 it was alleged that ASIS and DSD had failed to collect, or the Government had failed to act upon, intelligence regarding the role and presence of Sandline mercenaries in relation to the independence movement in Bougainville.<sup>14</sup>)

In 1992 two reports were prepared on ASIS by officers within the Department of Prime Minister and Cabinet and Office of National Assessments for the Secretaries Committee on Intelligence and Security (SCIS) and the Security Committee of Cabinet (SCOC). The Richardson Report in June examined the roles and relationships of the collection agencies (ASIO, ASIS and DSD) in the post cold war era. The Hollway Report in December examined shortfalls in Australia's foreign intelligence collection. Both reports endorsed the structure and roles of the organisations and commended the performance of ASIS.

## Samuels and Codd Royal Commission

Towards the end of 1993 ASIS became the subject of media attention after allegations were made by former ASIS officers that ASIS was unaccountable and out of control. One newspaper alleged that 'ASIS regularly flouted laws, kept dossiers on Australian citizens ... and hounded agents out of the service with little explanation'. In particular it alleged that agents were being targeted in a purge by being threatened with criminal charges relating to their official conduct, reflecting a pattern which suggested to some that ASIS or a senior ASIS officer had been 'turned' by a foreign intelligence service.<sup>15</sup>

On 21 February 1994 *Four Corners* ran a program which aired the key allegations. Two former ASIS officers made claims regarding cultural and operational tensions between ASIS and DFAT. They claimed that embassy staff had maliciously or negligently compromised activities involving the running of foreign informants and agents and the defection of foreign agents to Australia. They claimed that their grievances were ignored and that they were 'deserted in the field' and made scapegoats by ASIS.

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The officers and the reporter (Ross Coulthart) also made brief claims regarding operational activities and priorities. The officers personally claimed that ASIS advice had been ignored by DFAT. The reporter repeated claims regarding ASIS operations aimed at destabilising the Aquino Government in the Philippines. He also made claims regarding ASIS assistance to UKSIS in the Falklands conflict, in Hong Kong and in Kuwait for the benefit of British interests and potentially to the detriment of Australian interests.

Ross Coulthart also made allegations regarding intelligence held by ASIS on Australians. He claimed that 'ASIS secretly holds tens of thousands of files on Australian citizens, a database completely outside privacy laws'.<sup>16</sup> This allegation was investigated and denied by Royal Commissioners Samuels and Codd (see below),<sup>17</sup> but the Minister did acknowledge that ASIS maintained files. He said that these were 'essentially of an administrative nature' on Australian persons and organisations.<sup>18</sup>

The bulk of the personal statements by the officers concerned their private grievances. They raised two issues of public interest regarding the effect of secrecy on the operation of grievance procedures and the extent to which the Minister for Foreign Affairs and Trade was aware of or in control of ASIS operations. The reporter directly raised the issue of the appropriateness of ASIS operations particularly with respect to priority setting in overseas postings and operations, cooperation with foreign intelligence services, and the privacy of Australian persons and organisations. By implication, the program queried the extent to which ASIS is or should be accountable to the Minister, to Government and to Parliament.

The following day, the Shadow Minister for Foreign Affairs called for an independent judicial inquiry into the allegations. He expressed particular concern about the nature of ASIS cooperation with foreign agencies and the defects in ASIS grievance procedures.<sup>19</sup> He later called for the inquiry to examine the 'poisoned relationship between ASIS and [DFAT]'.<sup>20</sup> The Democrats spokeswoman called for a standing parliamentary committee.<sup>21</sup>

On 23 February 1994, the Minister announced a 'root and branch' review of ASIS. The Government appointed Justice Gordon Samuels and Michael Codd to inquire into the effectiveness and suitability of existing arrangements for control and accountability, organisation and management, protection of sources and methods, and resolution of grievances and complaints. The Royal Commission reported in March 1995.

Samuels and Codd found that certain grievances of the former officers were well founded. They appeared to support the officers' concerns regarding the grievance procedures:

Bearing in mind the context in which the members of ASIS work, it is not surprising that there should develop a culture which sets great store by faithfulness and stoicism and tends to elevate conformity to undue heights and to regard the exercise of authority rather than consultation as the managerial norm.<sup>22</sup>

However, Samuels and Codd observed that the information published in the program was 'skewed towards the false',<sup>23</sup> that 'the level of factual accuracy about operational matters was not high',<sup>24</sup> and, quoting an aphorism, that 'what was disturbing was not true and what

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was true was not disturbing'.<sup>25</sup> They concluded that the *disclosure* of the information was unnecessary and unjustifiable and had damaged the reputation of ASIS and Australia overseas.<sup>26</sup> They rejected any suggestion that ASIS was unaccountable or 'out of control'. They said, 'its operational management is well structured and its tactical decisions are thoroughly considered and, *in major instances*, subject to external approval'.<sup>27</sup> They recommended that complaints regarding ASIS operations continue to be handled by IGIS but that staff grievances be handled by the Administrative Appeals Tribunal.<sup>28</sup>

In addition to their recommendations, Samuels and Codd put forward draft legislation to provide a statutory basis for ASIS and to protect various information from disclosure. The Samuels and Codd Bill, like the bulk of the reports, was not made public.

## DSD

### History

While Justice Hope recommended that ASIS should be publicly acknowledged and that the relevant chapter of the Royal Commission Report be published, he did not take the same approach with respect to DSD. Thus, while the Prime Minister was prepared to describe the functions of DSD, the relevant chapter was not made public. He said:

[DSD] is an organisation concerned with radio, radar and other electronic emissions from the standpoint both of the information and the intelligence they can provide and of the security of our own Government communications and electronic emissions.<sup>29</sup>

In its own words, DSD's purpose is to 'support Australian Government decision-makers and the Australian Defence Force with high-quality foreign signals intelligence products and services'. It provides the 'policy departments and assessment agencies' with information 'that is not available from open sources'.<sup>30</sup> A Ministerial Directive in November 1986 described one of its functions as 'to collect, produce and disseminate foreign signal intelligence to meet the national requirements of the Commonwealth'.<sup>31</sup> Another of its functions is to 'provide material, advice and assistance' to Commonwealth departments 'on matters relevant to the security and integrity of official information the loss or compromise of which could adversely affect the national security'. It focuses on information that is 'processed, stored or communicated by electronic or similar means'.<sup>32</sup>

### Recent Controversy

On 23 May 1999, the *Sunday* program aired a cover story on DSD.<sup>33</sup> The program aired allegations regarding the existence and operation of *Echelon*, a computer automated satellite surveillance network under the 'UKUSA alliance' involving Australia, the United States, Britain, Canada and New Zealand.<sup>34</sup> Specifically, it was alleged that Britain had used a similar agency in Canada to undertake surveillance for domestic political purposes.

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It was also alleged that *Echelon* intelligence had been used by the United States to obtain commercial advantages for domestic companies negotiating for contracts with Indonesia. The implication was that the network could be or had been used by the larger parties to gain information for their interests potentially to the detriment of Australian interests.

Concern was expressed in the program regarding the focus on commercial interests and the potential for breaches of privacy for Australian citizens. It raised a public interest issue regarding DSD and the fact that 'its intrusive surveillance powers are not restrained by an act of parliament' and that its operations are not subject to parliamentary scrutiny.

## Secrecy

### Threshold Questions

One threshold question for the early inquiries was the *need* for intelligence services. The First Hope Royal Commission made the following comment on the need for ASIS:

Australia needs intelligence of quality, timeliness and relevance ... For Australia to maintain a degree of self-reliance in its international posture, we must have our own information, our own intelligence ... it would be naïve to imagine that overseas governments will always tell us everything they know about a particular matter.<sup>35</sup>

This view was either not questioned in subsequent inquiries or accepted on its merits.

A more enduring question has been the extent to which the intelligence services should be protected by secrecy or be subject to the standard requirements of public accountability. Initially, the government adopted a bright-line test relating to the extent of secrecy. The Prime Minister's Ministerial Statement of 1977 contained the following announcement:

ASIS's capacity to serve Australia's national interest will continue to depend upon its activities being fully protected by secrecy. The Government will therefore adhere strictly to the practice of refusing to provide details of ASIS's activities nor will it be prepared to enter into any discussion on the Service.<sup>36</sup>

However, with sporadic but intense media interest in the existence and activities of ASIS, this view became difficult to justify. Thus, by 1995 the Minister for Foreign Affairs had taken a substantially softer approach to the issue:

[W]hile we judge that it is now an appropriate time to be more forthcoming than we have been in the past, there is still a self-evident need for certain kinds of information relating to ASIS ... to remain secret so as to protect national security, the safety of individuals, and Australia's international relations. This especially includes information that could identify ASIS officers, sources and methods; places of ASIS deployment and operation; areas and issues of intelligence interest; and the purpose or objectives of individual operations, be they past, current or projected.<sup>37</sup>

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Ultimately, while the government has traditionally adopted a 'neither-confirm-nor-deny' approach, circumstances have ensured that at least some aspects of intelligence services' operations are questioned by the media and by parliamentarians. Obviously, the disclosure of information by former officers and journalists has prompted the most significant public debate. However, as a result of the Hope Royal Commissions, some disclosure and scrutiny has also been prompted by the ability of Parliament to review ASIS appropriations, ANAO audit reports and IGIS annual reports. There has also been an arrangement whereby ASIS provides briefings to the Opposition. In addition, the courts have indicated that at least some activities and decision making within the intelligence services agencies will be susceptible to judicial scrutiny (see below).

## The Courts

### Criminal Law

In the confidential *Fifth Report*, Justice Hope apparently asserted that '[w]e should not allow the use of any euphemisms to cloud the central issue'. He acknowledged that 'ASIS exists to conduct espionage against foreign countries and that, to do so successfully, ASIS must probably infringe the laws of those countries and certainly be prepared to do so'.<sup>38</sup>

This observation raises two issues: the extent to which conduct overseas may constitute an offence within Australia and the extent to which officers can be protected from liability.

### Protection of Secrecy

In *Sankey v Whitlam* the High Court held that the Commonwealth could, on national security grounds, withhold information from a court if the court was satisfied that the public interest in confidentiality outweighed the public interest in disclosure.<sup>39</sup>

In *A v Hayden*, a majority of the High Court held that a court would not enforce a *private* obligation of confidentiality where that would obstruct the criminal justice system.<sup>40</sup> The case involved actions by officers involved in the Sheraton Hotel incident seeking to prevent the Commonwealth from disclosing their names and activities to the Victorian Government for the purposes of prosecution under Victorian law. The Commonwealth had argued that it had the power to disclose this information regardless of a confidentiality provision in ASIS employment contracts. The Court held that, in the absence of a contrary statute, the public interest in the administration of justice required that criminal behaviour should be prosecuted, thereby permitting the Commonwealth to disclose the information.

Thus, while the Commonwealth may be able to withhold information regarding ASIS officers and their activities ASIS officers have no redress against the Commonwealth for disclosure of this information and therefore their exposure to criminal liability. Any contractual provision which sought to restrict the Commonwealth was void or voidable.

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## Immunity of Officers

In *A v Hayden* clear statements were also made regarding the Commonwealth's capacity, once information had been obtained, to protect ASIS officers against criminal prosecution. Mason J rejected the notion that ASIS officers could be authorised to break the law:

It is possible that the promise was given, and the arrangements for the training exercise made, in the belief that executive orders would provide sufficient legal authority or justification for what was done. It is very difficult to believe that this was the Commonwealth's view – superior orders are not and have never been a defence in our law – though it is conceivable that the plaintiffs may have had some such belief.<sup>41</sup>

In anticipation of further proceedings in that case, he added 'the point needs to be made loudly and clearly, that if counter-espionage activities involve breaches of the law they are liable to attract the consequences that ordinarily flow from breaches of the law'.<sup>42</sup>

Similarly Murphy J rejected the notion that the government could authorise an illegal act. As he noted, the rule of law requires that '[t]he executive power of the Commonwealth must be exercised in accordance with the Constitution and the laws of the Commonwealth'.<sup>43</sup> Thus, the Commonwealth could not authorise a person within Australia to commit an offence against Australian law. But, significantly, he was also prepared to state that '[n]either the Commonwealth nor any of its Ministers, officers, agents ... can lawfully authorise the commission by *anyone in another country* of conduct which is an offence *against the laws of that country* and is not authorised by international law'.<sup>44</sup> While these comments do not necessarily represent the common law, they suggest that *any* question of illegality could present a major obstacle to the functioning of ASIS.

## Extraterritorial Jurisdiction

Generally offences are presumed to be local and territorial.<sup>45</sup> Australian statutes are presumed to extend only to the territorial limits of Australia, unless a contrary intention is expressed.<sup>46</sup> Specifically, they are presumed not to extend to cases governed by foreign law.<sup>47</sup> Neither are they presumed to extend to actions of foreigners overseas.<sup>48</sup> The presumption can be rebutted, but only by express intention or by necessary implication from the nature, purpose and policy of the legislation.<sup>49</sup> Thus, while the *Crimes Act 1914* is generally expressed to operate 'beyond the Commonwealth and the Territories'<sup>50</sup> there are few offences that are expressly intended to capture offenders overseas.<sup>51</sup>

International law recognises a jurisdiction where a valid nexus exists between the alleged criminal conduct and the state. The nexus will exist where the offence occurs within the territory or where the offender is present within the territory ('territorial jurisdiction') and where the results of the conduct are felt within the territory ('extra-territorial jurisdiction'). It may also recognise a jurisdiction based on the offender's nationality ('nationality principle'), the victim's nationality ('passive personality principle') and the need to protect the interests of the state (the 'protective principle'), but there is a degree of uncertainty.<sup>52</sup>

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These principles are generally recognised in domestic jurisprudence, within the limits implied above. So, for example, the common law explicitly recognises the categories of 'territorial jurisdiction'<sup>53</sup> and 'extra-territorial jurisdiction'.<sup>54</sup> Except in relation to the Commonwealth, it would not ordinarily recognise the 'passive personality principle'.<sup>55</sup> Neither would it ordinarily recognise the 'protective principle', although there have been cases in which, having recognised an extraterritorial jurisdiction over a principal offence, it has recognised a jurisdiction over inchoate offences, such as attempt and conspiracy. This has occurred on the basis that intended results or the intended victim was within the territory and it was necessary to protect 'peace, order and good government'.<sup>56</sup>

More recently, the common law appears to have recognised an extraterritorial jurisdiction over ordinary and inchoate offences where there is a 'real and substantial link' between the offence and the territory. This approach has been adopted in Canada in relation to overseas offences<sup>57</sup> and has recently been endorsed in Australia in relation to interstate offences in *Lipohar and Winfield*.<sup>58</sup> In this case the High Court found that a conspiracy formed outside South Australia, which would have a 'real and substantial link' with the State of South Australia, was an offence known to the law of South Australia.<sup>59</sup> Taken literally this suggests that *any* conduct *anywhere* which has a 'real and substantial link' with a person or place in Australia is an offence which may be prosecuted if it is an offence in Australia.

Clearly, this creates some uncertainty, but it may be a conclusion which follows from the decision in *Lipohar and Winfield*. In addressing this uncertainty, various jurisdictions have sought to confine these principles.<sup>60</sup> The Model Criminal Code Officers Committee, in drafting the categories of extraterritorial jurisdiction, suggested that an extended extraterritorial jurisdiction ought to apply to domestic rather than international cases.<sup>61</sup> For present purposes, the approach in *Lipohar and Winfield* might imply that acts of ASIS staff members or agents overseas, and related acts within Australia, could attract criminal liability even if the relevant criminal laws were not expressed to apply extraterritorially.

In addition to these general observations it should be noted that the provisions in the *Criminal Code* dealing with bribery of foreign public officials expressly forbid Australian people from giving a benefit to a foreign public official to obtain a '*business advantage*'.<sup>62</sup> It is unclear whether this encompasses the sort of general advantages that may be obtained by ASIS overseas which serve the interests of Australia's national economic well-being.

## Judicial Review

In theory, ASIS and DSD could be subject to judicial review.<sup>63</sup> Essentially, the key issue for a judicial review court is the requirement that actions of a government agency must be authorised by law. This issue, and other issues such as the requirements of natural justice, depend on the nature of the actions, their impact on persons and organisations in Australia and the legislation, if any, governing the processes that that an agency must follow.

A judicial review court may examine the compliance of an agency with its statute. Thus, in *Church of Scientology v Woodward* the High Court was prepared to examine the actions of

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ASIO for their consistency with the ASIO Act. The Act prohibits ASIO from obtaining, correlating, evaluating or communicating intelligence unless it is 'relevant to security'. While a minority held that the question of relevance could not be examined by a court,<sup>64</sup> the majority held that it was justiciable, albeit that a plaintiff might be handicapped:

It is one thing to say that security intelligence is not readily susceptible of judicial evaluation and assessment. It is another thing to say that the courts cannot determine whether intelligence is "relevant to security" and whether a communication of intelligence is "for purposes relevant to security". Courts constantly determine issues of relevance and questions of relevance ... Intelligence is relevant to security if it can reasonably be considered to have a real connexion with that topic, judged in the light of what is known to ASIO at the relevant time. This is a test which the courts are quite capable of applying. It is a test which presents a formidable hurdle to a plaintiff and not only because a successful claim for [public interest immunity] may exclude from consideration the very material on which the plaintiff hopes to base his argument – that there is no real connexion between the intelligence sought and the topic.<sup>65</sup>

Thus, while the activities of ASIO (and ASIS) may be subject to judicial review, it is virtually impossible for a plaintiff to succeed unless there is some evidence of bad faith or some basis for concluding that the decision to obtain or communicate the particular intelligence was 'manifestly unreasonable' or 'so devoid of any plausible justification' that no reasonable person could have come to it in the circumstances.<sup>66</sup>

## The Parliament and the Public

Parliamentary accountability was a key issue in the Samuels and Codd Royal Commission. Samuels and Codd considered that '[i]f the Parliament is to approve ASIS's charter by lending it statutory authority, the Parliament should also be able to review the manner in which that authority is exercised'.<sup>67</sup> Nearly all of the stakeholders were in favour of ASIS being accountable to Parliament, however, there were differences of opinion as to how that should be effected. Options included a minimal approach based on ministerial accountability, an intermediate approach featuring briefings to key stakeholders and a more comprehensive approach involving a joint parliamentary committee.

## Briefing the Opposition

The Hope Royal Commission recommended that the Prime Minister and Opposition Leader 'arrange as convenient between them' to discuss intelligence and security issues 'from time to time'.<sup>68</sup> By contrast the Samuels and Codd Bill provided that the Director-General provide briefings to the Opposition Leader and relevant Shadow Minister(s) 'regularly and as of right' and 'at least every six months'.<sup>69</sup> This was consistent with parliamentary accountability, the need for bipartisanship and the convention that 'the alternative government' is informed of the activities of public sector agencies.<sup>70</sup> The Bill also provided for the Opposition to be given a full annual report of ASIS.

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### Parliamentary Committee

ASIS argued that a parliamentary committee would foster a more positive attitude among parliamentarians that would assist bipartisanship and officer morale and would enable ASIS, via the committee chairperson, to have a public voice on policy issues. Other submissions suggested a committee could provide an opportunity to improve public awareness and understanding of ASIS and to test parliamentary and public opinion. The Shadow Minister for Foreign Affairs was inclined to support a committee although he noted that it might leave the Opposition 'a bit hamstrung by ... prior knowledge'.<sup>71</sup> It was also argued that 'because ASIS has relatively little scope to affect the rights of Australians, oversight by a ... committee would have little to contribute to the public interest'.<sup>72</sup>

The Democrats considered that a committee was essential, subject to confidentiality. PM&C and the Department of Finance (DoF) were equivocal. PM&C recommended an expanded regime of briefings for the Shadow Ministry. DoF recommended the tabling of an expurgated Annual Report.<sup>73</sup> Samuels and Codd clearly favoured a committee:

We prefer the establishment of a standing parliamentary committee with a broad charter enabling it to review the activities, expenditure and administration of ASIS. It would be able to initiate its own inquiries, but not into operationally sensitive matters. The committee would exercise its functions principally through the medium of hearings in camera. It would have sufficient access to information to assure effective oversight, but under secure conditions designed to maintain operational integrity and subject to rules preventing the release of information without authority.<sup>74</sup>

They indicated that their draft Bill would prohibit the committee from inquiring into:

operationally sensitive matters or reporting in a way which would disclose the identity of ASIS ... officers and sources, operationally sensitive information or information that would be likely to prejudice national security or ... foreign relations.<sup>75</sup>

While they indicated that the Chair would be a Government appointee having 'a casting as well as a deliberative vote', the usual rules would apply to 'allow the combined non-government parties in the Senate to initiate inquiries over the objections of Government'.<sup>76</sup>

### Inspector-General

Following the Second Hope Royal Commission, the Hawke Government created the office of the Inspector-General of Intelligence and Security (IGIS). Hope had recommended that the IGIS primarily monitor ASIO's (and ASIS's) 'compliance with the law, the propriety of its actions and the appropriateness and effectiveness of its internal procedures',<sup>77</sup> and, secondarily, look into complaints. The IGIS was intended to 'protect the rights of Australian citizens and residents against possible errors or excesses by the intelligence and security agencies and to guard against breaches of Australian law'.<sup>78</sup> It was *not* meant to 'check on the general effectiveness and appropriateness of the agencies' operations'.<sup>79</sup>

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The *Inspector-General of Intelligence and Security Act 1986* (IGIS Act) gives the IGIS power to inquire into ASIS's and DSD's compliance with domestic law, ministerial directions or guidelines, or human rights and the propriety of particular activities undertaken by ASIS or DSD. But, the IGIS may not do so without ministerial approval except to the extent that Australians are affected or Australian laws may be violated.<sup>80</sup>

The Samuels and Codd Royal Commission recommended that the IGIS have additional powers to conduct audits of ASIS. They recommended the adoption of 'a system of retrospective auditing of the Service's compliance with Australian law and with approved rules and operational procedures' to be undertaken by IGIS.<sup>81</sup> They suggested that this would 'furnish further assurance to the Minister, and to a parliamentary committee ... that the rules are being followed and the procedures applied'.<sup>82</sup> This system began initially as an administrative arrangement between the IGIS and the relevant agencies. In 1999, it was accorded statutory recognition,<sup>83</sup> following a recommendation of the IGIS.<sup>84</sup>

It is worth noting that the aggrieved officers in the *Four Corners* program alleged that the IGIS had insufficient knowledge or skills to penetrate or understand ASIS files.<sup>85</sup> While there may be doubts as to the credibility of this information, which was tested before the Samuels and Codd Royal Commission, it *may* suggest caution before it is assumed that the IGIS has complete access to and awareness of ASIS or DSD activities.

## Legislation

Partly as a response to concerns over legality of ASIS actions and accountability for ASIS appropriations, the First Hope Royal Commission recommended that ASIS be the subject of legislation. Justice Hope considered that legislation would give ASIS a 'proper role' and 'establish it as part of the family of government' thereby improving its efficiency and effectiveness and morale among its officers.<sup>86</sup> The confidential *Fifth Report* apparently contained draft legislation which, among other things, defined the functions of ASIS.<sup>87</sup> However, one of the key obstacles was the legislative treatment of covert actions and a proposal that unlawful activities be capable of being authorised by secret regulations.<sup>88</sup>

The Samuels and Codd Royal Commission also recommended that ASIS have a statutory basis. ASIS was a key proponent of legislation, its main objective being to ensure that sources, staff and methods were given adequate protection, its secondary objective being to raise the standing of ASIS in the community. However, the Minister for Foreign Affairs, the Department of Foreign Affairs and Trade, the Attorney-General's Department (AG's) and PM&C were more equivocal.

Arguments in favour of legislation were that it would provide greater accountability, safeguards and guarantees against misuse and misdirection, it would provide 'protection' for staff, it would provide protection against disclosure of sensitive information and officer's names and it could provide ministerial powers for search warrants, etc. Arguments against legislation suggested it would involve further public acknowledgment of ASIS that could complicate foreign relations, its objectives could be achieved by other

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means, its key provisions would need to be 'so vague as to be virtually meaningless' and it could fail to resolve the issue of public accountability and indeed raise false expectations.

AG's suggested that sufficient legal basis was provided by the sections 61 and 67 of the Constitution. Moreover, it argued that it would not be in Australia's interests 'to confer 'legitimacy' on the precise means by which such activities were to be conducted'.<sup>89</sup> AG's proposed an alternative involving legislation to establish a parliamentary committee and amendments to the *Crimes Act 1914* to protect official information.<sup>90</sup> PM&C proposed a Ministerial Statement to Parliament detailing the functions and powers of ASIS.<sup>91</sup>

Within Parliament, the Coalition indicated that they would support legislation 'to establish the framework for ASIS'.<sup>92</sup> The Democrats emphasised the importance of parliamentary accountability and saw legislation as 'the only realistic basis' for a committee.<sup>93</sup>

Samuels and Codd provided a summary of the arguments for and against legislation which is included as an attachment at the end of this Digest. They recommended that legislation be adopted because it was 'desirable in principle' and would be 'of benefit in practice'.

ASIS carries out important functions in the national interest. Its operations are usually sensitive and potentially controversial. It is no longer appropriate that the formal conferral of authority for the exercise of these functions should be the exclusive province of the executive arm ... The existence of ASIS should be endorsed by Parliament and the scope and limits of its functions defined by legislation.<sup>94</sup>

While the legislation would ultimately serve various purposes, the most compelling argument for legislation was seen to be the fact that by 'defining key elements of the arrangements for control and oversight', the legislation 'should help to dispel the persistent mythology that ASIS is unaccountable and out of control'.<sup>95</sup> Arguably, the focus was on the form of the legislation rather than its substance. As Samuels and Codd acknowledged '[I] legislation as we envisage it, would merely confirm in a formal way matters which are, with no serious exception, on the public record already'.<sup>96</sup>

Ultimately, the draft legislation Samuels and Codd proposed was based on the Hope Bill, the ASIO Act and the *Intelligence Services Act 1994* (UK). Alongside these precedents one might include the Government Communications Security Bureau Bill (NZ). It may also be instructive to consider the ONA Act and possibly also the controlled operations provisions applying to Commonwealth law enforcement officers in the *Crimes Act 1914*.

## Funding

When ASIS was publicly acknowledged in 1977 the Prime Minister announced that its funding would in future 'be the subject of a one-line appropriation like ASIO'.<sup>97</sup> Thus, while Annual Reports from the Department of Foreign Affairs and Trade do not detail the expenses associated with ASIS, the Budget Papers have traditionally included a single line for appropriations to ASIS (within the Foreign Affairs and Trade portfolio):

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Estimated Expenses (\$m) 1998-99 – 2002-2003<sup>98</sup>

|                     | 1998-99 | 1999-00 | 2000-01 | 2001-02 | 2002-03 |
|---------------------|---------|---------|---------|---------|---------|
| ASIS (Departmental) | 37.8    | 42.5    | 42.6    | 42.7    | 43.5    |

Placed in context, this expenditure would seem to represent a significant proportion of the budget for the 'Australian intelligence community'. To illustrate, compare the following tables drawn from the budget papers for the 1998-99 and 1999-2000 Budgets.

Estimated Expenses (\$m) 1997-98 – 2001-2002<sup>99</sup>

|                                    | 1997-98 | 1998-99 | 1999-00 | 2000-01 | 2001-02 |
|------------------------------------|---------|---------|---------|---------|---------|
| Security and Intelligence Services | 118.1   | 113.8   | 125.7   | 120.0   | 115.1   |

The 'Security and Intelligence Services' line item includes:

the operations of the Australian Security Intelligence Organisation, the Australian Secret Intelligence Service and the Office of National Assessments. These agencies collect and assess information relevant to protection against threats to Australia's national interests. Other activities include the physical and technical security at overseas posts, counter-terrorist training and equipment and the operations of the Office of the Inspector-General of Intelligence and Security.<sup>100</sup>

Estimated Expenses (\$m) 1998-99 – 2002-2003<sup>101</sup>

|                                  | 1998-99    | 1999-00      | 2000-01    | 2001-02      | 2002-03      |
|----------------------------------|------------|--------------|------------|--------------|--------------|
| Foreign Affairs and Trade (ASIS) | 37.8       | 42.5         | 42.6       | 42.7         | 43.5         |
| Attorney-General's (ASIO)        | 60.9       | 65.9         | 63.7       | 58.3         | 58.4         |
| Prime Minister and Cabinet (ONA) | 7.3        | 6.8          | 6.7        | 6.8          | 6.9          |
| <b>Total</b>                     | <b>106</b> | <b>115.2</b> | <b>113</b> | <b>107.8</b> | <b>108.8</b> |

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On 22 May the Attorney-General announced that the 2000-2001 Budget would include an extra \$12.0 million over four years to allow ASIO to assist departments and agencies to improve their information security and to allow the Attorney-General's Department to improve its own security practices.<sup>102</sup> The commitment responded to recommendations by the IGIS following the 1999 arrest of Jean-Philippe Wispelaere, a former DIO officer, on charges of attempting to sell highly classified material.

**Expense Measures (\$m) 2001-02 – 2004-05<sup>103</sup>**

|  | 2001-02    | 2002-03    | 2003-04    | 2004-05    | Total       |
|--|------------|------------|------------|------------|-------------|
| Attorney-General's Department              |            |            |            |            |             |
| • <i>Improving Security within the AIC</i> | 0.7        | 0.6        | 0.6        | 0.6        |             |
| Attorney-General's (ASIO)                  |            |            |            |            |             |
| • <i>Improving Security within the AIC</i> | 2.5        | 1.8        | 1.9        | 1.9        |             |
| • <i>Protection of the NII</i>             | 0.6        | -          | -          | -          |             |
| Foreign Affairs and Trade (ASIS)           |            |            |            |            |             |
| • <i>Improving Security within the AIC</i> | 0.9        | 0.7        | 0.7        | 0.8        |             |
| <b>Total</b>                               | <b>4.7</b> | <b>3.1</b> | <b>3.2</b> | <b>3.3</b> | <b>14.3</b> |

The Government will provide additional funding to the Australian Security Intelligence Organisation, the Australian Secret Intelligence Service and the Office of National Assessments to undertake physical security improvements within these agencies. The Department of Defence will absorb and the Attorney-General's Department will offset the cost of implementing security enhancements

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Appropriations (\$'000) 2001-02<sup>104</sup>

|                                   | <i>Appropriation Bill (No.1)</i> | <i>Appropriation Bill (No.2)</i> |
|-----------------------------------|----------------------------------|----------------------------------|
| Foreign Affairs and Trade (ASIS)  | 45 369                           | -                                |
| Attorney-General's (ASIO)         | 64 790                           | 4 284*                           |
| Prime Minister and Cabinet (ONA)  | 7 131                            | 46                               |
| Prime Minister and Cabinet (IGIS) | 634                              | -                                |
| <b>Total</b>                      | <b>117 924</b>                   | <b>4 330</b>                     |

\* Equity injection

## Main Provisions

Broadly, the measures in this Bill may be grouped into the following categories:

- provisions describing and delimiting functions and activities of ASIS and DSD
- provisions protecting ASIS and DSD officers and information
- administrative and machinery provisions relating to ASIS, and
- provisions defining the role and powers of the parliamentary joint committee.

## Functions, Activities and Protection

**Proposed Part 2** deals with the functions and activities of ASIS and DSD and the limitations on performance of those functions and activities.

**Proposed sections 6 and 7** describe the functions of ASIS and DSD respectively.

One function of ASIS is to '*obtain intelligence about the capabilities, intentions or activities of people or organisations outside Australia*' and, by logical extension, to '*communicate such intelligence*' and to '*liaise with intelligence or security services or other authorities of other countries*'. Another is to '*conduct counter-intelligence activities*'.

One function of DSD is to obtain intelligence information in the form of '*[guided or unguided] electromagnetic energy [or] electrical, magnetic or acoustic energy*' and to

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'communicate such intelligence'. Another function is to provide Commonwealth and State authorities with assistance in relation to the 'security and integrity of information [in electronic form]', and in relation to cryptography and communications technologies.

### Ministerial Discretion and Control

These functions are subject to expansion and delimitation by the Minister:

**Proposed subsection 6(2)** allows ministerial expansion of ASIS functions.

- ASIS may undertake 'other activities' as directed by the Minister 'relating to the capabilities, intentions or activities of people or organisations outside Australia'.

The Minister may only direct ASIS to undertake 'other activities' if:

- s/he has consulted Ministers 'who have related responsibilities'
- s/he is satisfied that arrangements exist to ensure that 'nothing will be done beyond what is necessary' considering the purposes of the direction
- s/he is satisfied that arrangements exist to ensure that 'the nature and consequences of acts done ... will be reasonable' considering the purposes of the direction

**Proposed sections 8-10** provide for ministerial control over activities of ASIS and DSD.

- The Minister must specify the circumstances in which authorisation must be obtained before ASIS or DSD undertakes 'particular activities or classes of activities'.

The Minister may only issue an authorisation if s/he is satisfied that:

- the activities will be 'necessary for the proper performance of a function' of ASIS
- arrangements exist to ensure that 'nothing will be done beyond what is necessary for the proper performance of a function' of ASIS or DSD
- arrangements exist to ensure that 'the nature and consequences of the acts ... will be reasonable' considering 'the purposes for which they are carried out'
- The Minister may issue general directions regarding the performance of functions.

### Cooperation

**Proposed section 13** provides for cooperation between relevant authorities.

Subject to ministerial arrangements or directions, ASIS or DSD may cooperate with local or 'approved' overseas authorities 'so far as facilitates the performance of their functions'.

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## Broad Limitations

Various measures impose broad limitations on ASIS or DSD functions and activities:

- ASIS-DSD may only perform functions in the interests of Australia's '*national security*', '*foreign relations*' or '*national economic well-being*' as they are affected by '*the capabilities, intentions or activities of people or organisations outside Australia*'.
- ASIS-DSD may not '*undertake any activity*' unless it is '*necessary for the proper performance of [their] functions*' or '*authorised under or required by another Act*'.
- ASIS-DSD may not perform functions of a police or law enforcement nature except in limited circumstances incidental to the performance of another legitimate function.
- ASIS-DSD may only communicate intelligence information concerning Australians in accordance with rules developed to ensure that privacy of Australians is preserved '*as far as is consistent with the proper performance by the agencies of their functions*'.
- ASIS must not, in performing its functions, '*plan for, or undertake, paramilitary activities or activities involving violence against the person or the use of weapons*'

## Personal Liability

**Proposed section 14** immunises staff, agents and other persons from criminal liability.

A 'staff member or *agent*' of an agency (ie, ASIS or DSD) is not subject to *any* civil or criminal liability for *any* act done outside Australia in the '*proper performance of a function*' of the agency. A '*person*', whether a staff member or not, is not liable for *any* act done inside Australia which is complicit or directly connected with an otherwise criminal act done outside Australia provided the act was done by the person in the '*proper performance of a function*' of the agency.

## Staff Grievances

**Proposed section 37** requires the Director-General to establish procedures to deal with grievances or classes of grievances of employees and former employees. The procedures must involve 'initial consideration by the Director-General of ASIS (or delegate)' and Grievance Review Panels chaired by 'independent Chairs' to review these initial determinations. The Director-General must implement these decisions as far as it is within his or her power.

## Confidentiality

**Proposed sections 39 and 40** make it an offence for present or past staff members, agents or consultants to disclose information prepared in connection with or relating to the performance of ASIS or DSD functions. The maximum penalty is 2 years' imprisonment.

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Perhaps significantly, these provisions do not capture third parties such as journalists who may acquire information from staff members, agents or consultants of ASIS or DSD.

**Proposed section 41** makes it an offence for *any* person to disclose without consent any information indicating the identity of past or present ASIS staff members or agents. The maximum penalty is imprisonment for 1 year.

A person may disclose information from which the identity of a staff member or agent could reasonably be inferred if that information has been made public by means of authorised broadcasting or reporting parliamentary proceedings '*other than proceedings of the Parliamentary Joint Committee on ASIO and ASIS [PJC]*'.

Thus, a person may reproduce information from broadcasts or parliamentary hansard, but s/he may not reproduce information from broadcasts or transcripts of the PJC. Nor would s/he seem to be able to reproduce information from reports of the PJC. Strictly speaking, even though the PJC is itself prevented from publishing information on the identity of officers without authorisation (see below under the heading Parliamentary Committee: Offences), **proposed section 41** only permits disclosure of information made public by means of 'broadcasting or reporting proceedings [of the Chambers or other Committees]'.

This may be a significant departure from the long standing common law<sup>105</sup> and statutory<sup>106</sup> rule that reporting of proceedings in parliament are covered by parliamentary privilege.

## Comment

A number of points may be made about how these provisions may operate in practice. The comments below are drawn from the language of these provisions in the context of the issues and concerns raised by the media and canvassed in the inquiries discussed above.

## Functions

First, the expression 'intelligence' is not defined. For present purposes it might be assumed to mean 'processed information' or information which has been tested for credibility and assessed for relevance.<sup>107</sup> Borrowing from the ONA Act, 'intelligence' may at least be taken to mean information of political, strategic or economic significance to Australia.<sup>108</sup> However, borrowing from the ASIO Act, it would seem that there is a distinction between obtaining intelligence and 'correlating' or 'evaluating' the intelligence that is obtained.

## Gathering Commercial Intelligence

Second, the phrase '*national economic well-being*'<sup>109</sup> is not defined. It would seem to include intelligence of economic significance to Australian governments. It may even include intelligence of commercial significance to Australian companies. The importance of economic intelligence has been increasingly recognised by ASIS and the Government. For example, in 1977 the First Hope Royal Commission observed:

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In the past, intelligence has been believed to be of most relevance in the field of defence and related policy areas. It is, however, not only a matter of defence. More and more, intelligence is relevant to the formation of national policies in a number of other areas; this is a trend that will continue.<sup>110</sup>

On the recent *Sunday* program on DSD it was observed that 'now that the cold war is over the focus now is towards economic intelligence'<sup>111</sup> and that 'all countries have to re-examine their traditional relationships because in the world of economic competitiveness countries no longer have allies they only have interests'.<sup>112</sup>

#### Gathering Intelligence on Australians

Third, the phrase '*capabilities, intentions or activities of people or organisations outside Australia*'<sup>113</sup> may be interpreted widely. ASIS and DSD could gather intelligence on Australian persons or organisations to the extent that they live or operate overseas. Arguably, the agencies would be open to gather intelligence on Australians and Australian organisations *in Australia* regarding their capabilities or intentions *outside Australia*. If this is correct, there would seem to be a significant overlap with the functions of ASIO.<sup>114</sup>

This is a significant issue. Both the *Four Corners* program on ASIS and the *Sunday* program on DSD have alleged that intelligence is being gathered on Australian citizens.

It should be noted that the Government Communications Security Bureau Bill 2001 (NZ) expressly prohibits the Government Communications Security Bureau (GCSB), its employees or its agents from targeting domestic communications.<sup>115</sup> In addition, GCSB may not, without a warrant, undertake interceptions involving physical trespass.<sup>116</sup> In all other circumstances GCSB may only intercept communications if they are 'produced, sent, or received by, or sent to, a foreign organisation or a foreign person' and 'contain or may reasonably be expected to contain foreign intelligence' or intelligence relating to persons or organisations essentially unconnected with New Zealand.<sup>117</sup> GCSB is under a general obligation to take all reasonable steps to minimise the likelihood of intercepting third party communications<sup>118</sup> and any person who obtains an irrelevant communication must destroy any copies, etc as soon as practicable and it is an offence to knowingly fail to do so.<sup>119</sup>

Significantly, the *Rules on Sigint and Australian persons* prevent deliberate interception and dissemination by DSD of communications made by Australians within Australia.

It should be noted that ASIS and DSD's compliance with the privacy rules described above will, under amendments to the IGIS Act, be canvassed in the IGIS Annual Report.<sup>120</sup>

#### Special Operations

Fourth, the process for issuing directions for '*other activities*'<sup>121</sup> may operate permissively. Clearly, the Minister must be satisfied that satisfactory arrangements exist to ensure that actions and consequences will be necessary and reasonable. But aside from reinforcing the

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need for *procedural* checks and balances ministerial directions provide a purposive licence limited only by reasonableness or proportionality. Arguably, the ends justify the means.

Clearly, the direction may not permit violence or the use of weapons, but it would seem to permit activities which otherwise interfere with target *capabilities, intentions or activities*. It would also seem to permit activities which overlap with the functions of DSD, SAS, &c. an implication drawn from the requirement for the Minister to consult with '*other Ministers who have related responsibilities*', including the Minister for Defence.<sup>122</sup>

It should be noted that the controlled operations provisions of the *Crimes Act 1914* operate far more narrowly than the provisions proposed in this Bill. These provisions empower the Australian Federal Police Commissioner and the Chairperson of the National Crime Authority to issue certificates authorising 'controlled operations' relating to narcotic offences. The power is subject to statutory controls as to when certificates can be granted, their form, content and duration. A certificate serves to protect or 'immunise' law enforcement officers from criminal liability for narcotic goods offences. The authorising officers must report to the Minister 'as soon as practicable' after deciding to issue a certificate and the Minister must report to Parliament.

A parliamentary committee recently recommended that the range of offences, list of authorising officers and grounds for certificates be expanded. These recommendations are incorporated within the Measures to Combat Serious and Organised Crime Bill 2001.<sup>123</sup>

#### Focus on Issues of National Concern

Fifth, the focus on '*national security*', '*foreign relations*' or '*national economic well-being*'<sup>124</sup> may be significantly limiting. ASIS may only obtain intelligence to the extent that the target *capabilities, intentions or activities* affect '*national security*', '*foreign relations*' or '*national economic well-being*'. It may only communicate intelligence information or conduct 'counter-intelligence activities' or 'other activities' on similar bases.

In particular, the focus may restrict cooperation with other intelligence agencies. While ASIS may cooperate with 'approved' authorities '*so far as facilitates the performance of its functions*', it may only do so to the extent that '*national security*', '*foreign relations*' or '*national economic well-being*' are affected by target *capabilities, intentions or activities*. Thus, ASIS could not engage in joint operations or communicate intelligence information where the target person, organisation or information bore no relationship to Australia. In theory both of these activities serve the interests of foreign relations but the test is whether the relations *themselves* are affected by the target *capabilities, intentions or activities*.

It is worth noting that in the *Intelligence Services Act 1994* (UK) issues of national security, etc are not limited by reference to target *capabilities, intentions or activities*.

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### Use of Force

Sixth, the phrase '*must not plan for, or undertake ... activities involving violence against the person or the use of weapons*'<sup>125</sup> may be interpreted permissively. The prohibition does not expressly forbid the use of violence or weapons. It forbids ASIS from '*planning for or undertaking activities involving violence or weapons*' rather than '*performing acts involving violence or weapons*' or simply '*using violence or weapons*'. The Oxford Dictionary defines '*undertake*' as to '*enter upon, commit oneself to, an enterprise*'.<sup>126</sup>

Clearly, ASIS cannot *plan* to perform acts of violence or use of weapons. Arguably, it might not even be able to plan for the *contingency* in which violence or weapons are used. Moreover, ASIS cannot enter upon or commit itself to an operation involving violence or weapons. But unforeseen circumstances may necessitate the use of violence or weapons. Intelligence gathering might rarely involve violence or the use of weapons. However, violence or weapons might be an incident of counter-intelligence or 'other' activities. A staff member *might* be permitted to use violence or weapons in the course of such an activity at least where the conduct was not contemplated or involved at the outset.

Significantly, the immunity for criminal and civil acts is not limited to non-violent acts. A staff member or agent would be immunised from criminal and civil liability in respect of *any* act which was done in the '*proper performance of a function*' of ASIS. Thus, violence or use of weapons *could* be immunised if done in the '*proper performance of a function*'.

### Immunity Arrangements

Seventh, it is significant that the immunity applies to '*staff members*' and '*agents*'. 'Staff member' is defined as an employee or consultant of ASIS or a person made available by another person to perform services for ASIS. 'Agent' is not defined. In theory it could be taken to include foreign civilians or intelligence officers, contractors, etc.

It should be noted that the immunity arrangements under the controlled operations provisions in the *Crimes Act 1914* do not currently extend beyond law enforcement officers. However, amendments proposed by the Measures to Combat Serious and Organised Crime Bill 2001 include measures which would extend immunity to *all* persons authorised to participate in controlled operations but would exclude conduct that would involve a sexual offence or an offence involving death or serious injury.<sup>127</sup>

It should also be noted that the immunity arrangements under the *Intelligence Services Act 1994* (UK) require that any criminal acts are specifically authorised by the Secretary of State.<sup>128</sup> The authorisation process essentially mirrors the process described above regarding ministerial discretion to control '*particular activities or classes of activities*' and, to a lesser extent, the process regarding ministerial directions to permit '*other activities*'. In effect, ASIS and UKSIS officers are immunised for actions which are consistent with proper performance of the agency's functions. But, whereas ASIS officers have a general immunity, UKSIS officers have a limited immunity. UKSIS officers are immunised only in relation those actions which have been brought under ministerial control.

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A related point is that whereas the authorisation provisions in the *Intelligence Services Act* 1994 (UK) are limited as to time, the provisions in this Bill are less constrained. Thus, while the British Secretary of State may only authorise activities for six months,<sup>129</sup> subject to requirement to specify the duration of an authorisation, the Australian Minister may authorise activities for significantly longer periods.

Another related point is the effect of immunity on extradition. The *Extradition Act* 1988 provides for the extradition of persons from 'extradition countries'. An 'extradition country' includes a country which is prescribed as such by regulations (following the making of an extradition treaty).<sup>130</sup> A valid extradition application must include an arrest warrant, a statement of each extradition offence and a statement of the acts or omissions alleged.

In addition, ultimately the application would need to satisfy a court that:

- *an accused*: the person in question is 'accused' of an offence overseas<sup>131</sup>
- *an extradition offence*: the offence is indictable or is covered by an extradition treaty<sup>132</sup>
- *dual criminality*: the conduct is an offence overseas and in Australia<sup>133</sup>
- *not a political offence*: the offence is not a political offence<sup>134</sup>
- *no 'extradition objection'*: there is no valid objection to extradition<sup>135</sup>
- *consent*: the Attorney-General has exercised a discretion consenting to extradition, and
- *rule of speciality*: the person will only be prosecuted for the offence in the application.

Arguably, an ASIS officer or agent who was immunised by Australia could not be extradited to a foreign country for an offence under the foreign law. Alternatively, if they could be extradited, they would be able to claim immunity for proper performance.

### Counter Intelligence

Seventh, the functions of ASIS clearly include 'counter-intelligence' a role traditionally understood to be reserved for ASIO. Apparently, Justice Hope took the view that ASIS should not merely obtain and communicate intelligence but should have a more proactive function, including a role in counter-espionage. It has been suggested that this approach was in conflict with the view taken by ASIS and the Department of Foreign Affairs.<sup>136</sup>

### Grievance Procedures

Eighth, the Grievance Review Panels 'chaired by independent Chairs' may be far weaker than the model recommended by Samuels and Codd. As indicated, Samuels and Codd recommended that complaints continue to be handled by IGIS but that staff grievances be handled by the Administrative Appeals Tribunal.<sup>137</sup> While determinations are binding on the Director-General, the 'independence' of the 'independent Chairs' is not defined.

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It is worth noting that the *Intelligence Services Act 1994* (UK) establishes an independent tribunal responsible for examining complaints regarding the UKSIS or the Government Communications Headquarters (GCHQ). It is comprised of between 3 and 5 persons having legal qualifications and 10 years experience and examines whether UKSIS or GCHQ 'has obtained or provided information or performed any other tasks in relation to the actions or intentions of the complainant' and if so whether, 'applying the principles applied by a court on an application for judicial review' they had reasonable grounds for doing so.<sup>138</sup> It may issue various remedies including an order that the surveillance stop and that all records be destroyed and/or that compensation be paid to the complainant.<sup>139</sup>

### Oversight and Control

Aside from a broad ministerial power to veto activities or classes of activities and aside from ministerial assessments of procedural checks and balances there may be few concrete limits on the range of activities or actions that may be undertaken by ASIS or DSD. As indicated ASIS cannot plan or commit itself to activities that use violence or weapons, but there may be scope to permit the use of force in exceptional circumstances. ASIS and DSD must act within the parameters of '*national security*', '*foreign relations*' or '*national economic well-being*', but these are fairly broad and indeterminate notions.

Likewise, ASIS or DSD must not undertake activities unless they are necessary for the '*proper performance*' of its functions, but this is a loose and potentially subjective concept. The ASIO Act requires the Director-General to take all reasonable steps to ensure that nothing is done beyond what is 'necessary for the purposes of the discharge of its functions' and that the organisation is 'kept free from any influences or considerations not relevant to its functions' and that nothing is done that might support a suggestion that the organisation is 'concerned to further or protect the interests of any particular section of the community' or is concerned 'with any matters other than the discharge of its functions'. Even in the absence of a statutory requirement for '*proper performance*', such a limitation could probably be implied into the role and function of the Director-General.<sup>140</sup>

## Administrative and Machinery Provisions

**Proposed Part 3** establishes ASIS and deals with the role of the Director-General. **Proposed Part 5** deals with ASIS staff. Most of the measures proposed are standard machinery provisions. However, two areas are of potential interest to parliamentarians.

### Relationship Between the Director-General and Minister

**Proposed section 18** states that the Director-General controls ASIS and is responsible for its management, under the Minister. S/he must advise the Minister on ASIS matters. As indicated, the Minister may reserve the right to approve any intelligence gathering activity and, in theory, may withhold approval in relation to particular persons or organisations.

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The Minister may issue directions to ASIS regarding the performance of any functions or activities and s/he may authorise activities or acts of ASIS or of a specific staff member.

By contrast with the ASIO and ONA Acts, the Bill does not attempt to deal with potential interference by the Minister with the exercise of functions by the Director-General:

- ASIO may communicate intelligence to appropriate persons or authorities<sup>141</sup> and provide advice to Ministers, authorities and other prescribed persons.<sup>142</sup> The Minister may not override the opinion of the Director-General 'concerning the nature of the advice that should be given'.<sup>143</sup> Nor may s/he override the Director-General's opinion concerning the appropriateness of targeting a particular person without a written direction containing reasons which is copied to the Inspector-General and the Prime Minister.<sup>144</sup>
- ONA may provide reports and assessments to 'appropriate Ministers and other appropriate persons'<sup>145</sup> and, on request, may prepare and provide these to 'a Minister or prescribed Commonwealth officer'.<sup>146</sup> The Minister may not issue directions regarding 'the content of, or any conclusions to be reached in, any report or assessment'.<sup>147</sup>

One obvious reason for the difference is that ASIO and ONA are intended to identify and address security threats and to provide information and advice to Australian agencies. ASIS merely obtains information on external matters that might affect Australia generally. It is not empowered to provide information and advice to Australian agencies.

However, the comparison does raise the question of the extent to which ASIS should be protected from ministerial interference in the selection of targets and the extent to which DSD should be protected from ministerial interference in the provision of advice.

### Opposition Briefings

**Proposed section 19** provides that the Prime Minister may authorise the Director-General to 'brief' the Opposition Leader 'about ASIS'. The briefing may be at the behest of the Opposition Leader, the Prime Minister or, in theory, the Director-General. No limit is imposed on the range of matters that may be covered in briefings which might conceivably cover functions, expenditure or administration and even priorities and operational matters.

## Parliamentary Committee

### Establishment and Functions

**Proposed Part 4** provides for the establishment and functions of the PJC.

**Proposed section 29** permits the PJC to review administration and expenditure of ASIO or ASIS and 'any matter' referred to it by a responsible Minister or a House of Parliament.

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However, the PJC may *not* review:

- 'sources of information, other operational assistance or operational methods available'
- 'particular operations that have been or are being proposed to be undertaken'
- information provided by a foreign government which does not consent to disclosure
- 'an aspect of the activities of ASIO or ASIS that does not affect an Australian person'
- the privacy rules developed by the responsible Ministers for ASIS or DSD.

Nor may the PJC conduct inquiries into individual complaints.

Procedure, Offences and Administration

**Schedule 1** provides for the procedure, offences and administration of the PJC.

**Part 1** deals with procedure.

The PJC cannot compel the production of 'operationally sensitive information' or information which that 'would or might prejudice' national security or foreign relations.<sup>148</sup> 'Operationally sensitive information' basically relates to the first three dot points above.<sup>149</sup> Generally the PJC may require any person to appear before it, except for staff members or agents of ASIO or ASIS or the IGIS. Moreover, the PJC may not require the attendance of the Director-General of either agency *except* in relation to matters that have been referred to the PJC by the responsible Minister or a House of Parliament.<sup>150</sup>

The responsible Minister for ASIS or ASIO may prevent or restrict the provision of evidence or documents to the PJC if s/he is of the opinion that this is necessary to prevent the disclosure of 'operationally sensitive information'.<sup>151</sup> This opinion is subject to an privative clause: it 'must not be questioned in any court or tribunal'.<sup>152</sup>

The PJC may not disclose or publish without consent any evidence or document given or produced by any person.<sup>153</sup> For evidence or documents given by ASIO or ASIS staff members, consent may only be given by the relevant Director-General.<sup>154</sup> Moreover, the PJC may not disclose or publish *any* evidence or document without the Minister's consent. The Minister may object to disclosure or publication if s/he considers it contains:

- information indicating the identity of past or present staff members or agents
- information which that 'would or might prejudice'
  - national security or foreign relations
  - the performance by the agencies of their functions.

Similar rules apply to the disclosure of information in reports to Parliament.<sup>155</sup>

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In both cases, the Director-General of the relevant agency may authorise the PJC to disclose or publish information relating to the identity of staff members or agents.<sup>156</sup>

## Offences

**Part 2** deals with offences.

It is an offence to disclose or publish, without authorisation, evidence or documents given to the PJC.<sup>157</sup> The maximum penalty is 2 years' imprisonment.

A person may disclose information which has 'already been lawfully disclosed or published'. There is no indication of what constitutes 'lawful' disclosure or publication. As noted above, under the heading *Functions, Activities and Protection: Confidentiality*, disclosure or publication of information regarding the identity of a staff member or agent which has been drawn from broadcasts, transcripts (or reports) of the PJC is ordinarily *not* lawful. But presumably, disclosure or publication of information relating to sources, operations, methods, etc. which has been drawn from the same source *would be* lawful.

A witness before the PJC may claim *as of right* the privilege against self-incrimination.<sup>158</sup> It is worth noting that this privilege cannot ordinarily be claimed *as of right* in proceedings of other committees. Specifically, while a witness has 'technical' privilege against self-incrimination in respect of subsequent court proceedings, by virtue of the prohibition on questioning or impeaching parliamentary proceedings,<sup>159</sup> s/he ordinarily would not have any legally enforceable right not to answer a question put by a parliamentary committee.

A witness is also offered express and strong protection against interference.<sup>160</sup>

It is an offence for a member or staff member of the PJC to make a record of, disclose or communicate any information, or produce any document, acquired because of their involvement with the PJC unless it is for a purpose connected with PJC work.<sup>161</sup>

## Administration

**Part 3** deals with administration.

Two significant elements are the requirements that the PJC conduct inquiries *in camera* unless authorised by *both* relevant Ministers to conduct hearings in public,<sup>162</sup> and that the PJC make security arrangements acceptable to the relevant Directors-General.<sup>163</sup>

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## Endnotes

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- 1 Brian Toohey and William Pinwill, *Oyster: The story of the Australian Secret Intelligence Service*, Heinemann, Melbourne, 1989, p. 288.
- 2 Toohey and Pinwill, op. cit., pp. 291–292.
- 3 Richard Farmer, 'School for Aust. spies: Top-Secret Espionage Ring Exposed', *The Daily Telegraph*, 1 November 1972. See also Max Suich, 'Untangle the intelligence web', *The Australian Financial Review*, November 3, 1972.
- 4 Max Suich, 'Untangle the intelligence web', *The Australian Financial Review*, November 3, 1972, p. 3.
- 5 Mr Malcolm Fraser, 'Royal Commission on Intelligence and Security', Ministerial Statement, House of Representatives, *Debates*, 25 October 1977, p. 2339.
- 6 Ibid.
- 7 Royal Commission on Australia's Security and Intelligence Agencies, *Report on the Sheraton Hotel incident*, February 1984, p. 68.
- 8 Paul Daley, 'The Sheraton Shambles', *The Sunday Age*, 7 November 1993.
- 9 (1984) 156 CLR 532.
- 10 Royal Commission on Australia's Security and Intelligence Agencies, *Report on the Sheraton Hotel incident*, February 1984, p. 17.
- 11 Commission of Inquiry into the Australian Secret Intelligence Service, *Report on the Australian Secret Intelligence Service (Public Edition)*, March 1995 (hereinafter Samuels and Codd), p. 2.
- 12 Comments by Brian Toohey on *Late Night Live* program of 28 September 1989.
- 13 Comments by Brian Toohey on *Late Night Live* program of 12 February 1990.
- 14 Comments by Warren Reed, former ASIS intelligence officer in *Four Corners* program of 14 July 1997.
- 15 Brad Crouch, 'ASIS "Like the KGB"', *The Sunday Telegraph*, 26 December 1993.
- 16 Statement by Ross Coulthard in *Four Corners* program of 21 February 1994.
- 17 '[ASIS] does not maintain 'tens of thousands of files' containing dossiers about Australian citizens, as alleged in the media': Samuels and Codd, op. cit., p. xxiii.
- 18 The Minister said: 'ASIS does have some files, as one would expect in an organisation of that nature, even though its brief extends to activities outside the country rather than inside. They are essentially of an administrative nature': Senator Gareth Evans, [Answer to Question Without Notice](#), Senate, *Debates*, 22 February 1994, p. 859.
- 19 Hon. Andrew Peacock, MP, 'ASIS', *Press Release by Hon. Andrew Peacock, MP Shadow Minister for Foreign Affairs*, 22 February 1994.

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- 20 Hon. Andrew Peacock, MP, 'ASIS Inquiry Must Address Relations with DFAT', *Press Release by Hon. Andrew Peacock, MP Shadow Minister for Foreign Affairs*, 23 February 1994.
- 21 Senator Vicki Bourne, 'Four Corners: ASIS Out of Control', *News Release*, No. 94/41, 22 February 1994.
- 22 Samuels and Codd, *op. cit.*, p. xxxi.
- 23 *Ibid*, p. xx.
- 24 *Ibid*, p. xxiii.
- 25 *Ibid*, p. xxiii.
- 26 The commissioners stated that 'evidence presented to us of action and reaction in other countries satisfies us that the publication was damaging': *Ibid*, p. xx.
- 27 *Ibid*, p. xxiii.
- 28 *Ibid*, pp. xxiii-xxiv.
- 29 Mr Malcolm Fraser, *op. cit.*
- 30 Defence Signals Directorate, 'Introduction to DSD', at <http://www.dsd.gov.au/background2.html>.
- 31 Defence Signals Directorate, 'Government Directive', November 1986, at <http://www.dsd.gov.au/directive2.html>, para 3(b).
- 32 *Ibid*, para 4(a).
- 33 Ross Coulthard, 'Big Brother is listening', *Sunday*, 23 May 1999, at [http://news.ninemsn.com.au/sunday/cover\\_stories/transcript\\_335.asp](http://news.ninemsn.com.au/sunday/cover_stories/transcript_335.asp).
- 34 Apparently, *Echelon* sites, containing satellite dishes and automated computer processing facilities are located at Kojarena near Geraldton, Western Australia; Shoal Bay, near Darwin; Waihopai, near Blenheim, South Island New Zealand; Yakima, in Washington; Sugar Grove, West Virginia; Sabana Seca, Puerto Rico; Leitrim, Canada and at Morwenstow and London in Britain: Duncan Campbell, 'Careful, they might hear you', *The Age*, Sunday 23 January 1999 at <http://www.theage.com.au/daily/990523/news/news3.html>.
- 35 Royal Commission on Intelligence and Security, *Third Report: Abridged Findings and Recommendations*, April 1977, p. 6.
- 36 Mr Malcolm Fraser, *op. cit.*
- 37 Senator Gareth Evans, [Ministerial Statement](#), Australian Secret Intelligence Service, Senate, *Debates*, 1 June 1995, p. 716.
- 38 Toohey and Pinwill, *op. cit.*, p. 198.
- 39 (1978) 142 CLR 1.
- 40 (1984) 156 CLR 532.
- 41 *Ibid*, per Mason J at p. 550.

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- 42 Ibid.
- 43 Ibid, at p. 562.
- 44 Ibid (emphasis added).
- 45 *MacLeod v Attorney-General (NSW)* [1891] AC 455, per Halsbury LC, at p. 458-459; *Thompson v The Queen* (1989) 169 CLR 1, per Deane J, at p. 33, *R v Keyn* (1876) 2 Ex D 63, at pp. 68, 117, 152, 160-161, 239 *Huntingdon v Attrill* [1893] AC 150 per Watson LJ, at pp. 155–156.
- 46 *Jumbunna Coal Mine NL v Victorian Coal Miners' Association* (1907) 6 CLR 309 at p. 363 and *Morgan v White* (1912) 15 CLR 1 at pp. 3–9.
- 47 *Wanganui-Ragitikei Electric Power Board v Australian Mutual Provident Society* (1934) 50 CLR 581 at 601. See also *Air India v Wiggins* [1980] 2 All ER 593 per Scarman LJ at p. 597.
- 48 *Meyer Heine Pty Ltd v The China Navigation Co Ltd* (1966) 115 CLR 10 at p. 23.
- 49 This is discussed in Dennis Pearce and Robert Geddes *Statutory Interpretation in Australia* (3<sup>rd</sup> Ed), pp. 97–99.
- 50 *Crimes Act* 1914, section 3A.
- 51 A similar jurisdiction has been asserted in Australia, but only in relation to war crimes, hostages and torture: *War Crimes Amendment Act 1988*, *Crimes Act 1914*, Part IIIA (ss 50AA-50GA), *Crimes (Torture) Act 1988*, section 7; *Crimes (Hostages) Act 1989*, section 7.
- 52 See generally Ivan Shearer in S. Blay, R. Piotrowicz and B.M. Tsamenyi, *Public International Law: An Australian Perspective*, Oxford University Press, Melbourne, 1997, pp. 161-192, at pp. 165-179; Matthew Goode, 'The Tortured Tale of Criminal Jurisdiction', *Melbourne University Law Review*, 1997, vol. 21(2), pp. 411-459 at pp. 413-414.
- 53 *Broken Hill South Ltd (Public Officer) v Commissioner of Taxation (NSW)* (1937) 56 CLR 337 per Dixon J at 375; *Mynott v Barnard* (1939) 62 CLR 68 per Latham CJ at 75 and Starke J at 89; *Helmert v Coppins* (1961) 106 CLR 156. See also *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1.
- 54 *Ward v R* (1980) 142 CLR 308.
- 55 *Lipohar v The Queen; Winfield v The Queen* [1999] HCA 65 (9 December 1999), per Kirby J, at para 178. This is because individuals do not have any particular status as residents of a State or Territory in contrast to the Commonwealth of Australia which is a unique legal entity having its own criminal jurisdiction and being recognised in international law.
- 56 *Liangsiriprasert v United States* [1991] 1 AC 225 at 251; *R v Manning* [1999] QB 980 at 1000; *Lipohar*, op cit, per Gleeson CJ at para 35; per Gaudron, Gummow and Hayne JJ at para 123; per Callinan at para 269. Although the approach in *Liangsiriprasert* was criticised in Goode, 1997(b), p. 436 and *Lipohar*, op cit, per Kirby J, paras 175-176. The previous cases were *Board of Trade v Owen* per Tucker LJ, at 625-626 (conspiracy to defraud); *Department of Public Prosecutions v Doot* [1973] AC 807, per Wilberforce LJ at pp. 817-818 and Salmon LJ at pp. 832-833 (conspiracy to defraud); *DPP. v Stonehouse* [1977] 2 All ER 909 (attempt). See also comments in *R v Hansford* (1974) 8 SASR 164, per Wells J at p. 195; *McNeilly v The Queen* (1981) 4 Australian Criminal Reports 46; *R v Millar* [1970] 2 QB 54; *R v El-*

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- Hakkaoui* [1975] 2 All ER 146 discussed in Goode, 1997(b), op cit, at pp. 433-436. Aside from *Liangsiriprasert* all of these cases could be viewed as examples of crimes where some element of the principal offence occurred within the territory.
- 57 *Libman v The Queen* [1985] 2 SCR 178.
- 58 *Lipohar*, op cit, per Gleeson CJ at para 35; per Gaudron, Gummow and Hayne JJ at para 123; per Callinan J at para 269.
- 59 As in some other cases, there was no particular concern with the ambit of the law (ie that the offence may have occurred outside South Australia) but a real difficulty with the law itself (ie that there was no offence in South Australia of a conspiracy outside South Australia to commit a crime).
- 60 For example, section 5C the South Australian *Criminal Law Consolidation Act* provides that an offence against the law of South Australia will be committed if all the elements exist and there is a territorial link between an element and the State. The territorial link exists where the offender is within the State or where an element of the offence 'is or includes an event occurring in the State'. Similar provisions have been enacted in New South Wales (*Crimes (Application of Criminal Law) Amendment Act 1992*), Tasmania (*Criminal Law (Territorial Application) Act 1995*) and the Australian Capital Territory (*Crimes (Amendment) Act 1995*).
- 61 '[I]t can be argued that the quite extensive geographical extensions to the criminal jurisdiction of a State and Territory advocated in this Discussion Paper are more clearly appropriate to intra Australian cases and not international cases', Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Chapter 4: Damage and Computer Offences and Amendments to Chapter 2: Jurisdiction – Discussion Paper*, January 2000, p. 177 at [http://law.gov.au/publications/Model\\_Criminal\\_Code/damage.pdf](http://law.gov.au/publications/Model_Criminal_Code/damage.pdf) [1/9/00].
- 62 See generally *Criminal Code*, Division 70.
- 63 This judicial review would be an action taken under section 39B of the *Judiciary Act 1901* and section 75 of the Constitution rather than the *Administrative Decisions (Judicial Review) Act 1977*. This is because ASIO, and ASIS under the Intelligence Services (Consequential Provisions) Bill 2001, are exempt from AD(JR) actions: *Administrative Decisions (Judicial Review) Act 1977*, Schedule 1, paragraph (d).
- 64 Two judges said that, in the absence of bad faith or infringement of personal rights, such a question was not justiciable. They said that the issue of relevance either could not be assessed in isolation from other information that was or *could become* available to ASIO or was beyond the expertise of judges. They also said that the scrutiny of ASIO operations was dealt with exclusively in the ASIO Act and, in any event, judicial proceedings would be frustrated by claims of secrecy or public interest immunity.
- 65 *Church of Scientology v Woodward* (1982) 154 CLR 25 at pp. 59-61.
- 66 *Associated Provincial Picture Houses v Wednesbury Corporation* (1948) 1 KB 223 see also *Prasad v Minister for Immigration and Ethnic Affairs* (1984-1985) 6 FCR 155, per Wilcox J, at p. 169.
- 67 Samuels and Codd, op. cit., p. xxx.

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- 68 Royal Commission on Intelligence and Security, *Third Report: Abridged Findings and Recommendations*, April 1977, p. 13.
- 69 Samuels and Codd, op. cit., p. 40.
- 70 Ibid.
- 71 Statement made by the then Shadow Minister for Foreign Affairs, Mr Peter Reith, MP: Samuels and Codd, op. cit., p. 53.
- 72 Ibid, paraphrasing arguments put to the Royal Commission, p. 55.
- 73 Ibid, p. 54.
- 74 Ibid, p. xxx.
- 75 Ibid, p. 61.
- 76 Ibid, pp. 62-63.
- 77 Ibid, p. 93.
- 78 Ibid, p. 95.
- 79 Ibid, p. 95.
- 80 *Inspector-General of Intelligence and Security Act 1986*, subsection 8(4).
- 81 Samuels and Codd, op. cit., p. xxx.
- 82 Ibid, p. xxx.
- 83 *Inspector-General of Intelligence and Security Act 1986*, particularly section 9A inserted by Schedule 5 of the *Australian Security Intelligence Organisation Legislation Amendment Act 1999*.
- 84 '[T]he government has accepted my recommendation that these inspections be accorded specific statutory recognition, and will shortly introduce amendments to the IGIS Act which will achieve this. The amendments will also, if enacted, empower me to report on matters arising from those inspections if necessary: Letter from Mr Blick, Inspector-General of Intelligence and Security to Ross Coulthard, 12 March 1999, at <http://www.igis.gov.au/000001.PDF>
- 85 In one news story, officers alleged that 'even ASIS files [the IGIS] has access to are sufficiently encrypted so he does not fully understand what he is reading': Brad Crouch, 'Our spies are a "laughing stock"', *The Sunday Telegraph*, 16 January 1994.
- 86 Samuels and Codd, op. cit., p. 24.
- 87 Ibid, p. 5.
- 88 Toohey and Pinwill, op. cit., pp. 207-209.
- 89 Samuels and Codd, op. cit., p. 29.
- 90 Ibid, p. 29.
- 91 Ibid, p. 28.

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- 92 Ibid, p. 29.
- 93 Ibid, pp. 29-30.
- 94 Ibid, p. 34.
- 95 Ibid, p. 35.
- 96 Ibid, p. 36.
- 97 Mr Malcolm Fraser, op. cit.
- 98 *Budget Paper No. 1: Budget Strategy and Outlook (1999-2000)*, Statement 5: Expenses, p. 5-34.
- 99 *Budget Paper No. 1* (1998-99), p. 4-33.
- 100 *Budget Paper No. 1* (1998-99), p. 4-34.
- 101 *Budget Paper No. 1: Budget Strategy and Outlook (1999-2000)*, Statement 5: Expenses, p. 5-34.
- 102 The Hon. Daryl Williams AM QC MP, 'Improving Security within Government', [Media Release](#), 22 May 2001.
- 103 *Budget Paper No. 2, Part 2: Expense Measures Since the 2000-01 MYEFO*, Table 1 Expense Measures since the 2000-01 MYEFO at [http://libiis1/CorpPlan/Budget2001-2002/papers/bp2/html/4\\_expense.htm#P4\\_0](http://libiis1/CorpPlan/Budget2001-2002/papers/bp2/html/4_expense.htm#P4_0).
- 104 *Budget Paper No. 4: Agency Resourcing (2001-02)*, Appropriation Bill (No. 1) 2001-02, Schedule – Services for which money is appropriated at [http://libiis1/CorpPlan/Budget2001-2002/papers/bp4/html/06\\_b1\\_tables.htm](http://libiis1/CorpPlan/Budget2001-2002/papers/bp4/html/06_b1_tables.htm).
- 105 *Stockdale v Hansard* (1839) 112 ER 1112.
- 106 *Parliamentary Papers Act 1908*.
- 107 Justice Hope commented that intelligence is processed information in the sense that a lot of different items of knowledge have been put together, tested against each other for credibility and a judgment made on the balance as to the truth ... about some particular situation. It is also assessed as relevant to the customer; otherwise it would not be provided in 'finished' form': Royal Commission on Intelligence and Security, *Third Report: Abridged Findings and Recommendations*, April 1977, pp. 1-2.
- 108 One of the functions of ONA is to 'assemble and correlate information relating to international matters that are of political, strategic or economic significance to Australia': ONA Act, paragraph 5(1)(a).
- 109 **Proposed section 11.**
- 110 Royal Commission on Intelligence and Security, *Third Report: Abridged Findings and Recommendations*, April 1977, p. 6.
- 111 Mike Frost, former Canadian intelligence officer, on *Sunday*, 23 May 1999, op. cit.
- 112 Wayne Madsen, former United States National Security Agency staffer, on *Sunday*, 23 May 1999, op. cit.

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113 **Proposed sections 6, 7 and 11.**

114 For example, under the ASIO Act, a function of ASIO is to 'obtain, correlate and evaluate intelligence relevant to security' (paragraph 17(1)(a)). 'Security' means the protection of Australia and Australians against espionage, etc (definition of 'security' section 3, paragraph (a)). It also means 'the carrying out of Australia's *responsibilities* to any foreign country' (definition of 'security' section 3, paragraph (b)). 'Australia's responsibilities' to foreign powers are not defined in the ASIO Act, but might reasonably include protection of foreign countries and citizens against espionage, etc by Australian citizens or residents.

115 Government Communications Security Bureau Bill 2001, **proposed section 14.**

116 *Ibid*, **proposed section 15.**

117 *Ibid*, **proposed section 4**, definitions of 'foreign organisation' and 'foreign person'.

118 *Ibid*, **proposed section 19.**

119 *Ibid*, **proposed section 24.**

120 Intelligence Services (Consequential Provisions) Bill 2001, Schedule 2, **proposed section 35(2B).**

121 **Proposed paragraph 6(1)(e).**

122 **Proposed paragraph 6(2)(a).**

123 See generally, Jennifer Norberry, Measures to Combat Serious and Organised Crime Bill 2001, *Bills Digest No. 14 2000-2001*.

124 **Proposed subsection 11(1).**

125 **Proposed subsection 6(4).**

126 *The Oxford English Dictionary*, 2<sup>nd</sup> Edition, Clarendon.

127 See generally, Norberry, *op. cit.*

128 *Intelligence Services Act 1994* (UK), section 7.

129 *Ibid*, section 7(6)(a).

130 *Extradition Act 1988*, section 11.

131 A court may be unwilling to extradite a person who is merely 'under investigation' (*Moglia v The Republic of Italy*) or 'strongly suspected' (*Kainhofer v Austria* (1994) 124 ALR 665). Although in the latter case, on appeal, the High Court held that for the purposes of the *Extradition Act 1988*, 'terms which relate to the criminal procedure of other countries should not be interpreted so as to confine its reach to cases in which a step in the foreign procedure accords precisely with a step in the procedure of Australian courts': *Director of Public Prosecutions v Kainhofer* (1985) 185 CLR 528, at p. 529 (Headnotes).

132 That is, where the maximum penalty is death or imprisonment for more than 12 months: section 5.

133 *Extradition Act 1988*, sections 7(d), 16(2) and 19(2)(c). This requirement is also included in extradition treaties that define 'extraditable offences'.

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- 134 That is, an offence of a political character because of the circumstances in which it is committed or otherwise, not including specific offences such as hijacking or hostage taking (*Extradition Act 1988*, section 5).
- 135 In addition to the 'political offence' exception, the Act provides other grounds for objection (*Extradition Act 1988*, section 7):
- accused is really sought for prosecution or punishment according to his or her race, religion, nationality or political opinions
  - accused may be prejudiced at his or her trial, or punished, detained or restricted in his or her personal liberty by reason of race, religion, nationality or political opinion
  - the overseas offence would only have constituted an offence under Australian military law rather than the general criminal law, and
  - the accused has been pardoned, acquitted or punished for the offence already
- 136 Toohey and Pinwill, *op. cit.* pp. 199-200.
- 137 Samuels and Codd, *op. cit.*, pp. xxiii-xxiv.
- 138 *Intelligence Services Act 1994* (UK) Schedule 1, paragraph 3.
- 139 *Ibid*, paragraph 8.
- 140 In *Church of Scientology v Woodward* Mason J commented: 'I should have thought that this would have been the responsibility of the Director-General even if the statute had been silent upon that point': 154 CLR 25 at p. 58.
- 141 ASIO Act, paragraph 17(1)(b).
- 142 *Ibid*, paragraph 17(1)(c).
- 143 *Ibid*, subsection 8(4).
- 144 *Ibid*, subsection 8(5).
- 145 ONA Act, paragraph 5(1)(b).
- 146 *Ibid*, subsection 5(2).
- 147 *Ibid*, subsection 5(4)
- 148 **Proposed item 1.**
- 149 See the definition of 'operationally sensitive information' in **proposed section 3**.
- 150 Compare the difference in language between **proposed items 2(5)** and **3(4)**. In the former, the power to obtain information from 'persons' exists in relation to a matter that the PJC is 'reviewing or that has been referred to the [PJC]'. In the latter the power to obtain information from the Director-General(s) is limited to a matter 'that has been referred to the Committee'. Thus, if the PJC has initiated an inquiry of its own motion, as opposed to the inquiry being initiated by a reference, it has the power to compel persons but it does not have the power to compel the Director-General(s).
- 151 **Proposed item 4.**

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152 **Proposed item 4(4).**

153 **Proposed item 6(2).**

154 **Proposed item 6(2)(a).**

155 **Proposed item 7.**

156 **Proposed items 6(4) and 7(2).**

157 **Proposed item 9.**

158 **Proposed item 9.**

159 *Bill of Rights 1689*, Article 9; *Parliamentary Privileges Act 1987*, section 16(1).

160 The offences in the Bill for interference with a witness carry a maximum penalty of 5 years' imprisonment or a fine of 300 penalty units or \$3 300 (a penalty unit is currently \$110: *Crimes Act 1914*, section 4AA). By contrast similar offences in section 12 of the *Parliamentary Privileges Act 1987* carry a maximum penalty of 6 months' imprisonment or \$5 000 for an individual and \$25 000 for a corporation.

161 **Proposed item 12.**

162 **Proposed item 20(2).**

163 **Proposed item 22.**

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## Attachment: Legislation – Arguments For and Against

The arguments in favour of legislation are that it would:

- (a) give legislative authority of the type which should exist for the activities of all significant, continuing government agencies;
- (b) restrict ASIS activities to functions authorised by the legislature and establish appropriate arrangements for accountability, thus providing the opportunity to refute the common misconception that the Service is a 'loose cannon';
- (c) confer legitimacy on ASIS in the eyes of the community, and reduce the suspicion surrounding its activities;
- (d) provide increased protection for ASIS officers, sources, methods and product;
- (e) provide stability and continuity for the organisation, with consequent improvements in staff morale;
- (f) bring ASIS into line with ASIO and with intelligence services in most other parliamentary democracies.

The arguments against legislation for ASIS are that:

- (a) it is simply unnecessary or, alternatively, the specific issues requiring legislative treatment do not justify comprehensive ASIS legislation;
- (b) it would be likely to raise expectations in the community – as to accountability and the flow of information – which could not be met;
- (c) it could not be framed with sufficient specificity to be of practical value without also causing undesirable international repercussions;
- (d) it would invite intrusive parliamentary debate on the existence, role and function of ASIS; and
- (e) it would represent a significant move away from the 'neither-confirm-nor-deny' policy which is essential to security.'

*Samuels and Codd Royal Commission*<sup>(1)</sup>

1. Samuels and Codd, op. cit., pp 33–34.

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