



## Intelligence Services Legislation Amendment Bill 2005

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## Intelligence Services Legislation Amendment Bill 2005

**Date Introduced:** 16 June 2005

**House:** Senate

**Portfolio:** Defence

**Commencement:** Sections 1 to 3 commence on the day on which the Act receives Royal Assent. Schedules 1 to 8 commence 28 days after the Act receives Royal Assent.

### Purpose

The purpose of the Bill is to amend the *Intelligence Services Act 2001* (the ISA), the *Office of National Assessments Act 1977* (the ONA Act), the *Inspector-General of Intelligence and Services Act 1986* (the IGIS Act) and related legislation to implement proposals recommended by the [Flood Inquiry](#)<sup>1</sup> and the Government's review of the intelligence services agencies coordinated by the Department of the Prime Minister and Cabinet (PM&C) in 2004.

### Background

The Australian intelligence agencies are:

- 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).

The Bills Digest prepared for the [Intelligence Services Bill 2001](#) described the various functions and roles of each agency and how they work together:

...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

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and take action to address those threats. DSD also advises government(s) regarding the security of electronic information.<sup>2</sup>

DIGO is an agency of the Department of Defence, established in November 2000 as a result of an amalgamation of two Defence organisations. Imagery and other data are used to produce intelligence and geospatial information. The term 'geospatial' refers to the location and character of natural and constructed features and boundaries on, under or above the surface of the earth. DIGO's role is to provide imagery and geospatial intelligence in relation to Australia's defence interests and other national objectives.<sup>3</sup>

ASIO is administered by the Attorney-General's Department and is governed by the *Australian Security Intelligence Organisation Act 1979* (ASIO Act). ONA exists 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 come under the Department of Defence (Defence). The activities of all of these intelligence agencies are subject to scrutiny by the Inspector-General of Intelligence and Security (IGIS), albeit agencies currently have different levels and regimes of scrutiny according to legislation and administrative arrangements.<sup>4</sup>

The Parliament first appointed a Parliamentary Committee on ASIO, ASIS and DSD (PJCAAD) in March 2002 during the 40th Parliament. The PJCAAD replaces the former Parliamentary Joint Committee on ASIO.

The Committee is appointed under section 28 of the ISA. Section 29 of the ISA states that the functions of the Committee include:

- reviewing the administration and expenditure of the ASIO, ASIS and DSD, including the annual financial statements of ASIO, ASIS and DSD;
- reviewing any matter in relation to ASIO, ASIS or DSD referred to the Committee by the responsible Minister or a resolution of either House of the Parliament; and
- reporting the Committee's comments and recommendations to each House of the Parliament and to the responsible Minister;

The Committee is not authorised to initiate its own references, but may resolve to request the responsible Minister to refer a particular matter to it for review.

### **Basis of policy commitment**

In March 2004, the Prime Minister announced an independent review of the Australian foreign intelligence community including, inter alia, the effectiveness of oversight and accountability mechanisms; the suitability of the current division of labour among the agencies; the contestability of intelligence assessments and the adequacy of current resourcing of intelligence agencies. Mr Philip Flood AO conducted the Inquiry into Australian Intelligence Agencies and submitted his report to the Prime Minister in July

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2004. The Government subsequently agreed to accept the recommendations of the Flood Inquiry, with the exception of the proposal to change the name of the Office of National Assessments. This Bill implements several recommendations from the Flood Inquiry.

The Government has also agreed that this legislative package include the further amendments that have been agreed as a result of a review of the ISA coordinated by the PM&C in 2004. This review was initially suggested in the 2002 and 2003 Annual Reports of the IGIS. This review included a request from the PJCAAD in August 2004 that the Government consider a number of changes to that committee, including an increase in the size of the committee and other adjustments to help the PJCAAD respond to its increasing workload, for instance reviewing the listing of terrorist organisations and inquiry into ASIO's special powers under Division 3, Part III of the ASIO Act.

For background on these issues, readers are referred to the Bills Digest on the [Intelligence Services Bill 2001](#), the [Intelligence Services \(Consequential Provisions\) Bill 2001](#), and the [Intelligence Services \(Consequential Provisions\) Bill 2003](#).

### **DSD and the *Tampa***

This Bill raises the issue of legislative safeguards on intelligence-gathering activities regarding Australian citizens. This issue arose in late 2001 when News Limited alleged that DSD had listened to and reported phone conversations between the maritime unions and the Captain of the Norwegian freighter the *Tampa*.<sup>5</sup> The Minister for Defence released an edited report by then Inspector-General Blick into the matter on 2 May 2002,<sup>6</sup> and it was included as Annexe 2 to the IGIS *Annual Report 2001-2002*.<sup>7</sup> The report found four breaches of the classified privacy rules, but the Inspector-General found no evidence that any Minister directed or requested DSD to conduct any such collection activity. The ISA had not yet come into force. The communications intercepted in error were termed by the Defence Minister as 'incidental'.<sup>8</sup>

The classified rules at that time were reported by the IGIS as barring DSD from deliberately intercepting communications by Australians within Australia, but confirmed that DSD 'may collect foreign signals intelligence including, in certain limited circumstances, intelligence about the foreign communications of Australians'.<sup>9</sup>

Several issues arose from the *Tampa* incident as contained in the IGIS report – the first was whether DSD was in breach of the *Telecommunication (Interception) Act 1979* as both ends of the telephone call between the Melbourne lawyers and the *Tampa* were arguably a 'communication passing over the telecommunications system' of Australia for the purposes of the Act.<sup>10</sup> Collection of such information ceased as a result until the legal issue could be confirmed.<sup>11</sup> The second was why the conversations were regarded as foreign intelligence as there appeared to be no link between the subject matter - a domestic court case - and any foreign intelligence imperative, other than the potential client being

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foreign.<sup>12</sup> The third was how the breaches of privacy contrary to the Rules had come to pass, and what systemic changes were required to prevent further breaches.<sup>13</sup>

Parliamentary debate in February and March 2002 focused on the issues raised by the incident and raised a point directly relevant to this Bill. Senator Chris Evans asked Senator Robert Hill, Minister for Defence the following question without notice on 13 March 2002:

Can the minister confirm the simple fact that under the current arrangements governing the DSD there are no safeguards on the interception of phone calls between a non-national overseas and an Australian in Australia? Isn't it a fact that, while the Intelligence Services Act does provide protections for the collection of information on Australians overseas, it is silent on Australians in Australia who communicate with non-nationals overseas? Doesn't this represent a significant change from the previous arrangements, where the privacy of Australians was protected irrespective of whether they were overseas or in Australia?<sup>14</sup>

The Minister responded in the following manner on 21 March 2002:

Section 8(1)(a)(i) of the Intelligence Services Act 2001 (ISA) requires DSD to obtain an authorisation under section 9 before undertaking an activity, or series of activities for the specific purpose, or for purposes which include the specific purpose, of producing intelligence on an Australian person who is overseas. The Act did not specifically apply the same protection to Australians in Australia. Sections 8 and 9 were included in the Act on the recommendation of the Joint Select Committee on the Intelligence Services.

To ensure that the privacy of Australians was properly protected irrespective of whether they were overseas or in Australia, my predecessor issued a direction to Director DSD under section 8(1)(b) directing DSD to obtain an authorisation before undertaking any such activities in relation to Australians within Australia. This direction took effect with the date of the introduction of the Act, and had the effect of requiring DSD to afford the same level of protection to all Australian persons regardless of their location.<sup>15</sup>

## Commentary

### Press commentary

There have been a number of press reports analysing the implications of the Flood Inquiry,<sup>16</sup> generally finding the report 'cautious'<sup>17</sup> or 'limited',<sup>18</sup> but a good starting point for reform. Other commentators see the report as useful but affected by the scope of its terms of reference, political context, short timescales and the career background of the author, and still press for a Royal Commission.<sup>19</sup>

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Some commentators have been critical of perceived ‘sweeping changes’ ushered in by the Bill in going beyond the implementation of Flood report recommendations.<sup>20</sup> Banham draws out the issue that:

The domestic spy agency, the Australian Security Intelligence Organisation, can monitor Australian citizens in Australia but is subject to a significant warrant regime, which the overseas agencies are not.<sup>21</sup>

### **Australian Labor Party policy position**

The former Shadow Minister for Defence and Homeland Security, Mr Robert McClelland, MP, said that the Government does not ‘seem to have the same degree of objective detachment to fully identify failings in our intelligence gathering, analysis and reporting [as does the United States].’<sup>22</sup> No specific criticisms of the Bill have been identified in detail, rather the ALP position has been to criticise the timeliness and scope of the Government’s response to problems identified by the Flood Inquiry. The ALP promised a Royal Commission into the intelligence agencies in their electoral platform in 2004.

### **Australian Democrat policy position**

Senator Andrew Bartlett was in favour of the recommendation to expand the mandate of the PJCAAD to cover other intelligence agencies. Senator Bartlett also recommended an expansion of the numbers and membership of the Committee to include representation by minority parties and Independents.<sup>23</sup>

### **Other commentary**

Professor George Williams of the University of New South Wales said that the provisions in the Bill regarding gathering intelligence on Australians and ‘incidental intelligence’ were unclear but ‘a concern’.<sup>24</sup> Professor Williams commented:

You’ve got to wonder how it might apply in an operational context given how these agencies work and the secrecy with which they operate.<sup>25</sup>

The concern was that the provisions of the Bill, particularly in relation to ‘incidentally obtained information’ might be interpreted as an ‘extension of their powers that would enable agencies to conduct their operations in regards to Australians in Australia in a way they have not been able to in the past’.<sup>26</sup>

Mr Christopher Michaelsen of the Strategic and Defence Studies Centre in Canberra noted that because Australia did not have a bill or rights or human rights act there would be no impediment to the extension of the agencies’ powers.<sup>27</sup>

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Professor Williams and Ben Saul also note that due to the absence of a bill of rights (unlike in every other modern liberal democracy such as Canada, New Zealand, the United States, South Africa and the United Kingdom):

Australians do not enjoy the same level of protection from unjustifiable governmental interference with their liberty as citizens of other liberal democracies.<sup>28</sup>

### Reference to the Parliamentary Joint Committee on ASIO, ASIS and DSD

The Bill was referred to PJCAAD on 16 June 2005. No date for a report has been set.

## Main Provisions

### Schedule 1 – Intelligence Services Act 2001

**Item 10** - defines ‘incidentally obtained intelligence’. **Item 29** states that this information may be communicated by ASIS, DSD or DIGO to Commonwealth, State agencies or approved foreign authorities in certain circumstances.

**Item 13** - repeals the current definition of ‘permanent resident’ and replaces it with a definition which maintains the link to the ASIO Act for the purposes of a natural person, but redefines the understanding of body corporate. For the purposes of the ISA, a permanent resident would include a body corporate incorporated under a law in force in a State or Territory, but would exclude a body corporate whose activities are controlled (or could be controlled) by a foreign power or natural person who is neither an Australian citizen nor a permanent resident.<sup>29</sup>

**Item 17** - amends the definition of a ‘staff member’ of the agencies to include consultants and contractors. As a result, immunities from civil and criminal liability provided to employees will extend to consultants and contractors.

**Items 18 and 20** - propose the insertion of specific reference to the fact that, in performing their functions, ASIS and DSD are able to provide assistance to Commonwealth authorities, including to the Defence Force in support of military operations, and to State authorities. The Explanatory Memorandum notes this is not an extension of the functions of DSD but a clarification of them.<sup>30</sup> DSD is also given the function of provision of assistance to Commonwealth and State authorities in relation to (ii) ‘other specialised technologies acquired in connection with the performance of its other functions’. **Item 28** allows ASIS, DIGO and DSD to provide police and law enforcement agencies general assistance, described in the Explanatory Memorandum as ‘non-intelligence assistance’.<sup>31</sup>

**Item 19** - outlines the functions of DIGO. **Item 52** - inserts a new offence into the ISA in relation to the communication of certain information relating to DIGO. This offence

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mirrors that applying to the communication of information relating to DSD contained in section 40 of the Act.

**Item 22** - would delete the words ‘who is overseas’ from section 8 of the ISA regarding Ministerial directions. ASIS, DIGO and DSD will be required to seek a ministerial authorisation to produce intelligence on an Australian person, whether that person is overseas or in Australia.

**Items 24 and 25** - deal with authorisations under section 9, and add a new section 9A, which allows the Prime Minister, the Minister for Defence, the Minister for Foreign Affairs or the Attorney-General to issue an authorisation in an ‘emergency’ situation where the Minister responsible for ASIS, DIGO or DSD is not readily available or contactable. The Explanatory Memorandum states that:

... where the agency head is satisfied that the grounds for the authorisation no longer exist, an agency head must so inform the responsible Minister, and ensure that relevant activities are discontinued. The proposed amendment also requires the Minister to consider cancelling the authorisation as soon as practicable after being so informed. Agency heads would now be required to report to their Ministers on the results of each collection activity authorised under section 9 within three months of the discontinuation.<sup>32</sup>

‘Emergency’ situation is not defined.

**Items 41 to 51** - extend the mandate of the current Parliamentary Joint Committee on ASIO, ASIS and DSD to cover DIGO, DIO and ONA, with a name change to the Parliamentary Joint Committee on Intelligence and Security (PJCIS) (**item 4**) and an increased membership from seven to nine (**item 40**). **Item 64** provides that the Deputy Chair must be a member of the Government.

## Schedule 2 – Inspector General of Intelligence and Security Act 1986

**Part 1 Items 1-8** - generally expands the Inspector-General’s monitoring role to include DIGO.

**Item 10** - empowers the Inspector General to initiate own-motion inquiries into ONA and DIO.

**Item 11** - provides that the IGIS should regularly review the statutory independence of ONA and **item 29** requires the IGIS include comments about such reviews in his/her Annual Report.

**Items 14 and 22** - These items empower the Inspector-General, after notifying the Director-General of Security, at any reasonable time, to enter any place where a person is being detained under Division 3 of Part III of the ASIO Act for the purposes of an

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inspection or an inquiry. Division 3 of Part III gives ASIO special powers of questioning and detention under warrant.

**Items 15-17, 23-27** - deal with natural justice issues where the IGIS is dealing with a head of agency. The provisions give the Inspector-General a discretion about advising the head of an agency before commencing an inquiry where the inquiry relates directly to the head of the agency. In such cases, the IGIS must advise the responsible Minister or Departmental Secretary. Similarly, if the IGIS does not give a copy of the draft report to the agency head, a copy must be given to the relevant Minister or Departmental Secretary.

**Item 28** - empowers the Inspector-General to prepare and provide a full report of an inquiry to the Prime Minister if the responsible Minister or the Secretary does not take, within a reasonable period, action that the Inspector-General considers is adequate and appropriate in the circumstances.

### Schedule 3 – Office of National Assessments Act 1977

**Items 4 and 5** - provide stronger authority for ONA's intelligence community coordination and evaluation role in **paragraph 5(1)(d)**.

**Item 7** - Establishes a single national assessment board to be chaired by the head of ONA.

### Schedule 4 – Australian Security Intelligence Organisation Act 1979

**Item 1** - creates a new **subsection 29(4)** that requires the Director-General to inform the IGIS, by providing a copy of the warrant, of the exercise of the Director-General's emergency warrant power within three working days of the emergency warrant being approved. In urgent circumstances, the Director-General, rather than the Minister, can issue search, computer, listening device, tracking device and other warrants.

### Schedule 5 – Telecommunications (Interception) Act 1979

**Item 1** - creates a new **subsection 10(5)** that requires the Director-General to inform the IGIS, by providing a copy of the warrant, of the exercise of the emergency warrant power within three working days of the emergency warrant being approved.

### Schedules 6 and 7 - Privacy Act 1998 and the Freedom of Information Act 1982

These amendments ensure that all Australia's intelligence agencies will now be exempt from the FOI and Privacy Acts in a uniform manner. DSD and DIO were previously treated as part of the Defence Department which was not FOI exempt.

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## Specific Comments

### Gathering Intelligence on Australian Citizens

Item 22 of Schedule 1 would delete the words ‘who is overseas’ from section 8 of the Act. Section 8 reads:

(1) The responsible Minister in relation to ASIS, and the responsible Minister in relation to DSD, must issue a written direction under this subsection to the relevant agency head. The direction must:

(a) require the agency to obtain an authorisation under section 9 from the Minister before:

(i) undertaking an activity, or a series of activities, for the specific purpose, or for purposes which include the specific purpose, of producing intelligence on an Australian person who is overseas; or

(ii) undertaking, in accordance with a direction under paragraph 6(1)(e), an activity, or a series of activities, that will, or is likely to, have a direct effect on an Australian person who is overseas; and

(b) specify the circumstances in which the agency must, before undertaking other activities or classes of activities, obtain an authorisation under section 9 from the Minister.

The amendments proposed by **item 22** have raised some concerns. A recent *Sydney Morning Herald* article said that ‘[u]nder the new bill, the overseas agencies will be free to spy on Australians in Australia, with ministerial authorisation’.<sup>33</sup> It is not clear that removing the words ‘outside Australia’ would have that effect. The ISA defines the functions of ASIS and DSD. For both agencies, key functions include *obtaining* ‘intelligence about the capabilities, intentions or activities of people or organisations *outside Australia*’ (paragraphs 6(1)(a) and 7(a)). In the case of ASIS, it is also tasked with undertaking such other activities as the responsible Minister directs relating to the capabilities, intentions or activities of people or organisations *outside Australia*’ (paragraph 6(1)(e)).

In view of these limitations on the agencies’ legal functions, how could the responsible Minister authorise the agencies to undertake activities for the purpose of *producing* intelligence on Australians irrespective of whether they are inside or outside Australia?<sup>34</sup> In the case of ASIS, how could a Ministerial authorisation enable ASIS to undertake activities that may have a direct effect on Australians — irrespective of whether they are inside or outside Australia — in accordance with a direction under paragraph 6(1)(e), when that paragraph limits ASIS to activities relating to actions etc of people or organisations *outside Australia*?

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Nor does the Explanatory Memorandum clarify matters. Among other things, it says that the amendments:

... strengthen the strict procedures contained in the original Act which apply when the activities of an agency are specifically directed at collecting intelligence on an Australian person, by removing the legislative limitation on those procedures which currently applies them to Australians who are outside Australia.<sup>35</sup>

Does this suggest that the ISA is already being interpreted to give ASIS or DSD the power to *obtain* intelligence on Australians *inside* Australia regarding the capabilities and intentions of persons *outside* Australia - with the consequence that the amendments are needed to give Australians in Australia the same protections as Australians outside Australia?

Different readings of the statute arise depending on whether the agencies are bound by geographical/citizenship-based limitations when collecting the raw information or whether they are bound by the purpose or focus of the intelligence they produce. ASIO is the only intelligence agency which is allowed to obtain a warrant to intercept telecommunications within Australia under the regime set by the *Telecommunications (Interception) Act 1979*. ASIS and DSD are therefore only able currently to intercept communications by an Australian communicating with a person overseas, when the purpose is to *obtain* foreign intelligence. And they are subject to the general limits and liabilities set out in sections 11, 12 and 14 of the ISA and the privacy rules.

If these agencies wish to *produce* intelligence on Australians in Australia, perhaps after receiving information that has been originally been incidentally obtained, they would now require a Ministerial authorisation and still be subject to the privacy rules in the reporting of such intelligence. The intelligence would still need to be directed at the capabilities, intentions or activities of people or organisations outside Australia. Given this reading of the statute, the amendment would be an additional safeguard on surveillance of Australians by the foreign intelligence agencies. However, it is difficult to deduce what reading of the statute as a whole a court would take.

Parliament might consider asking for clarification of the reasons for and intended effect of **item 22**.

### **'Incidentally Obtained' Intelligence**

One of the key changes in the Bill is a power for ASIS, DIGO and DSD to communicate 'incidentally obtained' intelligence which has been 'collected unintentionally in the proper conduct of the functions of the agencies' to Commonwealth or State authorities or to approved authorities of other countries.<sup>36</sup> At present, these agencies can only communicate 'such intelligence' as is collected in pursuit of their primary functions.<sup>37</sup>

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The definition of ‘incidentally obtained intelligence’ is contained in **item 10**, amending section 3 of the ISA. It exhaustively defines the term as intelligence:

(a) that is obtained by ASIS in the course of obtaining intelligence under subsection 6(1), by DIGO in the course of obtaining intelligence under paragraph 6B(a), (b) or (c) or by DSD in the course of obtaining intelligence under paragraph 7(a); and

(b) that is not intelligence of a kind referred to in those provisions.

The general definition of ‘intelligence information’ is therefore updated to include this new category. In the definitional process, the limits upon what type of intelligence information the agencies can communicate has been widened considerably. The new limitations are that it must be ‘incidentally obtained’ (as defined) and that it satisfies the requirements of new subsection 11(2AA) which reflects the current grounds required to grant a Ministerial authorisation under section 9(IA):

An agency may communicate incidentally obtained intelligence to appropriate Commonwealth or State authorities or to authorities of other countries approved under paragraph 13(1)(c) if the intelligence relates to the involvement, or likely involvement, by a person in one or more of the following activities:

(a) activities that present a significant risk to a person’s safety;

(b) acting for, or on behalf of, a foreign power;

(c) activities that are a threat to security;

(d) activities related to the proliferation of weapons of mass destruction or the movement of goods listed from time to time in the Defence and Strategic Goods List (within the meaning of regulation 13E of the Customs (Prohibited Exports) Regulations 1958);

(e) committing a serious crime.

Another interesting issue regarding this power is how the transmission of incidental intelligence to State authorities might work, especially in the absence of staff who hold national security clearances. No limits are placed on what bodies might be an ‘appropriate’ State authority, in other words it is not specified that information needs to be given to specified law enforcement agencies, although the source of the information need not necessarily be identified.

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### **DSD and specialised technologies**

Under the ISA, DSD's functions include assisting Commonwealth and State authorities in relation to cryptology and communications technologies. The functions of DSD under new **paragraph 7(d)** are expanded to provide assistance to Commonwealth and State authorities in relation to search and rescue functions and in relation to 'other specialised technologies acquired in connection with the performance of its other functions'. What specific activities this provision might capture is in need of clarification, especially as it is unclear what 'other functions' DSD has that are not related to cryptography and communications and computer technologies.

### **Foreign-Owned Corporations**

Section 3 of the ISA defines 'Australian person' as meaning an Australian citizen or a permanent resident.

**Item 13** now seeks to amend the definition of 'permanent resident' which, at present, is defined according to section 4 of the ASIO Act.

The ASIO Act definition of 'permanent resident' in turn means a person:

- (a) in the case of a natural person:
  - (i) who is not an Australian citizen;
  - (ii) whose normal place of residence is situated in Australia;
  - (iii) whose presence in Australia is not subject to any limitation as to time imposed by law; and
  - (iv) who is not an unlawful non-citizen within the meaning of the Migration Act 1958; or
- (b) in the case of a body corporate:
  - (i) which is incorporated under a law in force in a State or Territory; and
  - (ii) the activities of which are not controlled (whether directly or indirectly) by a foreign power.

The amended term, 'permanent resident', would mean:

- (a) a natural person who is a permanent resident within the meaning of the *Australian Security Intelligence Organisation Act 1979*; or

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(b) a body corporate incorporated under a law in force in a State or Territory, other than a body corporate whose activities one or more of the following controls, *or is in a position to control*, whether directly or indirectly:

(i) a foreign power;

(ii) a natural person who is neither an Australian citizen nor a person covered by paragraph (a);

(iii) a group of natural persons, none of whom is an Australian citizen or a person covered by paragraph (a).

The activities of the agencies in respect to people within Australia on temporary protection student or business visas or people detained such as asylum-seekers, criminal deportees or overstayers therefore continue to be outside the safeguards afforded to Australian persons. This may be contrary to the position at international law where Australia is required to safeguard basic human rights of all people on its territory.

The new definition will lift the protections currently afforded to Australian natural persons and corporations from corporations who are owned or controlled, or in a position to be controlled, by a foreign person or group. It is unclear what the phrase ‘in a position to control’ might mean in practice.<sup>38</sup>

The main implications of the change effected by **item 13** are that the privacy rules under section 15 do not apply, and the need to obtain a Ministerial authorisation under section 8 does not apply. Further, the PJCAAD Committee cannot review an activity of the intelligence agencies that does not affect an Australian person under paragraph 29(3)(e). The IGIS still has the ability to review agency actions that affect non-Australian persons under section 8 of the IGIS Act, but seemingly only if the complaint is lodged by an Australian person.<sup>39</sup>

It is possible that the provision making a foreign corporation a permanent resident in the ISA was an anomaly in the first instance which the Government is now rectifying. It makes the definition more in line with the ASIO Act, but is potentially wider than that definition in relation to the phrase ‘in a position to control’. There is no explanation of why the definition is wider than the ASIO Act. The Bills Digest for the ISA in 2001 noted that the importance of economic intelligence has been increasingly recognised by ASIS and the Government.

### **The Parliamentary Joint Committee on ASIO, ASIS and DSD**

The Explanatory Memorandum notes that the amendments in **items 38-51** of **Schedule 1** were made in response to proposals from the PJCAAD in August 2004 because of its increasing workload. The Government agreed that these proposals would be considered in the context of the wider review of the ISA. As a result, the Government has agreed that

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the committee's membership be increased from seven to nine, a position of Deputy Chair be established, and the committee be empowered to establish subcommittees when required.

The Bill provides for extension of the Committee's mandate to include DIGO, DIO and ONA. There is also provision to rename the Committee as the Parliamentary Joint Committee on Intelligence and Security (PJCIS).

Issues for the Committee may include that while the provisions establish a new Deputy Chair of the Committee on Intelligence and Security as requested, the Bill stipulates the position must be filled by a Government member. The Chair must also be a Government member as laid down in section 16 of the ISA. Presumably this is to prevent the casting vote being held by a non-Government member in the Chair's absence, although normally another Government member is selected to be acting Chair. This goes against the convention laid down in Senate Standing Order 25(10)(e) and may impact on the bipartisan nature of the Committee. This appears to be the first time in Parliamentary history that this has occurred. A rationale for the change is not given.

The Government has not incorporated into the Bill the other issues the Committee identified in its Annual Report 2004-2005 as important to its mandate in relation to access to the classified annual reports of each of the agencies, and the removal of the restriction on disclosures to parliament 'the conduct of Australia's foreign relations' from Clause 7, Schedule 1 of the Act.

The Committee might also be affected by the new provisions on foreign corporations as discussed above (ie. The Committee may be unable to review the actions of intelligence agencies which affect non-Australian corporations, and 'incidentally obtained intelligence' in terms of its monitoring of annual reports.

## **Concluding Comments**

The Bill is a mix of provisions which will mostly streamline processes and operation of agencies, and increase the accountability and transparency of the agencies, although some provisions require further clarification.

For example, provisions which seem to promote the Government's aim of increasing accountability are those which in the main implement the recommendations of the Flood Inquiry concerning DIGO, ONA and the proposed new PJCIS. The PJCAAD's recommendations in its Annual Report regarding the lifting of key restrictions on its mandate were not taken into account by this Bill, and legislating the Chair and Deputy Chair positions for Government members may weaken bipartisanship. The new role and powers of the Inspector-General seem to be a positive step towards accountability, with

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the possible exception of inaction on reports if the Prime Minister does not respond, which could be a possibility.<sup>40</sup>

The amendments in **item 22** and those relating to incidentally obtained intelligence, as well as people within Australia who lie outside the defined term of ‘permanent resident’ are not addressed by the Flood Report recommendations. If the amendments are meant in response to the issues raised by the DSD intercepts of telephone calls to the *Tampa*, they may not adequately address that situation. Parliament may wish to seek further clarification about the reasons for the amendments in **items 22** and **10**, and the intended effect of each.

## Further Reading

- Australian Government, *Report of the Inquiry into Australian Intelligence Agencies*, [http://www.pmc.gov.au/publications/intelligence\\_inquiry/](http://www.pmc.gov.au/publications/intelligence_inquiry/), accessed 21 June 2005
- R. Coulthart, ‘Big Brother is Listening’ *Sunday Program*. Channel Nine. May 23, 1999. [http://sunday.ninemsn.com.au/sunday/cover\\_stories/transcript\\_335.asp](http://sunday.ninemsn.com.au/sunday/cover_stories/transcript_335.asp) accessed 4 July 2005
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- G. Barker, ‘Limited reform in Flood Report’, *Australian Financial Review*, 23 July 2004 at: p. 19
- N. James, ‘Picking up after Flood’, *Defender*, Spring 2004 at: pp. 18–21
- P. Jennings, ‘Unfinished business: Reforming our intelligence agencies’, *Policy*, 20(4) 2004-5, pp.3–8.

## Endnotes

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- 1 Australian Government, *Report of the Inquiry into Australian Intelligence Agencies*, [http://www.pmc.gov.au/publications/intelligence\\_inquiry/](http://www.pmc.gov.au/publications/intelligence_inquiry/), accessed 21 June 2005.
  - 2 N. Hancock, ‘Intelligence Services Bill 2001’, *Bills Digest no. 11, 2001–02*, Parliamentary Library, Canberra, <http://www.aph.gov.au/library/pubs/bd/2001-02/02bd011.htm>, accessed 23 June 2005.
  - 3 Australian Government, Department of Defence, Defence Imagery and Geospatial Organisation homepage, <http://www.defence.gov.au/digo/about.htm>, accessed 21 June 2005.

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- 4 *ibid.*
- 5 McPhedran, I. 'New Curbs on Spying'. *Herald Sun*, 26 April 2002.
- 6 Senator R. Hill (Minister for Defence), *Blick Report into MV Tampa*, media release, Parliament House, Canberra, 2 May 2002.
- 7 Inspector-General of Intelligence and Security, 'Appendix 2: Tampa Inquiry', *Annual Report 2001-2002*, Canberra. 22 October 2002. <http://www.igis.gov.au/annuals/01-02/annex2.cfm> accessed 25 July 2005.
- 8 Hill, *ibid.* See: also response of Minister for Foreign Affairs, Alexander Downer to a question without notice from Kevin Rudd MP on this matter, 'Defence Signals Directorate', House of Representatives. *Debates*. 13 February 2002, p. 110.
- 9 Inspector-General of Intelligence and Security, *op cit.*, at paragraph 8.
- 10 Section 6, *Telecommunications (Interception) Act 1979*.
- 11 Inspector-General of Intelligence and Security, *op cit.*, at paragraphs 24–25
- 12 *ibid.*, at paragraphs 13–21.
- 13 *ibid.*, at paragraphs 26–33.
- 14 Senator Chris Evans, 'Question Without Notice: Defence Signals Directorate', Senate, *Debates*, 13 March 2002, p. 659.
- 15 Senator Robert Hill (Minister for Defence), 'Question Without Notice: Additional Answers: Defence Signals Directorate', Senate, *Debates*, 21 March 2002, p. 1274.
- 16 G. Barker, 'Limited reform in Flood Report', *Australian Financial Review*, 23 July 2004 at: p. 19; N. James, 'Picking up after Flood', *Defender*, Spring 2004 at pp. 18-21; P. Jennings, 'Unfinished business: Reforming our intelligence agencies', *Policy*, 20(4) 2004-5, pp. 3–8; A. Yates, 'Changes now accelerating in Defence intelligence agencies', *Australian Defence*, May/June 2005 at: p. 12.
- 17 P. Jennings, p. 4
- 18 G. Barker, *op. cit.*, p. 19.
- 19 N. James, *op. cit.*, p. 21.
- 20 C. Banham, 'Agencies get loophole to spy through', *Sydney Morning Herald*, 18 June 2005, p. 7.
- 21 Banham, *op. cit.*, p. 7.
- 22 The Hon. Mr Robert McClelland, MP, [Media release](#), 1 April 2005 at p. 2. Mr Arch Bevis became the new Shadow Minister for Homeland Security on 24 June 2005.
- 23 Australian Democrat Speeches, 'Senator Andrew Bartlett speaks to tabling of document: The Flood Inquiry into Intelligence Services and the pre-Iraq war intelligence', [Media release](#), 3 August 2004 at: p. 2.
- 24 Banham, *op. cit.*, p. 7.

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- 25 *ibid.*
- 26 *ibid.*
- 27 *ibid.*
- 28 Professor George Williams and Ben Saul, 24 March 2005. Submission to Parliamentary Joint Committee on ASIO, ASIS and DSD. Review of Division 3 Part III of the ASIO Act 1979 - Questioning and Detention Powers.
- 29 [Explanatory Memorandum](#), Intelligence Service Legislation Amendment Bill 2005, Item13 at: p. 6.
- 30 *ibid.*, Item 20 at: p.7.
- 31 *ibid.*, Item 28 at: p. 8.
- 32 *ibid.*
- 33 Cynthia Banham, ‘Agencies get loophole to spy through’, *Sydney Morning Herald*, 18 June 2005.
- 34 There may be a qualitative difference between the terms ‘obtain’ intelligence in the functions provisions of the ISA and ‘produce’ intelligence in authorisation section (section 8). These terms are not defined in the ISA. The intelligence sector seems to differentiate between the obtaining of raw information and the production—through processes of organisation and analysis—of intelligence. It is not clear whether the distinction was intended here.
- 35 Explanatory Memorandum, *ibid.*, p. 1.
- 36 *ibid.*, Item 29 at: p. 9.
- 37 The relevant sections are: ASIS section 6(1)(b); DSD – section 7(b); and DIGO new section 6B(d) contained in item 19.
- 38 Section 9(1)(a) of the *Foreign Acquisitions and Takeovers Act 1975* (Cth) defines a person as having a ‘substantial interest’ in a corporation if the person is in ‘a position to control’ not less than 15 per centum of the voting power in the corporation or holds interests in not less than 15 per centum of the issued shares in the corporation.
- 39 Note the IGIS *Annual Report 1999-2000* paras 153-167 relating to a defective character assessment for a detained protection visa applicant. This incident is discussed in detail by Savitri Taylor, ‘Guarding the Enemy from Oppression: Asylum-Seeker Rights Post-September 11.’ *Melbourne University Law Review*, 2002, vol 26, pp. 396–689.
- 40 For example, in the continued lack of response to the Lance Collins report. See further, the Inspector General of Intelligence and Security *Annual Report 2003-2004*, paragraphs 406-419. Online: [http://www.igis.gov.au/annuals/03-04/defence\\_intel.cfm](http://www.igis.gov.au/annuals/03-04/defence_intel.cfm), accessed 22 July 2005. See also ‘*Media Release: Inquiry by Inspector-General of Intelligence and Security.*’ Minister for Defence Robert Hill 9 December 2004 MIN231/04; and Marion Wilkinson ‘Timor intelligence report awaited’, *Sydney Morning Herald*, 13 May 2005.

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