



**AUSTRALIAN
SECRET INTELLIGENCE
SERVICE**

**JOINT SELECT COMMITTEE ON THE INTELLIGENCE SERVICES
INQUIRY INTO THE LEGISLATIVE REFORMS IN THE INTELLIGENCE
SERVICES BILL 2001, THE INTELLIGENCE SERVICES (CONSEQUENTIAL
PROVISIONS) BILL 2001 AND THE PROVISION IN THE CYBERCRIME BILL
2001 RELATING TO ASIS AND DSD – LIABILITY FOR CERTAIN ACTS**

AUSTRALIAN SECRET INTELLIGENCE SERVICE (ASIS) SUBMISSION

Preamble

1. ASIS welcomes the introduction of the Intelligence Services Bill 2001, the Intelligence Services (Consequential Amendments) Bill 2001 and the provision in the Cybercrime Bill 2001 relating to ASIS and DSD – Liability for Certain Acts.
2. While the Intelligence Services Bill also deals with the Defence Signals Directorate (DSD) and the Australian Security Intelligence Organisation (ASIO) to varying degrees, this Submission will only canvas matters relating to ASIS.

Background to the Bill

3. The suggestion that ASIS should be placed on a statutory footing was first made by Mr Justice Hope in 1977 in the Report of the Royal Commission on Intelligence and Security. In 1995 the Commission of Inquiry into the Australian Secret Intelligence Service, which was conducted by the Hon. Gordon J. Samuels AC, QC and Mr Michael H. Codd AC, similarly recommended legislation for ASIS.
4. In making this recommendation the 1995 Commission of Inquiry stated that:

“We consider, however, that the move from executive to legislative authority would add a significant new dimension to the accountability framework, bringing with it qualities of legitimacy and transparency which the Service needs. The enactment of legislation should serve to reassure the public, in a way that statements by the Minister or the Director-General cannot do, that the activities of ASIS are properly authorised and controlled. By defining key elements of the arrangements for control and oversight – involving the Minister, the Director-General and, as we shall recommend, the Parliament itself – the legislation should help to dispel the persistent mythology that ASIS is unaccountable and out of control. None of the other arguments for legislation is as compelling.”
5. The recommendation was endorsed by the then Government and legislation began to be drafted for ASIS. In the intervening period Government decided that aspects of DSD's activities should also be included in legislation. This resulted in the development of an Intelligence Services Bill, dealing with ASIS, DSD and the establishment of a new Parliamentary Joint Committee for ASIO and ASIS.

6. The 1995 Commission of Inquiry said:

“The proposition that secrecy is crucial to the operations of a secret intelligence service is incontrovertible. Since the primary function of ASIS is to collect secret foreign intelligence, it necessarily follows that information about its intelligence collection activities – where, how and by whom they are carried out – must remain secret if the activities are to be viable.”

The Intelligence Services Bill seeks the appropriate balance between transparency and secrecy.

Features of the Intelligence Services Bill 2001

7. The Intelligence Services Bill 2001 has the following key elements. The Bill:

- places the Australian Secret Intelligence Service (ASIS) on a statutory footing;
- articulates the functions of ASIS;
- provides for the amendment of ASIS' functions under very strict conditions;
- makes explicit that ASIS cannot plan for, or undertake, violence or use weapons in carrying out its activities. Para-military activities also continue to be ruled out;
- outlines the levels of accountability under which ASIS operates - from the Parliament, to the Minister for Foreign Affairs, to the Director-General;
 - in so doing it requires written directions be issued by the Minister for Foreign Affairs to the Director-General in relation to the activities of ASIS;
 - these directions are to stipulate those occasions when the Director-General must seek authorisation for the conduct of particular activities;
- reinforces the role of the Inspector-General of Intelligence and Security in his oversight of ASIS;
- sets limits on ASIS' functions – these are only to be performed in the interests of Australia's national security, Australia's foreign relations or Australia's national economic well-being;
- reinforces that ASIS does not have police functions or any other responsibility for the enforcement of the law;
- provides limited liability for ASIS staff and agents overseas;
- provides limited liability for ASIS staff and those who assist ASIS, and those who may be involved in the tasking and direction of ASIS in Australia, in respect of civil and criminal prosecution for activities strictly connected to ASIS' performance of its functions overseas;
- requires the Minister for Foreign Affairs to make written rules for ASIS which protect the privacy of Australian persons;

- establishes a Parliamentary Joint Committee for ASIS (and ASIO). The powers of the proposed ASIO/ASIS Committee will extend further than those of the current Parliamentary Joint Committee on ASIO as it will have responsibility for the examination of the expenditure and administration of ASIS (and ASIO);
- provides protection for the identities of the staff members of ASIS, similar to that afforded to staff members of ASIO under the Australian Security Intelligence Organisation Act 1979.

Principal Legislative Reforms

8. The principal legislative reforms in the Intelligence Services Bill are as follows:

- The representation of the functions of ASIS

9. The bill defines ASIS' functions as:

- the **collection** of foreign intelligence at the direction of the Government - Clause 6(1)(a);
- the **distribution** of this foreign intelligence in accordance with Government requirements – Clause 6(1)(b);
- the conduct of **counter-intelligence** activities through which ASIS protects its intelligence collection work, and contributes to national security, in conjunction with other Australian agencies such as ASIO – Clause 6(1)(c);
- the conduct of **liaison**, to engage authorities in other countries, in furthering Australia's national interests – Clause 6(1)(d);
- the undertaking of **other activities** as the responsible Minister directs, should the need arise, under very limited conditions – Clause 6(1)(e).

10. To so task ASIS to undertake other activities the Minister for Foreign Affairs must consult other Ministers with related responsibilities. These would normally be those Ministers who currently are members of the National Security Committee of Cabinet.

11. In addition, the Minister must be satisfied that arrangements are in place to ensure that there are defined limits to the proposed activity and that acts done would be reasonable. These qualifications are also directly related to the prohibitions mentioned below. Beyond this the Inspector-General of Intelligence and Security (IGIS), who must receive a copy of any amendment to the functions of ASIS as soon as practicable after the direction is given to the Director-General.

- Prohibitions on violence, use of weapons and para-military activities

12. The bill sets out what ASIS cannot employ in the performance of its functions – Clause 6(4) – and rules out violence, the use of weapons or para-military activities. ASIS does not use violence, the threat of violence or weapons in the performance of its functions – ASIS gathers intelligence by non-violent means. This clause also seeks to dispel some of the myths about the Service's activities. The reference to planning means that ASIS cannot engage individuals, groups or other bodies to conduct activities on its behalf which may involve violence, or the use of weapons or para-military activities. The "other activities" function – Clause 6(1)(e) – does not override these prohibitions.

- Ministerial directions and authorisations

13. The Clauses dealing with Ministerial directions and authorisations – Clauses 8 and 9 – in part reflect current Ministerial oversight and approval arrangements. The Directions under Clause 8 will set the parameters for activities undertaken by ASIS. ASIS currently operates under a classified Directive from Government. The bill will take the place of this Directive. Given the need for secrecy to enable ASIS to perform its functions, there will still need to be a classified Direction which specifies those circumstances when the Director-General must seek Ministerial approval or authorisation for certain activities, for example, proposals to vary the place and number of ASIS staff deployed overseas.

14. The authorisations, at the written request of the Director-General, will only be provided by the Minister when the Minister is satisfied that the activities so authorised are necessary for the proper performance of a function of ASIS; that nothing will be done beyond what is necessary for the proper performance of a function of ASIS; and that there are satisfactory arrangements in place to ensure the nature and consequences of acts done will be reasonable. The authorisations must be in writing and specify how long they will be in effect. Under Clause 10, authorisations may be renewed, varied or cancelled and this must be in writing. The IGIS will receive a copy of the Direction from the Minister and be able to inspect the Director-General's request for an authorisation and the Minister's response. As with all aspects of ASIS' activities, the IGIS will audit the legality and propriety of ASIS activities under these authorisations.

15. ASIS may also cooperate, subject to any direction issued by the Minister, with Commonwealth and State authorities and authorities of other countries. Cooperation with authorities of other countries capable of assisting ASIS in the performance of its functions is dependent, however, on ASIS gaining approval from the Minister. This provision is related to ASIS' liaison function. Any such approvals must also be available for inspection by the IGIS.

- Limits on ASIS' functions and activities

16. The bill sets out the framework for what ASIS can and cannot do. It makes clear that ASIS functions at the close direction of Government, in the interests of Australia's national security, Australia's foreign relations and Australia's national economic well-being, and only in so far as those interests are affected by people or organizations outside Australia. ASIS does not carry out police functions or have a law enforcement role. Should ASIS obtain intelligence relevant to serious crime, however, it can communicate that intelligence to law enforcement agencies. Clause 12 reinforces that ASIS cannot undertake any activity unless that activity is necessary for the proper performance of ASIS' functions or authorised or required by or under another Act.

- Limited liability

17. The bill provides for limited liability under civil and criminal law.

18. Clause 14(1) states that a staff member or agent of ASIS is not subject to any civil or criminal liability for any act done outside Australia carried out for the purpose of carrying out the functions of ASIS in relation to the capabilities, intentions or activities of people or organisations outside Australia. These activities are as intended and required by the Government.

19. Clause 14(2) deals with limited civil and criminal liabilities for ASIS staff and those who assist ASIS and those who may be involved in the tasking and direction of ASIS, for certain acts done inside Australia. There are clear and strict conditions that must be met for this limited liability to be provided – they are three-fold and they are linked. As such, there is no blanket immunity from Australian laws for all acts undertaken by ASIS.

20. For the limited liability to come into force the activity **must:**

- be preparatory to, or in support of, or otherwise directly connected with, overseas activities of ASIS, **and**
- involve aiding, planning or attempting to carry out or be directly connected with some other act outside Australia that would be an offence if committed within Australia; **and**
- be done in the proper performance of a function of ASIS.

21. Under Clause 14(2) this limited liability extends beyond ASIS staff as there is a need to provide protection for those who assist ASIS and who task and authorise ASIS' activities. Under certain circumstances, without this protection, individuals including bureaucrats from departments and agencies and Ministers could find themselves in contravention of conspiracy provisions under various Australian laws.

22. In recent years, ASIS has been restricted in its ability to achieve the objectives of Government due to global technological change and laws that have been passed in Australia that can have application overseas. In cases where there was concern that a proposed ASIS activity could raise difficulties under Australian law, ASIS has sought legal advice. Where this advice has indicated that ASIS could be in breach of Australian law if the activity proceeded, ASIS has not undertaken the activity. This has resulted in the loss of intelligence required by Government. It was not the intention of such legislation to inhibit Commonwealth agencies from fulfilling their charter at the behest of the Commonwealth. The Cybercrime Bill 2001 is an example of proposed legislation which has been drafted in response to global technological change and which includes provision for the legislation to have effect outside Australia. Without provision for limited liability under this bill ASIS could be restricted in its ability to achieve Government objectives.

23. The limited liability provision in Clause 14 limits the application of Commonwealth, State and Territory laws in certain circumstances. Such a provision is not new. The controlled operations provisions inserted in the Commonwealth Crimes Act in 1996, for example, give federal law enforcement officers immunity from State drug possession offences, when certain pre-conditions are met.

24. As stated above IGIS audits ASIS' activities and reports on the legality and propriety of ASIS' activities.

25. The limited liability envisaged for ASIS is broadly comparable to that provided for Western counterpart foreign intelligence collectors, bearing in mind their functions and the differing systems governing them.

- Rules to protect the privacy of Australians

26. ASIS does not set out to collect information on Australians and does not have a free rein to collect intelligence information as it sees fit. Nevertheless, Australians may be incidentally mentioned in intelligence. ASIS currently has rules to protect the privacy of Australians which are approved by the National Security Committee of Cabinet and issued to the Director-General by the Minister for Foreign Affairs. These cover collection priorities and practices which ensure that ASIS acts with propriety, and in accordance with the Government's commitment to the protection of Australians' civil liberties and privacy. ASIS is not permitted to report foreign intelligence involving Australians except in some carefully defined circumstances. Such circumstances are infrequent, and safeguards are provided to ensure that the privacy of Australians is not compromised. The rules apply to all forms of foreign intelligence – whether collected by ASIS directly, or provided by another Commonwealth agency or by a foreign liaison service. The rules cover all forms of reporting used by ASIS.

27. The rules proposed in this bill, which will be issued to the Director-General by the Minister, will ensure that Australian citizens and permanent residents are protected. These rules, and ASIS' adherence to them, will be continually monitored by IGIS and reported on in IGIS' annual report.

- Committee on ASIO and ASIS

28. The bill provides for a Parliamentary Joint Committee on ASIO and ASIS. This committee is to review the administration and expenditure of ASIO and ASIS and may review any matter in relation to ASIO and ASIS referred to it by the responsible Minister or a resolution of either House. As a result, the ambit of this proposed Committee, is broader than that of the current ASIO Committee. The ASIO/ASIS Committee is not to consider operational matters, however, or intelligence priorities, targets, activities concerning non-Australian persons or individual complaints. The Committee's functions will be complementary to, but distinct from, the existing oversight functions performed by IGIS and the Australian National Audit Office, which audits all ASIS' financial accounts.

29. The final sections of the bill (Schedule 1, Parts 1, 2 and 3) set out various procedural matters in respect of the operation of the Parliamentary Joint Committee and are largely based upon sections of the ASIO Act which cover the operation of the ASIO Parliamentary Joint Committee. The Committee is not to require the disclosure of operationally sensitive information or information that would or might prejudice Australia's national security or the conduct of Australia's foreign relations. Investigations into matters which relate to operationally sensitive matters are undertaken by the Inspector-General of Intelligence and Security.

30. Given the Committee's powers to examine the expenditure and administration of ASIS (and ASIO) and the sensitivity and classified nature of these matters, the staff supporting the Parliamentary Joint Committee are to be cleared for security clearances to the same level and with the same frequency as ASIS officers. This requirement, under Parliamentary convention, will not apply to members of the Parliament who serve on the Parliamentary Joint Committee.

Other Legislative Reforms

31. Other legislative reforms contained in the Intelligence Services Bill are as follows:

- Establishment of ASIS and the role of the Director-General

32. Part 3, Division 1 of the bill provides for the establishment of ASIS on a statutory basis and its continuation in existence. It also sets out the way in which the Director-General of ASIS is appointed, lines of control and accountability and sets in place arrangements for the Leader of the Opposition in the House of Representatives to be consulted on the appointment of the Director-General and to be briefed about ASIS.

- Administrative provisions relating to the Director-General

33. Part 3, Division 2, provides the administrative provisions concerning the Director-General of ASIS – period of appointment, remuneration arrangements, resignation, termination, the circumstances where an acting Director-General may be appointed, ban on outside employment, the requirement for the Director-General to disclose his interests, and delegations.

- Matters relating to the staff of ASIS

34. The employees of ASIS are employed under written agreements with the Director-General. While they are not employed under the Public Service Act 1999, under the bill the Director-General must adopt the principles of the Public Service Act 1999 in relation to the staff of ASIS to the extent they are consistent with the effective performance of ASIS' functions. This Part of the bill mirrors current personnel and administration arrangements for the staff of ASIS.

35. One of the matters considered by the Samuel's Commission of Inquiry was the handling of staff grievances. ASIS changed its grievance procedures in the light of the Inquiry. The bill enshrines that practice in legislation. This includes provision for an external grievance panel. ASIS appointed an external grievance panel Chairman in 1996 who continues in this position.

- Protection of ASIS information

36. To undertake its work, ASIS needs to ensure that information concerning its activities is appropriately protected. To do otherwise would be to negate the agency's effectiveness. Individuals employed by ASIS have a responsibility to protect the information to which they are given access. Part 6 of the bill deals with the protection of ASIS information by those who are, or who have been, staff members or working under a contract with ASIS. Clause 39 outlines the offence that would be committed by such a person if information was released without the approval of the Director-General.

- Protection of the identity of ASIS staff

37. Similarly, it is vital that the identities of ASIS staff members are protected. The revelation of the identity of an ASIS staff member could place individuals at risk. Clause 41 deals with the protection of the identity of ASIS staff other than the Director-General. This is

similar to the protection already afforded to the staff of ASIO under the Australian Security Intelligence Organisation Act 1979.

- Provision of an annual report

38. ASIS currently provides a classified Annual Report to the Minister for Foreign Affairs. This requirement is replicated in the bill. This Annual Report is also made available to other members of the National Security Committee of Cabinet.

INTELLIGENCE SERVICES (CONSEQUENTIAL PROVISIONS) BILL

39. The Consequential Provisions Bill associated with the Intelligence Services Bill contains the amendments that flow from ASIS being placed on a statutory footing. It also caters for changes necessary to accommodate the establishment of a Parliamentary Joint Committee and the disbanding of the current ASIO Committee. A series of transitional provisions are included in the bill for this purpose.

40. Importantly, however, the bill also encapsulates a number of changes to the Inspector-General of Intelligence and Security Act 1986 which emphasise the role of the Inspector-General. The effect of the repeal of subsection 19(2) is to remove any restriction on the Inspector-General's access to agency premises.