



Community and Public Sector Union

9 March 2018

Committee Secretary

Foreign Affairs, Defence and Trade Committee Department of the Senate
PO Box 6100
Parliament House
Canberra ACT 2600
Australia
by email: fadt.sen@aph.gov.au

Dear Committee Secretary

Re: *Intelligences Services Amendment (Establishment of the Australian Signals Directorate) Bill 2018*

The Community and Public Sector Union (CPSU) welcomes the opportunity to make a submission to the inquiry into the *Intelligences Services Amendment (Establishment of the Australian Signals Directorate) Bill* on behalf of CPSU members. As the key union representing Australian Public Service employees in Department of Defence, our submission draws directly from the knowledge, experience and concerns of CPSU members.

This submission principally relates to the establishment of the new body, how it deals with staff, and concerns to retain APS mobility arrangements and maternity leave entitlements for ASD employees. These issues are outlined below.

OVERVIEW

The Bill seeks to separate the Australian Signals Directorate (ASD) from the Department of Defence and create it as an independent statutory authority. It would have its own staffing powers and not employ employees under the *Public Service Act 1999*.

There is strong staff support for ASD's transition to a Statutory Agency. The transition is widely viewed a necessary step in repairing and rebuilding the organisation's capability and will hopefully provide it with adequate resourcing and support to effectively serve the public.

The CPSU believe that staff need to be able to consult and genuinely negotiate on their employment arrangements. The new ASD needs to have the right pay and conditions to help recruit and retain the right staff at the levels needed. It will also allow it to better perform the broader intelligence and cyber-crime roles the organisation is increasingly tasked with.

Notwithstanding broad staff support for a separate and independent Australian Signals Directorate, CPSU members have expressed some concerns and reservations about how their terms and conditions of employment will be set under the proposed Bill. The Bill contains some omissions regarding how staff terms and conditions will be treated and the CPSU recommends the Bill should be appropriately amended.

REBUILDING CAPACITY OF THE ASD

The Independent Review

In June 2017, the Report of the Independent Intelligence Review recommended that ASD become a statutory authority within the Defence portfolio.

The review noted:

“Australia’s intelligence agencies are facing a range of challenges relating to the recruitment, retention, career management and training of their workforces. These challenges derive partly from the rapid evolution of technology, the demand for technical expertise in the private sector and the long lead times in security clearance processes. They also reflect the **pressures on staff numbers** as well as work cultures, career structures and **public sector remuneration practices**.”

“These challenges are particularly demanding where highly specialised and technologically expert work forces are involved. ASD is one such organisation. **ASD has experienced a net reduction in its workforce over recent years**. While the 2016 Defence White Paper has provided for significantly increased staffing numbers for Defence-intelligence related capabilities over the next decade, and for ASD in particular, the net reduction in ASD staff over recent years has presented **significant challenges**.”¹

While the points below will not necessarily impact the content of the draft legislation, we feel it is important in explaining the strong staff support for ASD’s transition, and the desire for the transition to not be delayed past 1st July 2018.

Effects on staffing, morale and remuneration from APS bargaining

The results of the Independent Intelligence review were not a surprise to ASD staff. To those who work for the organisation it was no secret that the organisation was struggling to retain staff, and maintain a level of staffing capacity (including support staff and specialists) that allowed the organisation to accomplish its goals. Over the last few years, ASD staff have felt unsupported by

¹ Commonwealth of Australia, Department of the Prime Minister and Cabinet, 2017 Independent Intelligence Review

Government and increasingly under pressure. This has occurred for various reasons described below:

- In November 2013, a recruitment freeze was initiated across the Australian Public Service, including Defence. ASD was not quarantined from this freeze and it was not lifted until 2015.
- In mid-2014, the Defence Enterprise Collective Agreement (2012-2014) expired. Since that time negotiations were conducted for a new Enterprise Agreement under the Australian Government Public Sector Workplace Bargaining Policy 2014 and its amended form, the Workplace Bargaining Policy 2015. Both these policies took an aggressive stance to bargaining by introducing arrangements that restricted bargaining outcomes, with new and onerous restrictions on pay, conditions, rights at work and agreement content. The effect of these policies was protracted negotiations, three votes of all staff which rejected proposed enterprise agreements and protected industrial action.
- By 2015, with no new workplace agreement (or payrise) in sight, challenges had started to develop within ASD. Morale began to decline as staff were stuck in roles with no opportunity for movement or promotion. Staff were working additional long hours, mostly unpaid, to ensure key outcomes were met. Cost of living increases and no corresponding shift in pay meant staff were struggling to make ends meet and left some questioning whether they could continue working at ASD.
- By 2016, staff began to leave the organisation in greater numbers, many with lengthy experience and speciality going to higher paying jobs in other Government Departments or into private enterprise. There were efforts to try and stem the loss of staff, through the granting of additional Building Defence Capability Payments (BDCPs) to individuals and groups of employees. This had some impact, however the application of BDCP arrangements across the organisation was not consistent, which further impacted morale and retention.
- By 2017, staff began to see light at the end of the tunnel. Management boldly supported several staff care initiatives. Small numbers of new staff, recruited after the recruitment freeze was lifted, started to trickle through.
- In mid-2017 the Independent Intelligence Review recommended ASD become a statutory authority, which staff believed would assist in helping the recruitment, capacity and financial challenges. On the 4th offer, staff voted up a new Enterprise Agreement, and a pay rise (albeit significantly below inflation) began to trickle through.
- A new Defence Enterprise Agreement was finally voted on and approved by the Fair Work Commission in August 2017. The effect of this course of bargaining was a de facto pay freeze of four years since the last general payrise provided by the 2012-2014 Enterprise Agreement.

The transition to a Statutory Agency could provide ASD the chance to repair, preserve and grow capability to serve the public. With the Director-General of ASD reporting directly to the Minister for Defence, it will likely be easier for ASD's unique organisational requirements to be recognised. It *should in principle* enable the ASD to avoid damaging recruitment freezes and allow more flexibility in attracting and retaining staff. It will allow for more flexibility in structuring work-streams in a way that supports core business, staff development and career progression.

The government's new Workplace Bargaining Policy 2018

However, CPSU members remain concerned that the new Workplace Bargaining Policy 2018 will continue to apply to APS and non-APS entities and requires ASD take an aggressive approach in workplace negotiations by imposing wages caps, limiting enhancements to conditions and other

restrictions. CPSU members do not believe such an approach to the treatment of staff remuneration and conditions is conducive to the ASD fulfilling its role and would hurt staff. The policy could hinder rebuilding organisational capabilities.

HOW THE BILL DEALS WITH STAFFING

CPSU members and staff have a proud history of working collaboratively with ASD management. ASD Management have a demonstrated approach of collaboration and consultation with regards to major organisational change, which continues to date. The CPSU expects these traditionally positive working relations between management the union and staff will continue under the new ASD.

Under the Bill, staff will no longer be members of the APS. Rather, staff will be employees of a non-APS Government statutory authority. Some protection is offered by the proposed legislation which requires the Director-General of ASD to adopt principles of the *Public Service Act* in relation to employees of ASD, to the extent to which the Director-General considers the principles 'are consistent with the effective performance of the functions of ASD.' The CPSU supports the Bill requiring the Director-General to adopt the APS Values and Employment principles of the *Public Service Act*.

Transitional provisions

Regarding terms and conditions of employment, the Bill's Transitional provisions continue the employment of existing ASD staff in the new ASD, preserving their accrued entitlements and continuity of service. This would logically cover annual leave, Long Service Leave, and individual arrangements. However, CPSU members are concerned that the new ASD should adopt the same consultative and representative arrangements and policies as those which apply in Defence, given such arrangements are not likely covered by the Bill.

The Bill also continues for existing employees the written agreements they were employed under prior to 1 July 2018. The provisions go on to say these arrangements are subject to any determination made by the Director-General. The Bill provides for the Director-General to determine terms and conditions of employees, with consultation. While the CPSU has received welcome assurances from management regarding working conditions, consultation and employee representation, the CPSU remains concerned such determinations only require consultation, not agreement.

Further it would be somewhat concerning and anomalous if these provisions were viewed as allowing the Director-General to override common law contracts or the Defence Enterprise Agreement negotiated and agreed by staff. The CPSU would not support such a position. It is contrary to usual employment principles and how such arrangements work under the *Public Service Act*.

Ordinarily, movements of APS employees outside the APS, such as here where a new statutory authority is being established, are effected under s72 of the *Public Service Act 1999* as a machinery of government move. It is also a transfer of business under the *Fair Work Act 2009*, entailing the new employer and the transferring employees being covered by the current Defence Enterprise Agreement. These are important protections for staff terms and conditions.

However, the Bill's Transitional provisions do not clearly specify that that the Defence Enterprise Agreement will apply and that this is a Machinery of Government move under s72 of the *Public Service Act 1999*. The CPSU recommends, for abundant caution and to put beyond any lingering staff

concerns, that the Bill state the Defence Enterprise Agreement will transfer to the employees of the new ASD and the move will be dealt with under s72 of the *Public Service Act 1999*.

MATERNITY LEAVE AND MOBILITY

Staff mobility and redeployment

As APS employees, ASD staff currently have the advantage of employment mobility between Department of Defence and other APS agencies. This includes the ability to apply for jobs in, and to transfer at level to, another APS Agency (including for some positions that are only available for current APS employees to apply for), transfer to an APS agency in the event of a promotion (rather than resign and be re-engaged), and the entitlement to seek redeployment in another APS agency in the event they are declared potentially excess before they are made redundant.

As a career based service comprising more than 100 agencies, mobility rights for employees are quite important in terms of job security and career advancement. CPSU members, many of whom are based in Canberra, are very concerned about losing these mobility rights. There is a concern that this could affect their careers as it will make it more difficult to apply for and get jobs within the APS, especially in a redundancy situation.

The Bill appears to address the issue of voluntary moves from the new ASD back to the APS, such as situations of transfer or promotion, and the CPSU welcomes this. However, such employees would still not have the entitlements provided to excess employees, like access to the redeployment register. The CPSU seeks amendments to the Bill that would retain mobility rights for employees to be able to access the mechanisms provided by the APS Redeployment Policy if they are declared excess or potentially excess.

Paid Maternity Leave

The *Maternity Leave (Commonwealth Employees) Act 1973* (the *Maternity Leave Act*) provides a number of entitlements to women in the APS. The most significant of these is 12 weeks paid parental leave at full pay. This is in addition to the paid leave available under the Paid Parental Leave scheme that applies more broadly.

Section 5 of the *Maternity Leave Act* states that the Act applies to persons employed under the *Public Service Act 1999* and other persons employed by the Commonwealth and Commonwealth authorities as prescribed by the Regulations. Schedule 1 of the *Maternity Leave (Commonwealth Employees) Regulations 2017* (the *Regulations*) sets out the bodies corporate that are prescribed authorities for the purposes of the Act which does not include the new ASD. As employees will no longer be employed under the *Public Service Act*, unless they are captured by s5 or, prescribed in the Regulations, they will lose their statutory entitlement to 12 weeks paid maternity leave under the *Maternity Leave Act*.

The CPSU suggests that the clearest way to preserve this entitlement is by a consequential amendment to the *Maternity Leave Regulations* that would include employees the new ASD as a prescribed authority for section 5 of the *Maternity Leave Act*.

Yours sincerely,

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CPSU Deputy Secretary