



**AUSTRALIAN SIGNALS DIRECTORATE
DEPARTMENT OF DEFENCE**

**SUBMISSION TO THE
SENATE FOREIGN AFFAIRS, DEFENCE AND TRADE
LEGISLATION COMMITTEE**

**Inquiry into the Intelligence Services Amendment
(Establishment of the Australian Signals Directorate) Bill 2018**

March 2018

Introduction

1. The Intelligence Services Amendment (Establishment of the Australian Signals Directorate) Bill 2018 (the Bill) implements the recommendations of the 2017 Independent Intelligence Review to establish the Australian Signals Directorate (ASD) as an independent statutory agency within the Defence portfolio reporting directly to the Minister for Defence, as endorsed by Government. This Bill also includes a number of other related amendments following the establishment of ASD.
2. On 7 November 2016, the Prime Minister, the Hon Malcolm Turnbull MP, announced that Mr Michael L'Estrange AO and Mr Stephen Merchant PSM would jointly undertake an independent review of the Australian Intelligence Community. The timing of the review was consistent with the 2011 Independent Review of the Intelligence Community recommendation that periodic review occur every five years.
3. On 18 July 2017, the Prime Minister released the unclassified version of the 2017 Independent Intelligence Review (the Review) report. The Review made 23 recommendations in relation to the structural, legislation and oversight architecture of the intelligence community, including the establishment of ASD as an independent statutory agency within the Defence portfolio.

The role of the Australian Signals Directorate

4. ASD has been in the signals intelligence business for over 70 years delivering decisive information advantages and security to the Australian Defence Force (ADF) and Government through some of the darkest and most perilous times in Australia's history. During World War II, Signals Intelligence collected and reported by ASD's predecessor Central Bureau often made the difference between victory and defeat and ASD remained at the forefront of national security throughout the Cold War. Now, in the face of the new battles against terrorism and securing our networks from cyber-attacks, the men and women of ASD continue to solve some of the most complex technical problems imaginable to keep Australia safe.
5. ASD remains first and foremost a Defence warfighting capability, and will remain in the Defence portfolio, but it now has a broader national role. Throughout its history ASD has continually evolved its technical capabilities and mission focus to ensure it remains at the forefront of delivering consequential intelligence and security outcomes for the Australian Defence Force and Government. Today, ASD is a truly national asset whose purpose can be described as *'Defend Australia from global threats and advance our national interests through the provision of foreign signals intelligence, cyber security, and offensive cyber operations as directed by Government.'*
6. More than just being a traditional signals intelligence agency, ASD has become an analytic engine that helps to drive intelligence outcomes across the national security community. It provides critical cyber security advice and support to protect the integrity and resilience of the vital networks of both Government and industry and provides world-leading offensive cyber capabilities to give the ADF a critical edge in the cyber battlespace.
7. ASD's famous mission statement *'Reveal their Secrets, protect our own'* neatly demonstrates the core signals intelligence and security function of the agency. However, it now only tells part

of the contemporary story of ASD which now sits across the three domains of *Informing*, *Protecting* and *Disrupting*. As Australia's cryptologic agency ASD:

- a. Informs through covertly accessing information not publicly available (signals intelligence);
 - b. Protects by comprehensively understanding the cyber threat. The agency provides leading advice and proactive assistance that shapes the environment and influences others to ensure governments, business and the community are able to better manage cyber security risk; and
 - c. Disrupts by applying our offensive cyber capability to support military operations, counter terrorism activities, and countering cyber espionage and serious cyber enabled crime.
8. ASD's mission continues to see the agency operate in the slim area between the difficult and the impossible. In this context, while ASD remains a technology-heavy business, its critical edge has always come from its ability to recruit the best and brightest people Australia has to offer and to employ those people in innovative ways to out-think and out-imagine our some of the toughest problems imaginable. In recent years, recruiting and retaining those people within a highly competitive private and public sector market place has become increasingly difficult.
9. Critically, within the public sector ASD's base salary ranges have not kept pace with our domestic intelligence partners. Similarly, the generic recruitment processes and career structures offered by the Australian Public Service have also made it difficult for ASD to compete for staff in what is now a global market for the types of information, technology and engineering workers needed by ASD. Those same factors have also meant that ASD is unable to offer existing staff the flexible career paths that current graduates, in particular, demand.
10. It was in this context that the 2017 Independent Intelligence Review wrote, and the Government endorsed, that:

"Our main focus in relation to this issue has been on how ASD is best structured to meet the range of its ongoing and evolving support for the ADF, its expanding interactions with other intelligence agencies and its developing national cyber security responsibilities. In our view, ASD will be better placed if it remains in the Defence portfolio but if it is in a position to operate with greater independence from the Department's requirements, especially those in relation to its capacity to recruit, retain, train, develop and remunerate its specialist staff.

For ASD, the option of continuing to operate within the Department of Defence's employment framework, even with some specific exemptions, is not the most effective way forward. It would increase the risk of losing additional critical talent, skills and capabilities. ASD needs to be more in control of its own destiny." [paragraphs 4.73 and 4.74]

11. The Bill before the parliament gives effect to the Government's stated intent that ASD continue to evolve its operations and remain at the leading edge of national security capabilities. For ASD, becoming an independent statutory agency enables the agency to become the flexible and

agile organisation it needs to be, particularly in the recruitment and retention of its staff, in order for it to continue to be able to deliver on its national security mandate.

The provisions of the Intelligence Services Amendment (Establishment of the Australian Signals Directorate) Bill 2018

12. In broad terms, the Bill will separate ASD from the Department of Defence, and establish it as an independent statutory agency within the Defence portfolio under the control of the Director-General of ASD.
13. Importantly, the Bill does not seek to alter the indispensable relationship that ASD has with the Department of Defence and ADF. The Bill also does not diminish the primacy of its principal foreign signals intelligence responsibilities, as well as the use of its offensive cyber warfighting capabilities and cyber security expertise, in critical support of military operations. Indeed, through the implementation of the recommendations of the Independent Intelligence Review, ASD's functions to provide this support to military operations remain unchanged.
14. More broadly, and separate to the Bill currently before the parliament, at an administrative level ASD and the Department of Defence will continue to rely on the provision of corporate shared services to each other. This includes services such as human resources, financial management, estate and infrastructure, ICT and security. Except in a very small number of necessary cases, ASD will not be seeking to replicate corporate functions and the underpinning ICT architecture for these, and similarly ASD will not be ceasing the shared service security functions it provides to the Department.
15. Underpinning the closeness and the enduring nature of the relationship between ASD and the Department of Defence, and consistent with recommendation 6 (c) of the Review, the agency now has for the first time a Principal Deputy Director – to become the Principal Deputy Director-General with the passage of the Bill – that is filled by a Three Star military officer. The creation of this position ensures that after 1 July 2018 ASD will continue to support Defence and meet the necessary requirements across the range of warfighting operations and capability delivery.
16. In addition to preserving ASD's relationship with Defence, the Bill also achieves the Government's requirements for the agency to take on broader responsibilities. The Bill will also amend ASD's functions to allow the Australian Cyber Security Centre (ACSC) to cooperate with the persons and bodies listed in the Act and to operate within ASD, in accordance with recommendation 3 (b) of the Review. In effect, this will allow ASD to advise and assist businesses and the community directly.
17. Related to the transition of ACSC, the Computer Emergency Response Team – Australia (CERT) and its functions relating to cyber policy and security, will also be transferred from the Attorney-General's Department to ASD. CERT was established in 2010 as the national response team, and is the primary government contact point for major Australian businesses in relation to matters involving cyber security.
18. Specifically, the Bill implements the recommendations of the Review by:

- a. amending ASD's functions to include providing material, advice and other assistance to any person or body listed in the Act (rather than Commonwealth and State authorities only) on matters relating to the security and integrity of information that is processed, stored or communicated by electronic or similar means, which will allow the ACSC to liaise with industry;
 - b. amending ASD's functions to include preventing and disrupting cyber-enabled crime. This section will provide ASD with a function to prevent and disrupt, by electronic or similar means, the use of information and communication technologies to commit or facilitate serious crime by people or organisations outside Australia. Serious crimes, such as child exploitation and illicit narcotics, will be captured by this new function;
 - c. establishing ASD on a statutory basis, and providing provisions for the appointment of the Director-General of ASD to control ASD and its staff;
 - d. requiring the Director-General of ASD brief the leader of the Opposition about matters relating to ASD;
 - e. giving the Director-General of ASD powers to employ persons as employees of ASD under this Bill (outside the framework of the *Public Service Act 1999*);
 - f. amending other legislation as appropriate to replace references to 'Director of ASD' with 'Director-General of ASD', and to remove references to the Department of Defence.
19. The Bill also includes an additional function for ASD, to protect the specialised technologies and capabilities acquired in the performance of its other functions. To carry out its functions to obtain intelligence, provide assistance to the Australian Defence Force, to assist other Commonwealth and State authorities, and to combat cybercrime, ASD uses specialised tools. ASD needs to be able to protect those tools to ensure their ongoing utility and protect Australia's national interests.
20. In relation to the employment of staff, ASD will operate outside of the *Public Service Act 1999* (Public Service Act) framework. This will provide ASD with greater flexibility to recognise the skills of its specialised workforce. This structure will reflect the need to retain those individuals with highly sought after skills, such as those with STEM (science, technology, engineering and maths) qualifications. Mobility across the public sector is also recognised as an important tool to bring in critical talent into ASD, but to also enable the further development of skills in different environments. To support this, the Bill includes the specific provision that will allow for the transfer of employment from ASD to the Australian Public Service. As part of these arrangements, the prior service and accrued leave balances of staff within the Australian Public Service and ASD will continue to be recognised and ASD staff will continue to be able to access public sector superannuation schemes. This amendment pursues the legitimate objective of providing ASD with greater flexibility to recruit, retain, train, develop and remunerate its specialist staff, in accordance with the recommendations of the 2017 Independent Intelligence Review.

21. As recognised by the Review, for ASD the option of continuing to operate within the Public Service Act employment framework, even with exemptions, is not the most effective way forward to ensure ASD can continue to deliver the outcomes required. It would increase the risk of further losing the critical skills needed to successfully perform this task and not address the need to improve ASD's position in the employment market to attract the highest quality candidates.
22. In seeking to achieve this for ASD the Government also recognises that ASD, while stepping outside of the Australian Public Service, will still be operating in close proximity to many public service agencies, and the Public Service Act provides several important protections for staff. In this context, an important safeguard has been included in the Bill to ensure that the new ASD employment framework would not be arbitrary. Under section 38F, the Director-General of ASD must adopt the principles of the Public Service Act in relation to employees of ASD to the extent to which the Director-General considers they are consistent with the effective performance of the functions of ASD. This has the effect of protecting ASD employees, similar to the protection received by public servants employed under the Public Service Act.
23. There are also additional measures to safeguard workers.
24. First, the *Fair Work Act 2009* (Fair Work Act) will continue to apply to ASD employees and provide them with an avenue for redress for their employment-related grievances. The Fair Work Act provides protections of employee rights, including:
 - a. workplace rights as currently defined by the Fair Work Act;
 - b. the right to engage in industrial activities;
 - c. the right to be free from unlawful discrimination; and
 - d. the right to be free from undue influence or pressure in negotiating individual arrangements.
25. The Bill before the parliament does not extinguish these rights for the staff of ASD. Additionally, the right of employees to be members of industrial associations and the ability to engage in industrial activities will continue, as well as have their workplace interests represented by industrial or employee advocates.
26. In this regard, in addition to rights for staff to be members of industrial associations, ASD continues to seek to augment this through the use of its Joint Staff Consultative Group. The objectives of this Group are to:
 - a. provide a forum in ASD for consultation between representatives of management, employees, and where employees choose, their representatives (including unions) on workplace issues affecting people employed in ASD;
 - b. investigate issues affecting people employed in ASD and develop proposals when necessary; and

- c. improve understanding between management, employees, and where employees choose, their representatives (including unions) of workplace issues within ASD.

27. Recent matters considered and actioned by the Joint Staff Consultative Group include:

- a. financial and human resource planning;
- b. organisational objectives, including the structure of the workplace and the physical working environment;
- c. personnel policies and practices;
- d. ASD staff development and training;
- e. equity and diversity issues; and
- f. workplace relations policies and practices.

28. The Joint Staff Consultative Group meets quarterly, but additional meetings can be scheduled for particular time sensitive items.

29. Importantly, the Group has engagement from ASD's most senior leaders; it is chaired by one of the agency's Deputy Directors, and the other members of ASD's senior leadership are invited to participate as well. The broader membership of the committee includes human resource representatives, as well as representatives from across the internal workforce and union delegates.

30. As ASD transitions to an independent statutory agency it is intended that greater use is made of the Joint Staff Consultative Group, particularly in relation to the consultation of future employment offers and the consideration of new conditions of service. To this end, ASD wants to ensure that employee representatives continue to have a strong awareness of the Group, its purpose and feel empowered to engage and contribute to its activities.

31. In addition to the continuation of the protections afforded to staff by the Fair Work Act, the Inspector-General of Intelligence and Security (IGIS) provides additional safeguards not normally afforded to workers outside of the intelligence community. Under this Bill the IGIS will be given powers to investigate complaints regarding employment-related grievances from ASD employees. At present, the IGIS is not able to investigate these complaints, and ASD employees can seek redress through the Public Service Commissioner or the Merit Protection Commissioner. After 1 July 2018, ASD employees can bring their grievances to the IGIS in the same way as for employees of the Australian Security Intelligence Organisation and the Australian Secret Intelligence Service.

32. The 2017 Independent Intelligence Review was clear on the need for ASD to adopt a different approach to management of its workforce capability. The provisions of the Bill give important new flexibility to the Director-General of ASD in how they choose to structure their workforce. Importantly, the move to operate outside of the Australian Public Service will remove the workforce caps applied to the agency. In this regard, while the Director-General will still be

required to operate within their workforce budget, the size and composition within this budget will be an internal management decision. In turn this allows the Director-General to recruit and structure the workforce to the appropriate employment levels and skill requirements without reference to set limits, such as the restrictions on the number Senior Executive Service staff and Full Time Equivalent staff limits for Defence. Similarly, the move to operate outside of the Australian Public Service for ASD will also insulate the agency from broader Government consideration and decisions regarding the overall size and structure of the public service.

33. Operating outside the Australian Public Service also provides the flexibility to design over time new employment categories and career pathways that are in addition to the standard public service structures. This will enable ASD to more directly market itself to the types of trades and skills it needs to attract, and highlight the skill development and career progression that can occur within these streams of work in the agency.
34. It is recognised that ASD operates within a highly competitive employment market, even within the Australian security and intelligence community. There are several other agencies that also offer rewarding careers to people with many of the skills and attributes ASD seeks to engage. Overall, in recognition of the environment ASD seeks to recruit from, the Bill effectively gives the same flexibility to the Director-General of ASD for the recruitment and retention, and establishing workplace agreements, as the Australia Security Intelligence Organisation and the Australia Secret Intelligence Service.
35. Importantly, the Bill also strengthens the oversight and transparency arrangements for ASD. As an independent statutory agency ASD will have new corporate reporting obligations, in particular through meeting the requirements of *Public Governance, Performance and Accountability Act 2013*. ASD will not be seeking exemptions from sections of this Act, and in turn it will have its own part within the Defence Portfolio Budget Statements, which will report at an unclassified level on the agency's resourcing and approach to meeting the Government's direction for the agency's priorities. This will also be supported by both unclassified and classified Corporate Plans. ASD will also attend Senate Estimates hearings and address questions, not as part of the Department of Defence, but as a separate statutory entity within the portfolio. ASD will similarly be required to publicly report on its performance through the release of an Annual Report.
36. The Parliamentary Joint Committee on Intelligence and Security will continue to have an important role in inquiring into and having oversight for ASD's administration and resourcing. In this oversight role ASD will continue to provide important information on many of the agency's sensitive capabilities. As part of this the Committee will also continue to receive a classified Annual Report on ASD's resourcing and performance.
37. The Inspector-General for Intelligence and Security is a critically important element of Australia's oversight arrangements for the intelligence community to ensure that all agencies are operating legally and with propriety. Through the implementation of recommendation 22 of the Independent Intelligence Review, the Office of the Inspector-General for Intelligence and Security will have its resourcing significantly increased to ensure that it can continue its important work overseeing intelligence functions as the scale and complexity of the operations of agencies like ASD increase.

Conclusion

38. ASD is a vital member of the national security community, operating across the full spectrum of operations required of contemporary Signals Intelligence agencies: intelligence, cyber security and offensive cyber operations in support of Government and the ADF. The Bill ensures that ASD will now have the appropriate statutory functions to ensure it is well placed to support the full spectrum of operations expected of it. The Bill will also ensure that ASD can meet its national responsibilities for combatting cyber-enabled crime, as well as the provision of advice to the private sector and public in how to safely work within the cyber connected global economy.
39. People remain ASD's most vital capability and ASD needs to change the way in which it recruits and manages its highly skilled and highly mobile work-force if it is going to maintain its critical edge. The provisions in the Bill give ASD the necessary flexibility, while maintaining the existing strong workplace safeguards, to be agile in its approach to recognising its existing staff and those that it seeks to recruit.
40. ASD also offers the committee to receive a briefing from the agency to further detail the nature of the work the agency undertakes and advise how the Bill will directly support these activities.