

Chapter 1

Referral

1.1 On 15 February 2018, the Intelligence Services Amendment (Establishment of the Australian Signals Directorate) Bill 2018 (the bill) was introduced into the House of Representatives.¹

1.2 On 15 February 2018, pursuant to the Senate Selection of Bills Report, the provisions of the bill were referred to the Senate Foreign Affairs, Defence and Trade Legislation Committee for inquiry and report by 21 March 2018.²

Background to the bill

1.3 Commissioned by the Commonwealth Government in November 2016, the 2017 Independent Intelligence Review (the Review) focused on the Office of National Assessments, the Australian Secret Intelligence Service (ASIS), the Australian Security Intelligence Organisation (ASIO), the Australian Signals Directorate (ASD), the Defence Intelligence Organisation and the Australian Geospatial-Intelligence Organisation.³ The Review examined:

...the relationship and engagement between those agencies and the members of the broader National Intelligence Community, including the Australian Federal Police, the Department of Immigration and Border Protection, the Australian Criminal Intelligence Commission, and the Australian Transaction Reports and Analysis Centre.⁴

1.4 The Review made a series of recommendations including that:

- ASD become a statutory authority within the Defence portfolio;
- ASD's priority role of supporting Australian Defence Force (ADF) capabilities be clearly reaffirmed and strengthened in new legislation;
- ASD's legislative mandate be amended to explicitly recognise its national responsibilities for cyber security, including the provision of advice to the private sector; and
- ASD take formal responsibility for the Australian Cyber Security Centre.⁵

1 House of Representatives, *Votes and Proceedings*, No. 99—15 February 2018, p. 1387.

2 *Journals of the Senate*, No. 87— 15 February 2018, p. 2739; Selection of Bills Committee, *Report No. 2 of 2018*, 15 February 2018, p. [3].

3 The Hon Malcolm Turnbull MP, Prime Minister, 'Independent Intelligence Review', *Media Release*, 7 November 2016.

4 Commonwealth of Australia, *2017 Independent Intelligence Review*, June 2017, p. 11.

5 Commonwealth of Australia, *2017 Independent Intelligence Review*, June 2017, p. 8.

Evolving role of the Australian Signals Directorate

1.5 ASD (formerly the Defence Signals Directorate⁶) is an intelligence agency in Defence. As noted in the Explanatory Memorandum (EM) for the bill:

ASD has evolved from a primarily Defence signals collection agency after World War II to become Australia's national signals intelligence authority for collecting intelligence, supporting the military, and undertaking cyber security and effects operations through the application of advanced technologies.⁷

1.6 It was emphasised that 'ASD is now a genuinely national asset, playing a much broader role than that defined by its previously exclusive Defence focus'.⁸

Purpose of the bill

1.7 According to the second reading speech this government bill:

...implements the recommendations of the 2017 Independent Intelligence Review and fulfils the government's commitment to establish the Australian Signals Directorate as an independent statutory agency within the Defence portfolio reporting directly to the Minister for Defence.⁹

Conduct of the inquiry

1.8 Details of the inquiry were placed on the committee's website at: www.aph.gov.au/senate_fadt. The committee also contacted a number of organisations to notify them of the inquiry and invite submissions by 9 March 2018.

1.9 The committee received four submissions to the inquiry which are listed at Appendix 1. The committee decided to prepare its report on the basis of submissions received and available information. The committee thanks those who made submissions.

Summary of the bill

1.10 As noted above, the bill will separate ASD from Defence and establish it as an independent statutory authority within the Defence portfolio reporting directly to the Minister for Defence.¹⁰

1.11 ASD's functions will be expanded to include the Australian Cyber Security Centre (ACSC)¹¹ and allow the ACSC to cooperate with persons and bodies listed in the *Intelligence Services Act 2001* (Intelligence Services Act). ASD noted that 'in

6 Renamed ASD in May 2013.

7 Explanatory Memorandum (EM), [p. 3].

8 EM, [p. 3].

9 The Hon Michael McCormack MP, *House of Representatives Hansard*, 15 February 2018, p. 12.

10 EM, [p.4].

11 Currently the joint responsibility of the Attorney-General and the Minister for Defence.

effect, this will allow ASD to advise and assist businesses and the community directly'.¹²

1.12 The bill will also enable the transfer of the Computer Emergency Response Team (CERT) and its functions relating to cyber policy and security from the Attorney-General's Department (AGD) to ASD.¹³

1.13 The bill will create new functions for ASD including: to prevent and disrupt, by electronic or similar means, cybercrime by people or organisations outside Australia, and to protect the specialised technologies and capabilities acquired in the performance of its other functions.

1.14 ASD will be under the control of the Director-General of ASD and the employment of staff will operate outside the *Public Service Act 1999* (Public Service Act) framework.

Key provisions

1.15 Part 1 of the bill outlines the main amendments of the bill and notes that they reflect the recommendations of the 2017 Independent Intelligence Review in relation to the ASD. Part 2 of the bill lists the Acts that will require amendments to reflect the establishment of ASD as a statutory agency and the establishment of the office of the Director-General of ASD. Part 3 covers transitional provisions.¹⁴

Maintaining the strong relationship between ASD and Defence

1.16 ASD noted that the bill 'does not seek to alter the indispensable relationship that ASD has with the Department of Defence and the ADF'.¹⁵

1.17 Following discussion of the bill at the 28 February 2018 Additional Estimates hearing, the committee notes that although ASD will have additional functions under the new legislative framework, appropriate prioritisation of ASD tasks as they relate specifically to Defence will be maintained:

The ASD remains within the Defence portfolio, and our large portions of its business, which deal with the delivery of war-fighting effects, continue to be effected through the normal processes the Department of Defence has for those activities. They will broaden the scope of their role to account for other national taskings that may come from the Office of National Intelligence when it's established, or from other portfolios under whatever legal mandate those portfolios have to conduct activities that might involve the Australian Signals Directorate's capabilities. Inevitably there will need to be a very strong prioritisation process to ensure that the mandates that we have in a war-fighting sense, from a Defence perspective, and the

12 *Submission 1*, p. 4.

13 EM, pp. [2–3]. CERT was established in 2010 as the national computer emergency response team, and is the primary government contact point for major Australian businesses in relation to matters involving cyber security.

14 EM, pp. [10, 20, 24].

15 *Submission 1*, p. 4.

mandates that might come from other agencies can be managed within what is not an overly largely growing resource.¹⁶

1.18 Mr Greg Moriarty, Secretary, Department of Defence, added:

I'm very reassured that the new Director-General is absolutely committed to maintaining the indispensable connection between ASD and the broader Defence organisation, particularly in support of military operations.¹⁷

1.19 An additional measure '[u]nderpinning 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' will be the creation of a Principal Deputy Director (to become the Principal Deputy Director-General with the passage of the bill) 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.¹⁸

1.20 The link with Defence will also be maintained in an administrative sense:

...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.¹⁹

New functions for ASD

1.21 As outlined above, the bill establishes new functions for ASD.

Transition of ACSC and CERT to ASD

1.22 In its submission, AGD expressed support for the legislative changes required to ensure CERT's functions can be integrated into ASD:

The Attorney-General's Department supports the proposed amendments to the *Intelligence Services Act 2001* (IS Act) and the *Australian Communications and Media Authority Act 2005* (ACMA Act) to ensure CERT Australia's functions can continue to be undertaken once it is integrated into ASD. The insertion of proposed paragraphs 7(1)(ca) and 7(2) into the IS Act will enable the functions of a national CERT to be undertaken by the ACSC within ASD, including assistance to and collaboration with various domestic and foreign partners to mitigate and

16 Mr Mark Ablong, Acting Deputy Secretary Strategic Policy and Intelligence, Department of Defence, *Proof Estimates Hansard*, 28 February 2018, pp. 54–55.

17 *Proof Estimates Hansard*, 28 February 2018, p. 55.

18 *Submission 1*, p. 4.

19 *Submission 1*, p. 4.

respond to cyber security incidents. The amendment to the ACMA Act will ensure that ACMA information continues to be available to support the performance of CERT Australia's functions after CERT Australia transfers to ASD. These changes are consistent with the recommendations of the Independent Intelligence Review (2017).²⁰

Prevent and disrupt cybercrime

1.23 Item 9 of Schedule 1 proposes a new function for ASD to prevent and disrupt, by electronic or similar means, cybercrime by people or organisations outside Australia. The EM provides further detail:

The new cybercrime function will permit ASD to use its technical expertise to combat serious crimes undertaken by people or organisations outside Australia, such as child exploitation and illicit narcotics, committed or facilitated by, the use of electromagnetic energy, whether guided or unguided or both.²¹

1.24 The EM also notes that 'ASD will only be able to use electronic or similar means to combat cybercrime, and will be limited to preventing and disrupting serious crimes committed by people or organisations outside Australia'.²²

1.25 The Inspector-General of Intelligence and Security (IGIS) advised that this new function is 'broadly consistent with the existing functions of ASD and, like ASD's intelligence functions, is focused on people and organisations outside Australia'.²³

1.26 However, the IGIS noted that there may be activities directed towards Australians. The bill proposes to extend the ministerial authorisation regime under sections 8 and 9 of the Intelligence Services Act which would require ASD to seek authorisation before undertaking such an activity. Therefore ASD would need to seek authorisation before:

...undertaking an activity, or a series of activities, for the specific purpose, or purposes which include the specific purpose, of preventing or disrupting cybercrime undertaken by, or enabled by, an Australian person.²⁴

1.27 The IGIS noted that:

This is an important safeguard and is consistent with the current framework in the Intelligence Services Act. The IGIS inspection regime in ASD pays particular attention to activities that require ministerial authorisation.²⁵

20 *Submission 2*, pp. 1–2.

21 EM, p. [11].

22 EM, p. [11].

23 *Submission 4*, p. 6.

24 *Submission 4*, p. 7.

25 *Submission 4*, p. 7.

Protection of specialised technologies

1.28 Item 11 of Schedule 1 to the bill proposes a new function of ASD to protect ASD's specialised technologies and capabilities acquired in connection with the performance of ASD's functions under subsection 7(a) to 7(d). This allows for the protection of specialised technologies and will allow ASD 'to take more active measures to protect highly sensitive technologies and capabilities from being detected or compromised'.²⁶

1.29 ASD uses specialised tools to carry out its functions to obtain intelligence, provide assistance to the ADF, to assist other Commonwealth and State authorities, and to combat cybercrime. ASD noted the importance of being able to protect those tools to 'ensure their ongoing utility and protect Australia's national interests'.²⁷

1.30 The IGIS submitted that 'protection of specialised technologies may be impliedly within ASD's current functions but the proposed amendment will put this beyond doubt'.²⁸

Employment framework

1.31 The bill establishes ASD as a statutory authority and provides provisions for the appointment of the Director-General of ASD to control ASD and its staff. The bill will also give the Director-General powers to employ persons as employees of ASD under this bill outside the framework of the *Public Service Act 1999*.²⁹

1.32 In its submission, ASD provided details about the anticipated benefits of the proposed framework for its workforce capability:

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.³⁰

26 EM, p. [11].

27 *Submission 1*, p. 5.

28 *Submission 4*, pp. 7–8.

29 EM, pp. [2–3].

30 *Submission 1*, pp. 7–8.

1.33 ASD also noted that operating outside the Australian Public Service (APS) will provide greater flexibility for the organisation:

...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...³¹

1.34 The Community and Public Sector Union (CPSU) noted there is strong support for ASD's transition to a statutory authority and that there is 'the desire for the transition to not be delayed past 1st July 2018'.³² In relation to the need to address workforce capability issues, the CPSU noted the potential for the new arrangements to improve these aspects:

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.³³

Review of employment matters

1.35 The bill will provide the IGIS with powers to investigate complaints regarding employment-related grievances from ASD employees as it currently does for ASIS and ASIO staff. IGIS advised that:

All of these changes can be accommodated within the current IGIS oversight framework and the additional resources required will be drawn from the recent increase in IGIS resources in response to a recommendation of the 2017 Independent Intelligence Review.³⁴

Accountability and transparency

1.36 The ASD submission noted the bill 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.

31 *Submission 1*, p. 8.

32 *Submission 3*, p. 2.

33 *Submission 3*, p. 3.

34 *Submission 4*, p. 4.

1.37 ASD also explained it will attend Senate Estimates as a separate statutory entity within the Defence portfolio and will be required to publicly report on its performance through the release of an Annual Report. Furthermore, 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.³⁵

1.38 The bill also includes a mandated requirement that ASD regularly brief the Opposition Leader.³⁶

Financial implications

1.39 The EM states that the bill would have no financial impact.³⁷

Consideration by the Scrutiny of Bills Committee

1.40 The Scrutiny of Bills Committee had not reported on the bill at the time of tabling this report.

Discussion of the bill

1.41 Submissions to the inquiry were supportive of the bill, noting that it implements the recommendations of the 2017 Intelligence Services Review. A small number of issues were raised which are detailed below.

Employment arrangements

1.42 Following the establishment of the statutory authority, ASD staff will no longer be employed under the Public Service Act. The bill includes provisions seeking to ensure that ASD staff will not be disadvantaged under the new legislative framework. The EM explains:

ASD will be required under the Bill to adopt the principles of the Public Service Act in relation to employees of ASD to the extent the Director-General of ASD considers they are consistent with the effective performance of the functions of the ASD.³⁸

1.43 The ASD emphasised that:

...an important safeguard has been included in the Bill to ensure that the new ASD employment framework would not be arbitrary...This has the effect of protecting ASD employees, similar to the protection received by public servants employed under the Public Service Act.³⁹

1.44 The IGIS observed that the approach proposed for ASD is consistent with the arrangements currently in place for ASIO and ASIS staff. The IGIS expressed confidence in its application noting:

35 *Submission 1*, p. 8.

36 EM, p. [14].

37 EM, p. [3].

38 EM, p. [3].

39 *Submission 1*, p. 6.

In my experience ASIS and ASIO adhere to this requirement and the employment related policies in the agencies are similar to those in the APS.⁴⁰

1.45 The CPSU expressed support for the bill requiring the Director-General to adopt the APS Values and Employment principles of the Public Service Act but also highlighted some concerns raised by its members:

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.⁴¹

Staff mobility, redeployment and paid maternity leave

1.46 The CPSU recommended some amendments to the bill relating to staff mobility, redeployment and paid maternity leave. It is noted by the CPSU that the bill appears to provide appropriate arrangements for staff undertaking voluntary moves from the new ASD back to the APS, such as for transfer or promotion. However, the CPSU expressed concern that such employees 'would still not have the entitlements provided to excess employees, like access to the redeployment register'.⁴²

1.47 To address this concern, the CPSU suggested that the bill should be amended to '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'.⁴³

1.48 With respect to paid maternity leave, the CPSU explained:

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.⁴⁴

1.49 The CPSU suggested that employees from the new ASD be included as a prescribed authority under the Maternity Leave Regulations.⁴⁵

40 *Submission 4*, p. 6.

41 *Submission 3*, pp. 1–2.

42 *Submission 3*, p. 5.

43 *Submission 5*, p. 5.

44 *Submission 3*, p. 5.

45 *Submission 3*, p. 5.

Transitional provisions regarding terms and conditions of employment

1.50 The CPSU raised concerns about some of the 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.⁴⁶

1.51 The bill indicates that a person who was employed under a written agreement before 1 July 2018 continues to be employed on the terms and conditions specified in that agreement. However, these arrangements are subject to any determination made by the Director-General who may determine terms and conditions of employees, with consultation.⁴⁷ The CPSU submission noted that they have received assurances from management about working conditions, consultation and employee representation but remain 'concerned such determinations only require consultation, not agreement'.⁴⁸

1.52 In addition, the CPSU stated:

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*.⁴⁹

1.53 The CPSU submission also notes that in situations where a new statutory authority is being established, involving movements of APS employees outside the APS, this is usually effected under section 72 of the *Public Sector Act 1999* as a machinery of government move. CPSU further notes that the establishment is also a transaction of business under the *Fair Work Act 2009* with both the new employer and the transferring employees to be covered by the current Defence Enterprise Agreement:

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

46 *Submission 3*, p. 4.

47 EM, p. [25].

48 *Submission 3*, p. 4.

49 *Submission 3*, p. 4.

to the employees of the new ASD and the move will be dealt with under s72 of the *Public Service Act 1999*.⁵⁰

1.54 In its submission, ASD noted the importance of providing adequate protections for its employees and provided details about available measures to safeguard workers, including protections under the *Fair Work Act 2009*.⁵¹

1.55 ASD also advised of its intention to use its Joint Staff Consultative Group as one of its objectives is to:

[P]rovide 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...⁵²

1.56 The Joint Staff Consultative Group is chaired by an ASD Deputy Director and broader membership includes representatives from human resources, internal workforce and union delegates. ASD emphasised its important role:

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.⁵³

Conclusion

1.57 The committee notes there is broad support for the establishment of the ASD as a statutory authority as recommended by the 2017 Independent Intelligence Review.

1.58 Evidence to the inquiry highlighted that operating as an independent authority will provide ASD with greater flexibility to recruit, retain, develop and remunerate its specialist staff.

1.59 The committee notes the representations made for the transition to a statutory agency as well as the provisions and arrangements to support staff through this transition and beyond.

1.60 In relation to the issues raised, the government may wish to consider whether any amendments to the bill, or additions to the EM, are necessary to provide greater clarity to staff.

50 *Submission 3*, p. 4.

51 *Submission 1*, p. 6.

52 *Submission 1*, p. 6.

53 *Submission 1*, p. 7.

Recommendation 1

1.61 The committee recommends that the bill be passed.

**Senator Linda Reynolds CSC
Chair**