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The Parliament of the Commonwealth of Australia

**An Advisory Report on the Intelligence  
Services Bill 2001, the Intelligence  
Services (Consequential Provisions) Bill  
2001 and certain parts of the  
Cybercrime Bill 2001**

Joint Select Committee on the Intelligence Services

August 2001  
Canberra

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## **Chairman's Foreword**

The Intelligence Services Bill 2001 (IS Bill) makes an historic contribution to the development of the Australian intelligence community. For the first time, the functions of both the Australian Secret Intelligence Service (ASIS) and the Defence Signals Directorate (DSD) are provided for in legislation.

The findings of the 1995 Commission of Inquiry into the Australian Secret Intelligence Service provide the basis for the IS Bill. One of the key recommendations of the Commission of Inquiry was the need for a legislative base for ASIS.

The key features of the IS Bill include the provision of immunities for both ASIS and DSD, the provision of rules to protect the privacy of Australians, and the creation of a Parliamentary Joint Committee on ASIO and ASIS (PJCAA).

The focus of the Committee's review was the accountability mechanisms applying to the use of the immunity provisions under clause 14 of the Bill. The Committee's scrutiny identified a number of unintended consequences in the IS Bill. The recommendations will eliminate these concerns and ensure that the accountability framework is effective. The major findings and recommendations include:

- amendments to clause 14 which will ensure that immunity can only be granted where an act is done in the proper performance of a function of the agency;
- the development of protocols to guide the operation of clause 14, and the requirement that clause 14 not come into effect until the Inspector-General of Intelligence and Security has received the protocols and the PJCAA has been briefed on the protocols;
- amendments to clauses 8 and 9 regarding Ministerial directions and authorisations which will narrow the scope of possible intelligence collection

- directed towards Australian persons or Australian organisations based overseas to matters of national security;
- the strengthening of clause 15 regarding rules to protect the privacy of Australians by ensuring that the responsible Minister must consult with the Attorney-General before making the rules relating to the communication and retention of information concerning Australian persons; and
  - amendments which enhance Parliamentary scrutiny through expanding the powers of the PJCAA. These additional powers include:
    - the requirement that the Minister advise the Committee of the nature of any direction made under paragraph 6(1)(e) regarding ASIS undertaking such other activities as the responsible Minister directs;
    - the requirement to be briefed by the IGIS on the protocols relating to clause 14, and the privacy rules made under clause 15; and
    - the requirement that DSD be subject to scrutiny by the Committee.

These recommendations will enhance the Intelligence Services Bill 2001 by providing an effective accountability framework which will provide confidence for the Parliament and the Australian public.

In conclusion, and on behalf of the Committee, I would like to thank all those who have contributed to this inquiry.

**DAVID JULL MP**  
Chair



## **Membership of the Committee**

**Chair** Hon David Jull MP

**Deputy Chair** Hon Laurence Brereton MP

<b>Members</b>	Senator Paul Calvert	Mr Kevin Andrews MP
	Senator Helen Coonan	Mr John Forrest MP
	Senator the Hon John Faulkner	Mr David Hawker MP
	Senator Brian Greig	Mr Stewart McArthur MP
	Senator Sandy Macdonald	Hon Leo McLeay MP
	Senator the Hon Robert Ray	Mr Daryl Melham MP
		Hon Neil O’Keefe MP

## **Committee Secretariat**

**Secretary** Mr Grant Harrison

**Inquiry Secretary** Mr Stephen Boyd

**Administrative Officer** Ms Katie Hobson





## **Resolution of appointment**

- (1) a Joint Select Committee to be known as the Joint Select Committee on the Intelligence Services be appointed to inquire into and report on the proposed legislative reforms in:
  - (a) the Intelligence Services Bill 2001 and the Intelligence Services (Consequential Provisions) Bill 2001: and
  - (b) the provision in the Cybercrime Bill 2001 relating to the Australian Secret Intelligence Service (ASIS) and the Defence Signals Directorate (DSD) - Liability for Certain Acts.
- (2) the committee consist of 15 members: 5 members of the House of Representatives to be nominated by the Government Whip or Whips, 4 members of the House of Representatives to be nominated by the Opposition Whip or Whips, 3 senators to be nominated by the Leader of the Government in the Senate, 2 senators to be nominated by the Leader of the Opposition in the Senate and 1 senator to be nominated by any minority party.
- (3) every nomination of a member of the committee be forthwith notified in writing to the President of the Senate and the Speaker of the House of Representatives.
- (4) the members of the committee hold office as a joint select committee until presentation of the committee's report or until the House of Representatives is dissolved, whichever is the earlier.
- (5) the committee report no later than 20 August 2001.
- (6) the committee elect a Government member as its chair.

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- (7) the committee elect a deputy chair who shall act as chair of the committee at any time when the chair is not present at a meeting of the committee.
  - (8) at any time when the chair and deputy chair are not present at a meeting of the committee, the members present shall elect another member to act as chair at that meeting.
  - (9) the chair, or the deputy chair when acting as chair, shall have a deliberative vote and, in the event of an equality of voting, a casting vote..P2068 No. 196—  
*27 June 2001*
  - (10) 5 members of the committee constitute a quorum of the committee, provided that in a deliberative meeting the quorum shall include 3 members of either House of the Government parties and 2 members of either House of the non-government parties.
  - (11) the committee have power to:
    - (a) send for persons, papers and records;
    - (b) move from place to place;
    - (c) adjourn from time to time and to sit during any adjournment of the Senate and the House of Representatives.
  - (12) the committee may determine the manner of conduct of its proceedings and in so doing shall consider whether the procedures prescribed in s.92F(2) and (3) of the *Australian Security Intelligence Organisation Act 1979* ('the ASIO Act') should be followed.
  - (13) the committee shall ensure that any documents having a national security classification provided to the committee are, while in the custody of the committee, kept at a place under such terms and conditions as are agreed between the committee and the Director-General of ASIS, the Director of DSD, or the Inspector-General of Intelligence and Security, as appropriate.
  - (14) the committee shall ensure that the identity of staff of ASIS is appropriately protected in accordance with the provisions of the Intelligence Services Bill 2001.
  - (15) the committee has leave to report from time to time its proceedings and the evidence taken and any recommendations as it may deem fit.
  - (16) a message be sent to the Senate acquainting it with this resolution and requesting that it concur and take action accordingly.



## List of abbreviations

AIC	Australian Intelligence Community
ASIO	Australian Security Intelligence Organisation
ASIS	Australian Secret Intelligence Service
DIGO	Defence Imagery and Geospatial Organisation
DIO	Defence Intelligence Organisation
DSD	Defence Signals Directorate
EM	Explanatory Memorandum
IGIS	Inspector-General of Intelligence and Security
IS Bill	Intelligence Services Bill 2001
JSCIS	Joint Select Committee on the Intelligence Services
ONA	Office of National Assessments
PJCA	Parliamentary Joint Committee on ASIO
PJCAA	Parliamentary Joint Committee on ASIO and ASIS
Samuels and Codd Report	Commission of Inquiry into the Australian Secret Intelligence Service



# List of recommendations

1

## Introduction

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## IS BILL – PART 2—Functions of the agencies

### Recommendation 1

Note 2 to Clause 6 of the Intelligence Services Bill 2001 be amended to read:

■ If the Minister gives a direction under paragraph (1)(e), the Minister must as soon as practicable after the direction is given to the head of ASIS provide a copy of the direction to the Inspector-General of Intelligence and Security, *and advise the Parliamentary Joint Committee on ASIO and ASIS of the nature of the other activity to be carried out.*

### Recommendation 2

Clauses 8 and 9 of the Intelligence Services Bill 2001 be amended to require authorisation by the responsible Minister for “other activities” under clause 6(1)(e) relating to Australian persons or Australian organisations overseas; and

■ that in giving any such authorisation under Section 9 the Minister must be satisfied that the Australian person or organisation overseas is

engaged in, or is reasonably suspected of being engaged in, or of being likely to engage in, activities prejudicial to Australia's national security;

- that the activity proposed to be authorised will directly enhance or protect Australia's national security;
- that any such authorisation have effect for six months, whereupon it will lapse unless renewed by the Minister.

### **Recommendation 3**

The Inspector-General of Intelligence and Security should report, in his Annual Report, on the operation of subclause 7(d) of the Intelligence Services Bill 2001, once enacted.

### **Recommendation 4**

Clause 15 of the Intelligence Services Bill 2001 be amended to require the responsible Minister in relation to ASIS, and the responsible Minister in relation to DSD, to consult with the Attorney-General before making the rules relating to the communication and retention of information concerning Australian persons.

### **Recommendation 5**

The Director-General of ASIS, the Director of DSD and the Inspector-General of Intelligence and Security, in conjunction with the Australian Government Solicitor and relevant law enforcement agencies, in developing protocols for the operation of clause 14 of the Intelligence Services Bill 2001 and Division 476.5 of the Cybercrime Bill 2001, must ensure that:

- the protocols for the operation of clause 14 and Division 476.5 in respect of both ASIS and DSD be put in writing and approved by responsible ministers and the Attorney-General, and be provided as soon as possible to the IGIS;
- clause 14 and Division 476.5 should not come into effect until the IGIS has received the protocols and the Parliamentary Joint Committee on ASIO and ASIS has been briefed on the protocols by IGIS; and
- the Parliamentary Joint Committee on ASIO and ASIS should be briefed by the IGIS on the provisions of the protocols and any changes to the protocols.

### **Recommendation 6**

Subclause 14(2) of the Intelligence Services Bill 2001 be amended to read:

■ (2) A person is not subject to any civil or criminal liability for any act done inside Australia if:

⇒(a) the act is preparatory to, in support of, or otherwise directly connected with, overseas activities of the agency concerned; and

⇒(b) the act:

⇒(i) taken together with an act, event, circumstance or result that took place, or was intended to take place, outside Australia, could amount to an offence; but

⇒(ii) in the absence of that other act, event, circumstance or result, would not amount to an offence; and

⇒(c) the act is done in the proper performance of a function of the agency.

In addition, a new subclause 2A be added to clause 14 that would read:

■ (2A) Subsection (2) is not intended to permit any act in relation to premises, persons, computers, things, or telecommunications services in Australia, being an act that ASIO could not do without a Minister authorising it by warrant issued under Division 2 of Part III of the Australian Security Intelligence Organisation Act 1979 or under Part III of the Telecommunications (Interception) Act 1979 or an act to obtain information that ASIO could not obtain other than in accordance with section 283 of the Telecommunications Act 1997.

Division 476.5, paragraph 2 of the Cybercrime Bill 2001 be amended to reflect the amendments proposed for subclause 14(2) of the Intelligence Services Bill 2001.

#### Recommendation 7

Clauses 8 and 9 of the Intelligence Services Bill 2001 be amended to require authorisation by the responsible Minister for any activity specifically directed towards obtaining intelligence concerning Australian persons or Australian organisations overseas, and

■ that in giving any such authorisation under clause 9 the Minister must be satisfied that the Australian person or organisation overseas is engaged in, or is reasonably suspected of being engaged in, or of being likely to engage in, activities prejudicial to Australia's national security;

■ that the activity proposed to be authorised be likely to assist the obtaining of intelligence relevant to national security;

- that any such authorisation have effect for six months, whereupon it will lapse unless renewed by the Minister.

#### Recommendation 8

The following subclauses be added to clause 14 of the Intelligence Services Bill 2001:

- The Inspector-General of Intelligence and Security may give a certificate in writing certifying any fact relevant to the question of whether an act was done in the proper performance of a function of an agency.
- In any proceedings, a certificate given under subsection (above) is prima facie evidence of the facts certified.

#### Recommendation 9

A new subclause be added to clause 15 of the Intelligence Services Bill 2001 to require that the Parliamentary Joint Committee on ASIO and ASIS be briefed by the IGIS on the privacy rules and any changes to their provisions.

### 3

## IS BILL – PART 4—Committee on ASIO and ASIS

#### Recommendation 10

The phrase ‘have been’ should be deleted from paragraph 29(3)(c) of the Intelligence Services Bill 2001, so that it reads:

- (c) reviewing particular operations that are being or are proposed to be undertaken by ASIO or ASIS.

#### Recommendation 11

The Intelligence Services Bill 2001 should be amended to ensure that DSD is subject to oversight by the Parliamentary Joint Committee on ASIO and ASIS.

#### Recommendation 12

Subclause 29(2) of the Intelligence Services Bill 2001 should be amended to read:

- The Committee may, by resolution, request the responsible Minister to refer a ~~particular aspect of~~ *matter in relation* to the activities of ASIO or

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ASIS (as the case may be) to the Committee, and the Minister may, under paragraph (1)(b), refer that ~~aspect~~ *matter* to the Committee for review.

#### Recommendation 13

Schedule 1, subclauses 6 and 9 of the Intelligence Services Bill 2001 be amended to ensure that the requirement to receive written authority to publish is only in relation to evidence taken in private.

#### Recommendation 14

Schedule 1, subclause 6(3) of the Intelligence Services Bill 2001 be amended to read:

■ The Committee ~~must~~ *may, after examining its evidence*, obtain the advice of the responsible Minister as to whether the disclosure or publication would or might disclose:

#### Recommendation 15

Schedule 1, subclauses 2(2) and 3(2) of the Intelligence Services Bill 2001 be amended to ensure that a notice to appear must not be less than 5 days after the day on which the notice is give to the person.

#### Recommendation 16

Schedule 1, subclauses 2(6) and 3(6) of the Intelligence Services Bill 2001 be deleted.

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### Other issues

#### Recommendation 17

Clause 3 of the Intelligence Services Bill 2001 should be amended to include definitions on the following terms:

- paramilitary;
- intelligence;
- national security;
- police functions;
- serious crime; and
- Australian organisations.



In defining national security, consideration must be given to a definition that includes protecting Australia from espionage, sabotage, politically motivated violence, promotion of communal violence, attacks on Australia's defence system, acts of foreign interference, and unauthorised movements of persons or objects across Australia's national borders.

**Recommendation 18**

Clause 19 of the Intelligence Services Bill 2001 be amended to ensure that arrangements for briefing the Leader of the Opposition about ASIS are the same as those relating to ASIO as set out in section 21 of the *Australian Security Intelligence Organisation Act 1979*.

**Appendix A – List of Submissions**

**Appendix B – List of Exhibits**

**Appendix C – Witnesses appearing at public hearings**