

Reviews of the intelligence services

The Flood Inquiry

- 2.1 In March 2004, the Prime Minister announced an independent review of the Australian foreign intelligence community including, *inter alia*, the effectiveness of oversight and accountability mechanisms; the suitability of the current division of labour among the agencies; the contestability of intelligence assessments and the adequacy of current resourcing of intelligence agencies. Mr Philip Flood AO conducted the Inquiry into Australian Intelligence Agencies ('the Flood Inquiry') and submitted his report to the Prime Minister in July 2004. The Government subsequently agreed to accept the recommendations of the Flood Inquiry, with the exception of the proposal to change the name of the Office of National Assessments (ONA).
- 2.2 The Intelligence Services Legislation Amendment Bill 2005 implements several recommendations from the Flood Inquiry that require legislative amendments to be implemented, namely:
- The mandate of the Parliamentary Committee on ASIO, ASIS and DSD (PJCAAD) should be extended to all of Australia's intelligence agencies - that is, it should also cover ONA, the Defence Intelligence Organisation (DIO) and the Defence Imagery and Geospatial Organisation (DIGO) on the same basis as it currently

covers ASIO, ASIS and DSD. The parliament may consider renaming the committee as the Parliamentary Joint Committee on Intelligence and Security.

- The functions and ministerial accountabilities of DIGO should be formalised in legislation by amendments to the Intelligence Services Act (ISA). Similarly, the *Inspector-General of Intelligence and Security Act 1986* ('the IGIS Act') should be amended to include scrutiny of DIGO on a basis comparable with that which applies to DSD and ASIS.
- The mandate of the Inspector-General of Intelligence and Security (IGIS) should be extended to allow IGIS to initiate inquiries at his or her own discretion into matters relating to ONA and DIO without ministerial referral, consistent with the IGIS jurisdiction in respect of ASIO, ASIS and DSD. The Inspector-General should also conduct a periodic review of ONA's statutory independence.
- The *Office of National Assessments Act 1977* ('the ONA Act') should be amended
 - ⇒ to remove the references to two assessments boards - the National Assessments Board and the Economic Assessments Board - to reflect the reality that there is only one National Assessments Board which covers strategic, political and economic issues, but with provision for different composition according to subject matter.
 - ⇒ to strengthen ONA's intelligence community coordination role in section 5 (1)(d). In fact Schedule 3 Item 5 strengthens and articulates ONA's co-ordination powers in the various areas of foreign intelligence - the prioritising of collection, policy, and long-term planning - as well as its role in evaluation, that is, to provide a more cogent and explicit assessment of foreign intelligence agencies.

Defence Imagery and Geospatial Organisation

- 2.3 The provision of a legislative basis for the activities of the Defence Imagery and Geospatial Organisation (DIGO) will be a major outcome of this Bill. DIGO is an agency of the Department of Defence, established in November 2000. While DIGO is a relatively new organisation, Australia's involvement in imagery intelligence and topography is not new. These activities have been an integral part of Australia's defence for many years. DIGO was created within Defence

to better realise increasing synergies in the exploitation of imagery and other data to produce intelligence and geospatial information. Like ASIS and DSD, DIGO has a foreign intelligence focus; however its role is not limited to that. The Bill sets out the five functional categories of DIGO's work:

- DIGO obtains imagery and geospatial data to produce intelligence relating to people or organisations outside Australia.
- DIGO obtains imagery and geospatial data to produce intelligence to support ADF exercises, training and operations wherever they may occur. This function includes providing data and material in support of ADF decision making for targeting.
- DIGO obtains imagery and geospatial data to produce intelligence to support Commonwealth and State authorities in their national security role.
- DIGO communicates the material produced as a result of the exercise of the functions described above, in accordance with the requirements of the Government.
- DIGO provides non-intelligence products and assistance to Commonwealth and State government agencies, as well as to approved non-government bodies and foreign governments. Non-intelligence products include routine topographic data and products. Assistance in search and rescue and response to natural disasters is specifically included in this function to acknowledge the important non-intelligence work done by DIGO in this area.

Intelligence Services Act Review

- 2.4 This legislative package also includes the amendments that have been agreed as a result of a review of the ISA coordinated by the Department of the Prime Minister and Cabinet. This review was initially suggested in the 2002 and 2003 Annual Reports of the IGIS. These reports recommended a review of the operation of the ISA on the basis that its application had shown that some refinement was needed. In addition, increased public interest in the activities of intelligence agencies and the ability of some agencies to impact on the privacy of Australians warranted an examination and fine-tuning of accountability mechanisms.

Parliamentary Joint Committee on ASIO, ASIS and DSD

- 2.5 Within the context of the ISA review, the Government agreed to consider proposals put to it by the PJCAAD. In August 2004, the Honourable David Jull MP, on behalf of the PJCAAD which he chairs, proposed to the Government that it consider an increase in the size of the committee and other adjustments to help the PJCAAD respond to its increasing workload.
- 2.6 Two of the these proposals were not accepted –
- that the Committee be given access to the classified annual reports of each of the agencies, and
 - that the definition of matters upon which ministers might seek exclusion of material from Committee reports be amended to remove “the conduct of Australia’s foreign relations”
- 2.7 However the Intelligence Services Legislation Amendment Bill 2005 implements the recommendations that the PJCAAD (to become the PJCIS):
- Will be increased in size from a membership of seven to nine
 - Will be empowered to establish subcommittees when required
 - Will have a position of Deputy Chair.

Deputy Chair

- 2.8 The Bill as currently drafted provides that the proposed Deputy Chair of the Committee must be a Government member elected by the members of the Committee. This provision was not in response to any request from the Committee.
- 2.9 If the conventions of the committee system were followed, the Deputy Chair would be drawn from the Opposition when the Chair is a Government member. Senate Standing Order 25(10)(e) sets out that in the case of legislation and references committees, deputy chairs are required to be from different parties to the chair. In the case of other committees: standing committees have no formal requirements as to the chair and deputy chair; in another group of committees (including the Appropriations and Staffing Committee, the Regulations and Ordinances Committee and the Scrutiny of Bills Committee, among others), the chair may appoint another senator as deputy chair. Odgers states that most committees have followed the practice of having the chair and deputy from a different party, although there is

no formal requirement to do so.¹ House Committees have always followed the convention that the deputy chair is a member of the Opposition.

- 2.10 The Committee is concerned that the consensus that has always characterised its deliberations is not reflected by the requirement that both the deputy chair and chair should be drawn from Government members.
- 2.11 Furthermore, the reasons for the Committee's request for a deputy chair included the need for a point of reference for the Opposition members of the Committee. That intention would be defeated by the present provision.
- 2.12 A possible amendment would be to remove the requirement for the Deputy Chair to be a Government member, but amend the section on meetings procedure (S 17 (5)) so that members must appoint a Government member to preside when the chair is not present at a deliberative meeting or is absent for a prolonged period.

Recommendation 1

The Committee recommends that Item 64 of Schedule I be amended to remove the requirement that the Deputy Chair must be a Government member; and that section 17(5) be amended to read as follows:

If the Chair is not present at a deliberative meeting of the Committee or is absent for a prolonged period, the members present are to appoint a Government member to preside and the member so appointed may exercise, in relation to the meeting, any of the powers of the Chair.

Collection of Intelligence – the roles of ASIS, DIGO and DSD

- 2.13 Other significant amendments resulting from the ISA review relate to the collection of intelligence by ASIS and DSD: clarification of the roles and functions of these agencies, and clarification of the ministerial authorisations necessary before the production of any intelligence on Australians.

1 Odgers, Senate Practice. P.395

Intelligence, and incidentally obtained intelligence

- 2.14 The definition of “intelligence information” is amended in the Bill – in addition to including the activities of DIGO – to include incidentally obtained intelligence, which in turn is defined as intelligence obtained by the agencies in the course of carrying out their functions, and which is “not intelligence of a kind referred to in [the provisions setting out their functions]” (Schedule I, Items 10 and 11).
- 2.15 Intelligence is currently defined in the ISA as information obtained by the agencies in the course of their defined functions. The function as set out in the Bill is:
- In the case of ASIS, to obtain, in accordance with the Government’s requirements, intelligence about the capabilities, intentions of activities of people or organisations outside Australia (S6 (1) (a));
 - In the case of DSD, to obtain intelligence about the capabilities, intentions or activities of people or organisations outside Australia in the form of electromagnetic energy, whether guided or unguided or both, or in the form of electrical, magnetic or acoustic energy, for the purposes of meeting the requirements of the Government, and in particular the requirements of the Defence Force, for such intelligence (S7(a)) ; and
 - In the case of DIGO, to obtain geospatial and imagery intelligence about the capabilities, intentions or activities of people or organisations outside Australia from the electromagnetic spectrum or other sources, for the purposes of meeting the requirements of the Government for such intelligence (S6B).
- 2.16 All of these functions refer to intelligence about activities *outside* Australia. Under the proposed definition, intelligence has been widened to include information which has been “collected unintentionally in the proper conduct of the functions of the agencies”.²
- 2.17 Additionally, this re-definition relates to a further amendment relating to the communication of intelligence to Commonwealth and State authorities.

Communication of intelligence

- 2.18 The limits upon the authorities to which the agencies can communicate intelligence have been widened considerably. Section 11 is amended to provide that agencies may communicate intelligence which is not foreign intelligence (the unintentionally gained intelligence) to appropriate Commonwealth or State authorities, or to authorities of approved other countries.
- 2.19 These provisions differ from the current ISA in two ways: it is currently only to “appropriate law enforcement authorities” that the agencies may communicate intelligence. Furthermore that intelligence is currently only the foreign intelligence obtained in the course of the agencies’ foreign intelligence gathering functions, and it must be relevant to serious crime. Currently any information obtained incidentally must be destroyed, and may not be passed on, even if it could be relevant to a serious crime.
- 2.20 Schedule I Item 29 would provide that intelligence which is “unintentionally but properly collected” may be passed on to the appropriate authorities, in limited circumstances.³ The information to be communicated must relate to the involvement, or likely involvement, by a person in any of four categories of activity in addition to the current one (serious crime):
- activities that are a threat to security;
 - activities related to the proliferation of weapons of mass destruction or the movement of goods listed from time to time in the Defence and Strategic Goods List;
 - activities that present a significant risk to a person's safety;
 - acting for, or on behalf of, a foreign power; and
 - committing a serious crime⁴.
- 2.21 The Bill would enable a wide range of information, unintentionally collected in the course of gathering foreign intelligence, to be passed on by the intelligence agencies to unspecified “appropriate” authorities, both State and Commonwealth, and of other countries. This could raise concerns because of the exemptions of the intelligence agencies from constraints, such as those in the Privacy Act, imposed on other authorities.

3 Explanatory memorandum Item 29

4 loc. cit

- 2.22 The Committee is of the view that, while the removal of barriers to cooperation between government agencies may be helpful, it would be prudent to draw attention to the implications for the administration of a whole range of government policies of this increased communication.
- 2.23 A direct result of these additional powers to communicate intelligence is the creation of closer links between Australia's foreign intelligence gathering agencies and ASIO.
- 2.24 The Committee is of the view that closer links within the intelligence gathering community should be particularly relevant to the current need to counter terrorism.

Assistance to Commonwealth and State authorities.

- 2.25 Consistency between the agencies' ability to assist the Defence Force is legislated under the Bill, which explicitly sets out that the roles of ASIS, DSD and DIGO each include assisting the Defence Force in support of military operations.
- 2.26 Assistance of various kinds, other than passing on intelligence, can be provided by the agencies to other Commonwealth and State authorities.
- In the case of DSD, Schedule I Item 20 provides that DSD may assist Commonwealth and State authorities in relation to cryptography and communication technologies, as well as assistance in relation to other technologies acquired by DSD in the course of carrying out its various functions. DSD can provide assistance to other authorities in the context of search and rescue.⁵
 - In the case of DIGO, it may provide non-intelligence products such as routine topographic data and products, to Commonwealth and State government agencies, as well as to approved non-government bodies and foreign governments.⁶ DIGO can assist in search and rescue operations and in response to natural disasters. (Schedule I Item 19).
 - In the case of ASIS, it may provide assistance to Commonwealth and to State authorities, (Schedule I Item 18). The nature of ASIS' assistance is not specified in the legislation but consists of those

5 Explanatory Memorandum, Schedule I Item 20

6 Explanatory Memorandum, Schedule I Item 19

circumstances where the agency may, in the proper performance of its functions, have a role in multi-agency training scenarios.

Ministerial authorisation

- 2.27 The amendment in Schedule I Item 22, deletes the word “who is overseas” from the current legislation. As a result, ASIS, DIGO and DSD will be required to seek a ministerial authorisation to produce intelligence on an Australian person, whether that person is overseas or in Australia.⁷
- 2.28 The ISA defines the functions of ASIS and DSD, and the Bill legislates the functions of DIGO (as well as clarifying the roles of ASIS and DSD). For all three agencies, key functions include obtaining ‘intelligence about the capabilities, intentions or activities of people or organisations *outside Australia*’ (paragraphs 6(1)(a) and 7(a) and the proposed 6B(a)). In the case of ASIS, it is also tasked with undertaking ‘such other activities as the responsible Minister directs relating to the capabilities, intentions or activities of people or organisations *outside Australia*.’ (paragraph 6(1)(e)).
- 2.29 In view of these apparent limitations on the agencies’ legal functions, it was not clear how the responsible Minister could authorise the agencies to undertake activities for the purpose of producing intelligence on Australians irrespective of whether they are inside or outside Australia. Similarly, in the case of ASIS, an issue arose as to ASIS’ power to undertake activities that may have a direct effect on Australians.
- 2.30 Schedule I Item 22 suggests that the ISA is already being interpreted to give ASIS and DSD the power to obtain intelligence on Australians *inside* Australia regarding the capabilities and intentions of persons *outside* Australia with the consequence that the amendments are needed to give Australians in Australia the same protections as Australians outside Australia.
- 2.31 It is relevant to draw attention to an answer given on 21 March 2002 by the Minister for Defence to a question on notice from Senator Chris Evans:

To ensure that the privacy of Australians was properly protected irrespective of whether they were overseas or in Australia, my predecessor issued a direction to Director DSD

7 Explanatory Memorandum, Schedule 1, Item 22.

under section 8(1)(b) directing DSD to obtain an authorisation before undertaking any such activities in relation to Australians within Australia. This direction took effect with the date of the introduction of the Act, and had the effect of requiring DSD to afford the same level of protection to all Australian persons regardless of their location.⁸

- 2.32 This answer indicates that at present, although protection of Australians inside Australia is not specifically legislated, there is in fact a ministerial direction under section 8(1) (b), which would enable the production of intelligence on Australians in Australia.
- 2.33 In the case of Australians outside Australia, the ISA provides that before any of the agencies can conduct an investigation, the Minister responsible must, pursuant to S8(1), require the agency to obtain Ministerial authorisation for the investigation.
- 2.34 Before issuing an authorisation the Minister must be satisfied that the Australian to be investigated is, or is likely to be, involved in one of the following categories:
- activities that present a significant risk to a person's safety;
 - acting for, or on behalf of, a foreign power;
 - activities that are a threat to security;
 - activities related to the proliferation of weapons of mass destruction or the movement of goods listed from time to time in the Defence and Strategic Goods List; and
 - committing a serious crime.
- 2.35 The amendment is intended to have the effect of protecting Australians in Australia in the same way as the current legislation protects Australians who are overseas.
- 2.36 The Committee notes it is the case that the foreign intelligence gathering agencies can currently be authorised to obtain intelligence on Australians inside Australia regarding the capabilities and intentions of persons outside Australia. The Committee approves the proposed amendment at Item 22, but requests additional provisions, to ensure consistency in the requirements on all agencies, domestic or foreign intelligence gathering.

8 Senate Hansard 21 March 2002, p.1274 and 13 March 2002, p.659

Recommendation 2

The Committee recommends that, as the regime moves from Ministerial direction to legislated Ministerial authority as proposed in Item 22, it should generally replicate the provisions of and have identical authorisation provisions to those that apply to ASIO.

Ministerial authorisation in emergencies

- 2.37 Item 24 allows the Prime Minister, the Minister for Defence, the Minister for Foreign Affairs or the Attorney-General to issue an authorisation for an activity under section 9 (relating to producing intelligence on an Australian) in an emergency and where the Minister responsible for ASIS, DIGO or DSD is not readily available or contactable. In an emergency people's lives could be at risk, particularly if the Minister for Defence were unavailable and therefore DSD would be precluded from taking action. The designation of other ministers capable of authorising an intelligence collection operation gave the agencies options.

Ministerial authorisations – accountability

- 2.38 Item 25 provides that where the agency head is satisfied that the grounds for a Ministerial authorisation to investigate an Australian (under S 8(1)) no longer exist, an agency head must inform the responsible Minister, and ensure that relevant activities are discontinued. The proposed amendment also requires the Minister to consider cancelling the authorisation as soon as practicable after being so informed, not merely allow the authorisation to lapse.
- 2.39 A further amendment relating to ministerial authorisations is that there must be a report to the Minister on intelligence collecting activities within 3 months of the expiry of the authorisation.

Accountability – IGIS powers

- 2.40 As mentioned above (2.2) the *Inspector-General of Intelligence and Security Act 1986* ('the IGIS Act') is amended to include scrutiny of DIGO on a basis comparable with that which applies to DSD and ASIS.

- 2.41 Two other recommendations of the Flood Inquiry in relation to the IGIS were also mentioned above: the mandate of the IGIS to initiate inquiries at his or her own discretion into matters relating to ONA and DIO without ministerial referral, and the requirement that the Inspector-General should also conduct a periodic review of ONA's statutory independence. This review must be reported in the Annual Report of the IGIS.
- 2.42 Other changes relating to the IGIS include a provision which expressly provides for the IGIS to consult with the Commonwealth Ombudsman to avoid a duplication of effort. A similar provision currently exists in the IGIS Act in respect of the Auditor-General.
- 2.43 Another provision will establish a clear right for the IGIS, as part of monitoring ASIO's activities, to access any place being used to detain a person under a warrant issued for the purposes of questioning in accordance with Division 3 of Part III of the ASIO Act.
- 2.44 Other amendments concern an IGIS inquiry which directly concerns the head of an agency. These changes will allow the IGIS the option of advising the Secretary of the Department of Defence, in relation to the Defence intelligence agencies, or the relevant Minister in the case of the other intelligence agencies, of an inquiry and to use these channels to consult on a draft inquiry report.
- 2.45 A further change will enhance accountability arrangements for any use by the Director-General of Security of his power under section 29 of the ASIO Act to authorise intelligence collection for up to 48 hours in advance of ministerial authorisation. This amendment will require IGIS to be advised within three working days of each case where this authority is exercised. A similar change will be made to the similar authorities of the Director-General of Security under the *Telecommunications (Interception) Act 1979*.

Other issues

Freedom of Information Act

- 2.46 The Bill also ensures that all Australian intelligence agencies are treated alike with respect to being exempt agencies under the *Freedom of Information Act 1982*.

Privacy Act

- 2.47 Consistent with the recommendation by the Flood Inquiry that DIGO be put on a proper legislative footing, the *Privacy Act 1988* is amended to provide DIGO with a similar standing under that legislation to the other intelligence collection agencies.
- 2.48 The exemption currently provided to ASIO and ASIS under section 7(1 A) of the Privacy Act is extended to DSD. This would provide for disclosure by Commonwealth agencies of personal information to DSD for the purposes of establishing Australian nationality or residency status. Because S 8(1) requires a Ministerial authorisation in respect of intelligence obtained on Australian persons, DSD needs to know who is Australian and who is not.

Definition of permanent resident

- 2.49 The definition of 'permanent resident' (Item 13 of Schedule) is amended so that agencies will be able to produce foreign intelligence, without requesting ministerial authorisation, on companies which although incorporated in Australia, are controlled and operated by foreign persons. Such companies will not in future be able to benefit from the protections afforded to Australians, simply by their incorporation under Australian law.

Definition of staff member

- 2.50 The definition of a staff member is amended to include service providers under contract to the agencies.

Provision of information

- 2.51 The Committee notes that the heading of Clause 3 in the Schedule I of the ISA, "Provision of information to the Committee by ASIO, ASIS and DSD" has not been amended to include the other agencies within the increased ambit of the Committee.

Recommendation 3

The Committee recommends that the heading of Clause 3, Schedule I of the Intelligence Services Act be amended to include DIO, DIGO and ONA.

Senator Alan Ferguson
Acting Chairman