

The Parliamentary Joint Committee on Intelligence and Security

- 1.1 Section 28 of the *Intelligence Services Act 2001* (the IS Act) establishes the Parliamentary Joint Committee on Intelligence and Security. The Act governs its size, structure, functions, procedures and powers. This report is made in compliance with section 31 of the Act which states that:

As soon as practicable after each year ending on 30 June, the Committee must give to Parliament a report on the activities of the Committee during the year.

Size and Structure

- 1.2 Section 28 (2) (3) of the IS Act stipulates that the Committee is a joint Committee of Parliament comprised of nine members, five government members and four opposition members. Of the five government members, three are from the House of Representatives and two are from the Senate. The Opposition members are comprised of two members of the House and two Senators.
- 1.3 Members are appointed by resolution of the House or the Senate on the nomination of the Prime Minister or the leader of the Government in the Senate. Prior to nomination, consultation must take place with the leaders of recognised parties in each of the Houses.
- 1.4 The size and structure of the Committee remained unchanged. However the membership of the Committee of the 42nd Parliament changed due to the resignation of The Hon. Alexander Downer MP on 14 July 2008. Mr Alexander Downer MP was replaced by The Hon

Andrew Robb AO MP on 27 August 2008. Following his appointment as Shadow Minister for Infrastructure, Mr Andrew Robb MP resigned from the Committee and was replaced by Mrs Kay Hull MP on 3 December 2008. Senator Fiona Nash resigned from the Committee on 6 December and was replaced by Senator the Hon. Helen Coonan. Senator Helen Coonan resigned from the Committee on 25 June 2009 and was replaced by Senator Russell Trood.

Functions

- 1.5 Under section 29 of the IS Act, the Committee is charged with reviewing the administration and expenditure of all six intelligence agencies: ASIO, ASIS, DSD, DIGO, DIO and ONA. Other matters may be referred by the responsible Minister or by a resolution of either House of the Parliament. In addition to this function, the Committee is required to review the operation, effectiveness and implications of:
- The amendments made by the *Security Legislation Amendment (Terrorism) Act 2002* and the following acts:
 - ⇒ *the Border Security Legislation Amendment Act 2002*;
 - ⇒ *the Criminal Code Amendment (Suppression Terrorist Bombings) Act 2002*; and
 - ⇒ *the Suppression of the Financing of Terrorism Act 2002*;
 - Division 3 of Part III of the *Australian Security Intelligence Organisation Act 1979*; and
 - the amendments made by the *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003*, except item 24 of Schedule 1 to that Act (which included Division 3 of Part III in the *Australian Security Intelligence Organisation Act 1979*)
- 1.6 Amendments made to the *Criminal Code Act 1995* (the Criminal Code), made in March 2004, allowed but did not require the Committee to review regulations specifying organisations as terrorist organisations for the purposes of section 102.1 of the Criminal Code. The Committee's findings on its reviews of these regulations are to be tabled before the end of the disallowance period, 15 sitting days from the tabling of the regulation.
- 1.7 During 2008-09 the Committee resolved to review all listings of terrorist organisations that came before it. Four reviews of the listing of organisations as terrorist organisations, covering thirteen organisations, were completed in 2008-09.

Procedures and powers

- 1.8 The Committee is a statutory committee. Section 29 of the IS Act outlines the oversight capacity of the Committee. However unlike other statutory or standing committees of Parliament there are specific limitations in this section with regard to the Committee's capacity to inquire into operational matters and the intelligence gathering and assessment priorities of the relevant intelligence agencies.¹ Again the Committee reiterates that, due to this limitation, balancing national security and parliamentary scrutiny remains a challenge for the Committee.² Despite these constraints, the Committee is ever mindful of its critical role in ensuring that Australia's intelligence agencies remain accountable through continuous public scrutiny.
- 1.9 Authority to inquire into special cases and all operational matters lies with the Inspector General of Intelligence and Security (IGIS) under the *Inspector General of Intelligence and Security Act 1986*. In conjunction with the IGIS the Committee provides essential bi-partisan oversight of the AIC.
- 1.10 Specific prohibitions on the Committee's activities include the following:
- Reviewing the intelligence gathering priorities of the agencies;
 - Reviewing sources of information, other operational assistance or operational methods available to the agencies;
 - Reviewing particular operations past, present or proposed;
 - Reviewing sources of information provided by a foreign government or its agencies, without the consent of that government to the disclosure;
 - Reviewing an aspect of the activities of the agencies that does not affect an Australian person;
 - Reviewing rules under Section 15 of the Act relating to the privacy of Australian citizens; or
 - Conducting inquiries into individual complaints in relation to the activities of the agencies.³

1 This limitation is contained within section 29(3) of the *Intelligence Services Act 2001*.

2 *Annual Report of Committee Activities 2005-2006*, September 2006, p. 3.

3 *Annual Report of Committee Activities 2005-2006*, September 2006, p. 3.

- 1.11 The IS Act also specifies the Committee's powers in relation to requesting witnesses and the production of documents. Clause 2 of Schedule 1 specifies that the Committee may give a person written notice requiring the person to appear before the Committee with at least 5 days notice, as well as notice of any documents required by the Committee.⁴
- 1.12 The Minister may prevent the appearance of a person (not an agency head) before the Committee to prevent the disclosure of operationally sensitive information either verbally or in a document. To achieve this, the Minister must provide a certificate outlining his opinion to the presiding member of the Committee, to the Speaker of the House of Representatives, the President of the Senate and the person required to give evidence or produce documents.⁵ There were no cases where this power was exercised during the year in review.
- 1.13 The IS Act also contains a protection, under subclause 7(1) of Schedule 1, against the disclosure in Committee reports of operationally sensitive information, namely:
- the identity of a person who is or has been a staff member of ASIO, ASIS or DSD; or
 - any information from which the identity of such a person could reasonably be inferred; or
 - operationally sensitive information that would or might prejudice:
 - ⇒ Australia's national security or the conduct of Australia's foreign relations; or
 - ⇒ the performance by an agency of its functions.⁶
- 1.14 Unlike the reports of other parliamentary committees which are privileged documents which may not be disclosed to anyone outside the committee itself until after tabling, the Intelligence and Security Committee must obtain the advice of the responsible Minister or Ministers as to whether any part of a report of the Committee discloses a matter referred to in subclause 7(1) of Schedule 1. A report may not be tabled until this advice is received.⁷ This issue is further discussed below.

4 *Annual Report of Committee Activities 2005-2006*, September 2006, p. 3.

5 *Intelligence Services Act 2001*, clause 4 of Schedule 1.

6 *Intelligence Services Act 2001*, subclause 7(1) of Schedule 1.

7 *Intelligence Services Act 2001*, subclause 7(3) of Schedule 1.

- 1.15 Lastly, to protect the national security status of the Committee's work and to maximise the Committee's access to information, the IS Act requires that staff of the Committee must be cleared for security purposes to the same level and at the same frequency as staff members of ASIS.
- 1.16 In addition to the security requirements for staff all new members of the Committee in 2008-09 were informed of the main legislation governing information regarding the AIC.
- 1.17 This information to members specifies that Section 92 of the *ASIO Act* 1979 makes it illegal to divulge the names of employees or former employees of ASIO. Section 41 of the IS Act makes it illegal to divulge the names of employees of ASIS. Sections 39, 39A and 40 of the IS Act make it illegal to divulge the names of employees or former employees of ASIS, DIGO and DSD. These sections also make it illegal to divulge information connected with functions of or information that relates to performance of functions of ASIS, DIGO and DSD. Members were also informed that this prohibition extends to information Committee members receive at briefings by these agencies.

Reports and Activities 2008-2009

- 1.18 Since the last annual report on the Committee's activities, tabled in October 2008, the Committee has tabled four reports. In this financial year, this total has consisted wholly of reviews of re-listing of terrorist organisations. In addition to the tabled reports, the Committee is currently working on its seventh review of the administration and expenditure of the six intelligence agencies. The Committee has completed its sixth review of the administration and expenditure of the six intelligence agencies but this is still being vetted as required by schedule 1, subclause 7 of the IS Act and has not yet been tabled in the Parliament.
- 1.19 The Committee has also undertaken a number of inspections of various facilities relevant to each of the six intelligence agencies.
- 1.20 Throughout 2007-08, the Committee has also received private briefings from the Defence Security Authority, the IGIS, AUSTRAC, and the National Security Advisor, and also met with Lord Carlile of Berriew, the UK's Independent Reviewer of Counter-terrorism Legislation.

Criminal Code Act 1995 – The proscription of terrorist organisations

- 1.21 Four reports on the listing of organisations as terrorist organisations were tabled in the period under review. The four reports dealt with thirteen organisations, all re-listings, although some organisations were listed under different names.

Review of the re-listing of Al-Qa'ida, Jemaah Islamiyah and Al-Qa'ida in the Lands of the Islamic Maghreb as terrorist organisations under the Criminal Code Act 1995

- 1.22 Al-Qa'ida and Jemaah Islamiyah were originally listed on 21 and 27 October 2002 and re-listed on 31 August 2004, with effect on 1 September 2004. The Committee first considered the listing of Al-Qa'ida and Jemaah Islamiyah in 2004 after the Committee's role in the Criminal Code procedure had been established. Both organisations were again re-listed on 4 September 2006 and the Committee subsequently reviewed the re-listing, reporting to Parliament in October 2006.
- 1.23 Al-Qa'ida in the Lands of the Islamic Maghreb was originally listed under the name Salafist Group for Call and Combat (GSPC) in 2002 following their listing by the United Nations Security Council. The Committee first considered the listing of the GSPC in 2004 after the Committee's role in the Criminal procedure had been established. The GSPC was re-listed on 5 November 2004 and again on 1 November 2006.
- 1.24 In a letter to the Committee on 29 July 2008, the Attorney-General advised that he intended to re-list these three organisations prior to the lapsing of their current listing as provided for in section 102.1(3). The Attorney provided statements of reasons for the re-listings.
- 1.25 The regulations were signed by the Governor-General on 7 August 2008. They were then tabled in the House of Representatives and the Senate on 26 August. The disallowance period of 15 sitting days for the Committee's review of the listing began from the date of the tabling. Therefore the Committee was required to report to the Parliament by 13 October 2008.
- 1.26 After considering the evidence given in ASIO's statement of reasons in support of the re-listing of the three organisations the Committee was satisfied that the three organisations continue to engage in activities that satisfy section 102.1 of the Criminal Code.

1.27 The Committee did not recommend disallowance of the regulations.

Review of the re-listing of Abu Sayyaf Group (ASG), Jamiat ul-Ansar (JuA) and Al-Qa'ida in Iraq (AQI) as terrorist organisations under the Criminal Code Act 1995.

1.28 The Abu Sayyaf Group (ASG) was initially listed as a terrorist organisation under the Criminal Code Act in 2002 following their listing by the United Nations Security Council (UNSC). The Committee first considered the listing of the ASG in 2004. The ASG was re-listed on 5 November 2004, and on 1 November 2006. This was the ASG's third re-listing and third review by the Committee.

1.29 Jamiat ul-Ansar (JuA), also known as Harakat ul-Mujahideen (HuM), was initially listed as a terrorist organisation under the Criminal Code Act in 2002 following their listing by the UNSC. The Committee first considered the listing of JuA in 2004. JuA was re-listed on 5 November 2004, and on 3 November 2006. This was JuA's third re-listing and third review by the Committee.

1.30 AQI was initially listed as a terrorist organisation under its previous name, Tanzim Qa'idat al-Jihad fi Bilad al-Rafidayn, on 2 March 2005. AQI was re-listed on 17 February 2007. This was AQI's third re-listing and third review by the Committee.

1.31 In a letter to the Committee on 23 October 2008, the Attorney-General advised that he intended to re-list these three organisations prior to the lapsing of their current listing as provided for in section 102.1(3). The Attorney provided statements of reasons for the re-listings.

1.32 The regulations were signed by the Governor-General on 31 October 2008. They were then tabled in the House of Representatives and the Senate on 10 November 2008. The disallowance period of 15 sitting days for the Committee's review of the listing began from the date of the tabling. Therefore the Committee was required to report to the Parliament by Monday 9 February 2008.

1.33 After considering the evidence provided by ASIO in the statement of reasons the Committee was satisfied that the three organisations continue to engage in activities that satisfy section 102.1 of the Criminal Code.

1.34 The Committee did not recommend disallowance of the regulations.

Review of the re-listing of Ansar al-Islam, AAA, IAA, IMU, JeM and LeJ as terrorist organisations under the Criminal Code Act 1995

- 1.35 These six organisations were initially listed as terrorist organisations under the Criminal Code Act in 2002 following their listing by the UNSC. The Committee first reviewed the re-listing of these organisations in August 2005. Following this, the Committee again reviewed the re-listing of these six organisations in June 2007. This was the third review of the re-listing of the six terrorist organisations.
- 1.36 In a letter received by the Committee on 10 March 2009, the Attorney-General advised that he intended to re-list these six organisations prior to the lapsing of their current listing as provided for in section 102.1(3). The Attorney provided statements of reasons for each organisation being re-listed.
- 1.37 The regulations were signed by the Governor-General on 13 March 2009. They were then tabled in the House of Representatives and the Senate on 17 March 2009. The disallowance period of 15 sittings days for the Committee's review of the listing began from the date of the tabling. The Committee was therefore required to report to the Parliament by Monday 15 June 2009.
- 1.38 After considering the evidence provided by ASIO in the statement of reasons, and evidence received during the hearing, the Committee was satisfied that the six organisations continue to engage in activities that satisfy section 102.1 of the Criminal Code.
- 1.39 A number of issues which arose during this review centred on improving procedures with regard to the information provided to the Committee by the Attorney-General's Department in support of the re-listing.
- 1.40 In the opening chapter of the report, the Committee highlighted a concern that the public statement of reasons provided to the Committee in respect of the six organisations, were not copies of the unclassified documents received from ASIO by the Attorney-General. The Committee was subsequently provided with another version of the statement of reasons which contained additional text previously deleted. This deleted text reported that the information within the statement of reasons had been corroborated by classified material and also contained a conclusion stating that each organisation satisfied the statutory criteria in the Criminal Code.
- 1.41 Another issue which arose during this review centred on the provision of information when a decision is taken not to re-list an

organisation. The Committee received notice that the Attorney-General had considered advice from the Director-General of Security and the Australian Government Solicitor that the Egyptian Islamic Jihad (EIJ) did not meet the requirements for listing under the Criminal Code. He stated he would not be re-listing the EIJ as a terrorist organisation under the Criminal Code after the listing expired on 30 March 2009.

- 1.42 The Committee expressed the view that whilst there is no requirement on the Attorney-General to provide the Committee with a statement of reasons when a decision not to re-list is made, as is done for those being listed or re-listed, it would be useful if one was provided. Such a statement would assist in defining the attributes which warrant listing and also increase transparency of the process. The public listing of an organisation brings with it serious punishments and the proscription regime brings with it restrictions not generally applied in Australian law. As a result recommendation seven recommended that where a decision not to re-list an organisation is made, that the Attorney-General provide a statement of reasons to the Committee and a public statement of reasons.⁸
- 1.43 The Committee also expressed the view that the statement of reasons provided in support of the re-listing of the six organisations could be improved in the future. The non-statutory guidelines used by ASIO to evaluate the evidence supporting a listing, or a re-listing, are useful tools. These have been commented on in many of the Committee's reports on the listing of organisations. As a result the Committee requested that the statements of reasons be written in a way that directly links the evidence with ASIO's non-statutory guidelines. Although these are internal non-statutory guidelines only, they are helpful to the Committee given the broad nature of the statutory test.
- 1.44 These issues were of particular interest in considering the re-listing of the Islamic Army of Aden (IAA).
- 1.45 During this review the Federation of Community Legal Centres (Vic) Inc has made the point that:

In the case of the six organisations, the Statements of Reasons do not identify that any of the organisations in question have any links to Australia. All of the six organisations are geographically remote from Australia and there is not

8 *Review of the Re-listing of Ansar al-Islam, AAA, IAA, IMU, JeM and LeJ as terrorist organisations*, June 2009, p. 30.

suggestion that any of the organisations have Australian members, receive financing from Australians or have been supplied by Australian personnel.

This criterion does not seem to have been applied in respect of the six organisations and they do not appear to have any 'links to Australia', as that criterion has been defined by the Committee. In our submission, the listing of organisations with no identifiable links to Australia exceeds the scope of the legislative intent behind the listing provisions and represents a misuse of the power to list organisations.⁹

- 1.46 The Committee made it clear that it was a misunderstanding of the statutory scheme to suggest that the listing of an organisation 'with no identifiable links to Australia exceeds the scope of the legislative intent...' or is 'misuse of the power to list'.¹⁰
- 1.47 In the report the Committee stated that information in the statement of reasons needed to be compelling, precise and authoritative and should be written in such a way as to be directly referable to the statutory criteria for listing in the Criminal Code. ASIO undertook to improve the statement of reasons in such a way for future listings.

Review of the re-listing of Hizballah's ESO as a terrorist organisation under the Criminal Code Act 1995

- 1.48 Hizballah's ESO was first listed in Australia on 5 June 2003 following their listing by the UNSC. The ESO came up for review under the current proscription regime, after their re-listing by the Attorney-General on 5 June 2005 and again on 25 May 2007. This review was of the third re-listing of Hizballah's ESO as a terrorist organisation.
- 1.49 In a letter received by the Committee on 8 May 2009, the Attorney-General advised that he intended to re-list this organisation prior to the lapsing of their current listing. The Attorney provided the Committee with statements of reasons supporting the re-listing.
- 1.50 The Governor-General signed the regulations on 14 May 2009. They were then tabled in the House of Representatives and the Senate on 25 May 2009. The disallowance period of 15 sittings days for the

9 Federation of Community Legal Centres (Vic) Inc, *Submission 3*, p. 11.

10 *Review of the Re-listing of Ansar al-Islam, AAA, IAA, IMU, JeM and LeJ as terrorist organisations*, June 2009, p. 10.

Committee's review of the listing began from the date of tabling. The Committee was therefore required to report to Parliament by 25 June 2009.

- 1.51 During this review the Committee received three submissions from the general public, in addition to the usual submissions from the Attorney-General's Department. They were from the Federation of Community Legal Centres (Vic) Inc, Dr Patrick Emerton of Monash University and the Australia/Israel and Jewish Affairs Council.
- 1.52 The submissions from the Federation and Dr Emerton both contained detailed criticism of the proscription regime itself and only briefly dealt with the review of the re-listing of Hizballah's ESO. Both stated that the statutory criteria had not been adequately made out with respect to Hizballah's ESO. The Federation maintained that this was due to there being no recent terrorist activity attributed to the group in the statement of reasons since the last review in 2007.
- 1.53 The Committee responded by stating that:
- Whilst it is preferable to see information which relates to the activities of the organisation since the last re-listing, this information is not in itself conclusive in the consideration of a re-listing.¹¹
- 1.54 Lebanese elections were held on 7 June. Hizballah won 11 seats of the 128 seat Lebanese Parliament. The Committee was therefore mindful of the complex political situation in Lebanon and Hizballah's ability to influence that situation.
- 1.55 In his submission to the inquiry Dr Patrick Emerton, also highlighted this complexity by pointing out that Hizballah is a multi-faceted organisation with strong links to the Lebanese community in Australia. The Committee responded by noting that the proscription applies specifically to the ESO, rather than Hizballah in its entirety.
- 1.56 The Australia/Israel and Jewish Affairs Council submitted to the Committee that it should recommend to the Attorney-General that Hizballah in its entirety be proscribed under Australian law. However the Committee heard evidence that the ESO constitutes a distinct wing which engages in terrorist activity and was not persuaded, at this time, to make the recommendation proposed by the Council.

11 *Review of Hizballah's External Security Organisation (ESO) as a terrorist organisation*, June 2009, p. 15.

- 1.57 After careful consideration of the evidence in support of the re-listing of Hizballah's ESO, and an account of the complex political situation in Lebanon, the Committee was satisfied that Hizballah's ESO continues to engage in activities that satisfy section 102.1 of the Criminal Code.

Current reviews

- 1.58 The committee is currently working on its Review of the Administration and Expenditure of the Australian Intelligence Organisations No. 7 (2007/08).

Inspections and visits

The International Intelligence Review Agencies Conference 2008

- 1.59 Since 2002, the Committee has sent representatives to the biennial conference of oversight agencies. In 2002 the conference was held in London, in 2004, in Washington and, in 2006, in South Africa. In 2008, the conference was hosted by the intelligence agencies of New Zealand in Auckland between Sunday, 5 October 2006 and Wednesday, 8 October 2006.
- 1.60 Since its inception in Australia in 1997 the conference has become larger and more elaborate. In 2008, the following countries sent delegates:
- Australia:
 - ⇒ Parliamentary Committee on Intelligence & Security;
 - ⇒ Inspector General of Intelligence and Security.
 - Belgium:
 - ⇒ Standing Intelligence Agencies Review Committee.
 - Canada:
 - ⇒ Security Intelligence Review Committee;
 - ⇒ Office of the Communications Security Establishment Commissioner;
 - ⇒ Office of the Inspector General of the Canadian Security Intelligence Service.

- New Zealand:
 - ⇒ Inspector General of Intelligence and Security.
 - ⇒ Commissioner of Security Warrants.
- Poland:
 - ⇒ Bureau of the Committee on Special and Intelligence Services of the Chancellery of the Prime Minister.
- Republic of South Africa:
 - ⇒ Office of the Inspector General of Intelligence.
- United Kingdom:
 - ⇒ Intelligence and Security Committee;
- United States of America:
 - ⇒ Office of the Inspector General, Defense Intelligence Agency;
 - ⇒ Office of Assistant to the Secretary of Defense for Intelligence Oversight;
 - ⇒ Office of Inspector General, National Geospatial Intelligence Agency;
 - ⇒ Office of Inspector General, CIA;
 - ⇒ Office of Inspector General , National Reconnaissance Office

1.61 The program was as follows:

Monday 6 October 2008

- Welcome and introductory remarks - Hon D P Neazor, IGIS, NZ
- Session 1
 - ⇒ Address: Sir Brian Elwood, Former Chief Ombudsman NZ
 - ⇒ Whose Interests do Oversight Mechanisms Serve: government, community, targeted individuals, agencies? (i.e. What is our task including aspects of freedom of information)
- Commentators:
 - ⇒ Mr Gary Filmon (Canada)
 - ⇒ Adv Paul Swart (Republic of South Africa)
- Session 2
 - ⇒ Content of review: Should particular aspects of intelligence agencies' activities have priority in oversight: product procedures resources?

- Speakers
 - ⇒ Ms Eva Plunkett (Canada)
 - ⇒ Rt Hon Michael Mates MP (UK)
 - ⇒ Mr Richard Woods (NZ)
 - ⇒ Mr G Rapaille or Mr P De Smet (Belgium)
- Session 3
 - ⇒ Criteria against which overseers judge agencies' performance, including how the propriety of any agency activity is judged.
- Speakers
 - ⇒ Mr Ian Carnell (Australia)
 - ⇒ Mr William Dugan (USA)

Tuesday, 7 October 2008

- Session 1: What Works? Breakout meetings (concurrent)
 - ⇒ Group 1: Developing trust in reviewers and reviewer's knowledge of agency work whilst retaining independence.
 - ⇒ Group 2: Selection of cases or topics for in-depth review – how to select what is of significance, and challenge of assurance of completeness of information provided.
 - ⇒ Group 3: Access to computerised records – has technological change presented new problems for reviewers?
- Session 2
 - ⇒ Intrusion into individual privacy in search of intelligence – oversight role
- Dinner
 - ⇒ Speaker Mr Terence O'Brien, Senior Fellow, Centre for Strategic Studies, Victoria University of Wellington, former NZ diplomat

Wednesday, 8 October 2008

- Discussion of privacy continued
- Session 1
 - ⇒ Is there a preference for one reviewer for each agency? Are there occasions when a joint review by more than one oversight body would be advantageous?

- Speakers
 - ⇒ Mr Z T Ngcakani (IGIS, Republic of South Africa)
 - ⇒ Mr Scott Dahl (USA)

The next conference is to be held in 2010 and will be hosted by Australia.

ASIO Headquarters Visit

- 1.62 On Monday 15 September 2008, the Committee visited the ASIO headquarters in Canberra. The Committee received a briefing on the threat environment currently faced by Australia and ASIO's litigation capacity.

AUSTRAC Visit

- 1.63 On Friday 29 May 2009 the Committee visited the AUSTRAC head office in Melbourne. Committee members and secretariat staff were briefed on the Memorandum of Understanding between AUSTRAC and ASIO and AUSTRAC's intelligence role.

ASIS Visit

- 1.64 The Committee visited ASIS on 31 July 2009.

Private briefings

- 1.65 On Thursday 12 February 2009, the Committee was briefed by representatives from the Defence Security Authority in relation to the Security clearance process undertaken by Defence intelligence agencies.
- 1.66 On Monday 16 March 2009, the Committee was briefed by Mr Duncan Lewis AO, National Security Advisor and representatives from the Office of National Security, Department of Prime Minister and Cabinet and ASIO. The briefing was valuable in informing the Committee about the Office of National Security and its role within the broader AIC.

Issues arising during the year

Attorney General's Department – Community Consultation on listing of terrorist organisations

- 1.67 In its Annual Report 2007-2008¹² the Committee commented on the Attorney-General's lack of a comprehensive community information program in relation to any listing of an organisation as a terrorist organisation.
- 1.68 Since 30 June 2008 the Attorney-General's Department have reported to the Committee on recent developments in improving community education and awareness. The Committee has been provided with a copy of a pamphlet, produced by the Attorney-General's Department, on Australia's counter-terrorism laws. The Committee has also received a list of the community organisations that this pamphlet has been distributed to.

Parliamentary privilege

- 1.69 In December 2008 the Committee were advised by the Presiding officer that the AFP were seeking documents held by the Committee.
- 1.70 The Committee sought advice on issues relating to Parliamentary Privilege from the Clerk of the Senate and the Clerk of the House of Representatives.
- 1.71 The Committee were unanimously of the view that the documents requested were documents of the Committee and were not merely administrative documents.
- 1.72 Having given the matter careful consideration the Committee agreed to provide the AFP with the documents sought.
- 1.73 On 9 February 2009 the Chair of the Committee wrote to Assistant Commissioner Mandy Newton APM of the Australian Federal Police (AFP) providing her with the document sought. The letter confirmed that the Committee were of the view that the document was a Committee document that may attract Parliamentary Privilege. It further stated that the Committee did not waive any privilege in relation to the document but had authorised the Chair to provide it to the AFP.

12 *Annual Report of Committee Activities 2007-2008*, October 2008, p. 15-17.

Report vetting

1.74 As mentioned in paragraph 1.18 Committee reports must be vetted.

1.75 In its entirety Schedule 1 subclause 7 of the IS Act states that:

7(1) The Committee must not disclose in a report to a House of the Parliament:

(a) the identity of a person who is or has been a staff member of ASIO or ASIS or an agent of ASIO, ASIS, DIGO or DSD or

(b) any information from which the identity of such a person could reasonably be inferred; or

(c) operationally sensitive information that would or might prejudice:

(i) Australia's national security or the conduct of Australia's foreign relations; or

(ii) The performance by an agency of its functions.

7(3) The Committee must obtain the advice of the responsible Minister or responsible Ministers concerned as to whether the disclosure of any part of the report would or might disclose a matter referred to in subclause (1) and

7(4) The Committee must not present a report of the Committee to a House of Parliament if a responsible Minister concerned has advised that the report or a part of the report would or might disclose such a matter.

1.76 Given the mandatory wording of subclause 7 (3), the Committee seeks advice from Minister's whose officers have appeared before the Committee in relation to any part of Committee report that they may have grounds for believing falls within the scope of s7(1)(a)(b)(c) (i)(ii).

1.77 In relation to the Committee's review of administration and expenditure No. 6 draft copies of the report had been sent to all agencies by 10 March 2009 and by 22 June 2009 some Ministers had not replied with a final vetting letter. Some letters were only received by the Committee in the sitting week 15-18 June.

1.78 The Committee accepts that, due to negotiations between it and agencies, there may be some time before a final vetting letter can be arrived at. However the time frames that have been involved are, the

Committee believes, unacceptable and point to an administrative failure by Departments in relation to the vetting of its reports.

- 1.79 It is clearly desirable that these Administration and Expenditure reports are tabled in a timely manner. The Committee believes that, in most cases, a response on vetting should be forthcoming within one month of its presentation to the relevant Ministers. Past experience indicates that any issues of concern tend to be straightforward and uncomplicated.
- 1.80 Reporting on these matters to the Parliament is important. The Committee therefore recommends that procedures be put in place to allow for the Committee's Administration and Expenditure reports to be vetted within one month of their presentation to the relevant Minister.

Recommendation 1

The Committee recommends that procedures be put in place to allow for the Committee's Administration and Expenditure reports to be vetted within one month of their presentation to the relevant Minister.

Intercept warrants

- 1.81 In Senate estimates on Tuesday 26 May Senator Scott Ludlam made the following two statements:

My next question relates to telephone interceptions. As you would obviously know, Australians are vastly more likely than citizens of the United States to have their telephones tapped by various agencies. I think the figures that I have access to are about 12 months out of date, but I would just like to get a sense of proportion. Of the 3,287 warrants sought in the year to June 2007, for example, what proportion of those would be ASIO and what would be the various state and territory police agencies.

It was worth asking. Just to press the point, though, in the period that I am referring to, 2006-07, 2,929 warrants were issued in Australia compared with about 1,800 in the entire

United States. So there is something rather peculiar happening in Australia that we are per capita vastly more likely to have a phone intercept than a citizen of the US is, which surprises me every time I come across that statistic.¹³

- 1.82 The Committee was interested in the matters raised by Senator Ludlam and sought further information/clarification from the relevant agencies.
- 1.83 The Committee was advised that it was not possible to undertake a like with like comparison between the US and Australia in relation to intercept warrants.
- 1.84 The United States authorises intercepts *per operation* rather than per individual. It therefore has many more intercepts than Australia where warrants are required for each person being intercepted. Further details follow.
- 1.85 In the Annual Report for the Year ending 30 June 2008 on the Telecommunications (Interception and Access) Act 1979 the numbers of applications for law enforcement warrants, with the figures Senator Ludlam referred to (**bolded**), are set out for the following periods:

	05/06	06/07	07/08
Made	2934	3287	3254
Issued	2929	3280	3246

Source Annual Report for the Year ending 30 June 2008 on the *Telecommunications (Interception and Access) Act 1979* p. 18

- 1.86 The Report of the Director of the Administrative Office of the United States Courts on Applications for Orders Authorizing or Approving the Interception of Wire, Oral, or Electronic Communications for the period 1 January 2008 to 31 December 2008 contains the number of and nature of federal and state applications for orders authorising or approving the interception of wire, oral, or electronic communications. A total of 1891 intercepts authorised by federal and state courts were completed in 2008. Nationwide, the average number of persons whose communications were intercepted per order in which intercepts were installed was 92.
- 1.87 This would translate into approximately 170,000 individual authorisations under the Australian warrant system – in Australia it is not possible to permit 92 separate intercepts on one warrant.

13 *Transcript of Evidence*, Senate Legal and Constitutional Affairs Committee, Tuesday, 26 May 2009, p. 99 - 100

- 1.88 Importantly, the US Report does not include interceptions regulated by Foreign Intelligence Surveillance Act of 1978 (US) (FISA). No report is required when an order is issued with the consent of one of the principal parties to the communication. eg obscene phone calls, a police officer or police informant is a party, or the use of a body microphone.
- 1.89 Of the 47 US State jurisdictions which have laws that authorise courts to issue orders permitting wire, oral or electronic surveillance 23 reported using one of these three types of surveillance as an investigative tool.
- 1.90 The report by the US Department of Justice indicates 2,082 applications were made by the Government during the calendar year 2008 for authority to conduct electronic surveillance and physical search for foreign intelligence.

Support for the Committee

- 1.91 To fulfil its statutory and other obligations the Committee is reliant on secretariat staff. In the reporting period the Committee was supported by four full time parliamentary officers. This consisted of a secretary, an inquiry secretary, a senior research officer and an office manager.
- 1.92 All staff are required under the *Intelligence Services Act 2001* (Schedule 1 Part 3 section 21) to be cleared to the 'level of staff members of ASIS' or a top secret positive security clearance (TSPV). Three staff were cleared to this level and one is in the process of upgrading their clearance. These staffing and clearance levels were sufficient for the work of the Committee.

Reply to recommendation from Annual Report 2007-2008

- 1.93 As mentioned, the Committee, unlike any other in the Parliament, does require support staff to have a quite intrusive TSPV security clearance. This means that the Committee's work requires a pool of staff within the Department of the House of Representatives who are able to meet that standard.
- 1.94 In the last annual report the Committee recommended to the Presiding officers the need for additional staff to have security clearances. This was needed to address staff movements and provide flexibility.

- 1.95 In December 2008 the Committee received a response from the Presiding officers. It read:

The Presiding officers are aware of the need for staff of the Parliamentary Joint Committee on Intelligence and Security to have appropriate clearances as stipulated in the Intelligence Services Act.

Due to staff movements at the commencement of the 42nd Parliament, for a period of several months, the staff dedicated to the committee included only one suitably cleared staff member. Clearances for other staff were completed by August 2008. Currently there are six employees of the Department of the House of Representatives which supports the Committee with the required level of clearance and one in the process of upgrading to the required level. All staff dedicated to this committee currently have the required security clearances.

It is considered that this is sufficient to support the foreseeable needs of the committee and reasonable contingencies. The Clerk of the House advises that the situation will be monitored and, if necessary, action will be taken to ensure the work of the committee is not inhibited. In particular, steps will be taken to ensure that staff to serve the committee in the next Parliament are identified as early as practicable and any necessary security clearance processes are commenced at the earliest practicable date.

- 1.96 The Committee considered this response at a meeting on 27 November 2008. The Committee was happy with the response.

The Hon Arch Bevis, MP

Chairman

