



COMMONWEALTH OF AUSTRALIA

Proof Committee Hansard

SENATE

LEGAL AND CONSTITUTIONAL AFFAIRS LEGISLATION
COMMITTEE

Intelligence Services Legislation Amendment Bill 2011

(Public)

THURSDAY, 16 JUNE 2011

CANBERRA

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SENATE
LEGAL AND CONSTITUTIONAL AFFAIRS LEGISLATION COMMITTEE
Thursday, 16 June 2011

Senators in attendance: Senators Barnett, Crossin, Fisher, Ludlam Pratt and Trood

Terms of reference for the inquiry:

To inquire into and report on:
Intelligence Services Legislation Amendment Bill 2011

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DONOVAN, Ms Helen, Co-Director, Criminal Law and Human Rights, Law Council of Australia

Evidence from Ms Donovan was taken via teleconference—

Committee met at 16:04

CHAIR (Senator Crossin): I open this public hearing of the Senate Legal and Constitutional Affairs Legislation Committee's inquiry into the provisions of the Intelligence Services Legislation Amendment Bill 2011. This inquiry was referred by the Senate to the committee on 24 March 2011 for inquiry and report by 21 September 2011; however, the committee has resolved now to report on 21 June 2011. The bill makes amendments to the Australian Security Intelligence Organisation Act 1979, the Intelligence Services Act 2001 and the Criminal Code with the aim of improving the operation of some provisions in those acts. We have received 13 submissions for this inquiry. They have all been authorised for publication and are available on our website.

I remind all witnesses that in giving evidence to the committee they are protected by parliamentary privilege. It is unlawful for anyone to threaten or disadvantage a witness on account of evidence given to the committee and such action may be treated by the Senate as contempt. It is also a contempt to give false or misleading evidence to the committee. We prefer all evidence to be given in public, but of course if you want a private session you can request we go in camera. I imagine that is going to happen this afternoon.

I welcome representatives from the Law Council of Australia. Thank you very much for your submission and your time. We appreciate the contribution you make to the work we do in considering these pieces of legislation. We have a submission from the Law Council of Australia, submission No. 1, and we also have a supplementary submission. I invite you to make a short opening statement before we go to questions.

Ms Budavari: The Law Council would like to thank the committee for the opportunity to appear and speak to our written submissions on this bill. The submissions on this bill are concerned with quite a discrete issue. The bill does touch on other areas and other amendments to the Criminal Code and the intelligence services legislation, but we are concerned with a confined issue—that is, the proposed amendment to the definition of 'foreign intelligence' in the ASIO Act and the proposed amendments to the test that has to be satisfied before ASIO is authorised to gather foreign intelligence within Australia.

The primary purpose of the ASIO Act is to establish clear statutory parameters on the work that ASIO can undertake and the means that it can use to fulfil its identified objectives. Two of the important ways that those parameters are established are: firstly, by defining key terms, such as 'security' and 'foreign intelligence', which are used in the articulation of ASIO's mandate and, secondly, by setting out the matters that the relevant minister has to be satisfied of before authorising the use of ASIO's powers. So, by altering the sections of the act relating to foreign intelligence and authorisation of gathering of that intelligence, you actually alter and expand the parameters of ASIO's lawful activity and in turn you alter and expand the agency's purpose and focus. For that reason, even though the amendments that the Law Council is focusing on are quite limited or contained within three clauses, they are actually very significant, particularly given the context in which ASIO operates. It operates in a secretive environment and the powers that it exercises can have significant impacts on people's rights, particularly their privacy rights. The Law Council opposes the proposed amendments relating to the definition of foreign intelligence essentially for two reasons. The first reason is that we consider that no real case has been made out to justify them, and certainly not one which takes proper account of the full scope of ASIO's existing powers and which explains by reference to more than fairly broad statements why those powers are inadequate. In this context it is important to note ASIO's existing powers to gather information that are relevant to security and the fairly broad definition of security that is already within the act. The materials that support this bill, the explanatory memorandum and submissions in our respectful submission from the Attorney-General's Department, do not clearly spell out the effect of the amendments nor provide sufficient justification for them. For example, what is not clearly stated is that the amendments are not simply about allowing ASIO to do the same work it has always done—for example, counterterrorism work, but in a different threat environment which is referred to in those materials—but, in fact, potentially allow ASIO to do different work altogether—for example, gathering information about economic activity and negotiations. In short, the amendments expand ASIO's sphere of activity.

It may be that there are more detailed reasons for the proposed expansion of powers which cannot be disclosed to the Law Council or cannot be disclosed more generally, but they should be disclosed to this committee and

they should be disclosed to the parliament. Therefore we would suggest that the committee ask the representatives of the Attorney-General's Department for further details of the reasons that these amendments are necessary. To add to the information that we want to put forward about the lack of justification for these particular amendments, we simply note that similar amendments were made to the Telecommunications (Interception) Act last year and at that stage we objected to those amendments as well.

The second reason that we oppose the new proposed definition and the threshold test for the authorisation of the gathering of this foreign intelligence is that these provisions are so broadly drafted they no longer fulfil their purpose. They do not simply substitute new parameters for old parameters, but they replace statutory parameters with broad ministerial discretion and that starts to undermine the purpose and effectiveness of the act. In this regard we contrast the test for the use of these powers with the threshold test for ASIO gathering information in relation to domestic matters which is far more tightly defined.

The rest of the submission and the supplementary submission on behalf of the Law Council hopefully speak for themselves. We will leave the opening statement at that and attempt to answer any questions from the committee.

Senator LUDLAM: Thank you for coming in on short notice. The government has not really provided justification, which is partly why the committee thought it was worthwhile to take your evidence directly. Can you give us an example of what ASIO will be able to do if the mandate is broadened, as the government proposes?

Ms Budavari: The example we referred to in the opening statement relates to the broadening of the definition, particularly in relation to economic activity. We are somewhat puzzled by what that could involve, but there have been other submissions to your committee that suggest that that could look at issues like industrial espionage. We would be seeking some clarity on that from the department as well.

Senator LUDLAM: In past discussions and the private briefing I had with ASIO some time ago, the agency has always been emphatic to outline the fact that it does not have the time, the resources or the mandate in its act to track civil society groups, for example, environmental campaigners, people working on climate change, people doing animal rights work or whatnot, unless there is that core element of the potential for politically motivated violence. That is the threshold test that ASIO has used up to date, which is appropriate. Would the amendments proposed that the Law Council objects to have any impact in that space on the issue of civil society groups operating here or overseas?

Ms Budavari: We certainly see the potential for that. It is not sufficient for agencies to come before committees and say they will not use that power because they have other priorities or they will not use that power for some other reason. If the power has been granted to them, it is potentially there to be used. It then puts both agencies and those who oversee those agencies in a difficult position. They then have to make judgment calls. From our perspective it is more straightforward to confine the amendments to the actual need that is there that has to be demonstrated for those amendments. Ms Donovan might want to comment on that as well.

Ms Donovan: I think you are right in identifying the fact that when ASIO are looking at gathering intelligence on matters relating to security they have to establish some nexus with politically motivated violence or other factors which are listed in the definition of 'security' in section 4. When gathering foreign intelligence there has never been a need for that nexus before but the definition of 'foreign intelligence' has previously been more confined. The current definition of 'foreign intelligence' is:

... intelligence relating to the capabilities, intentions or activities of a foreign power.

And that includes foreign political organisations. Now that that definition of 'foreign intelligence' is expanded to include basically anything that anybody does or says outside of Australia and is not required to be linked to politically motivated violence or the promotion of communal violence then yes, I think it would allow ASIO expanded capacity to gather information about civil society groups operating outside of Australia but with some connection to Australia in the sense that there are people in Australia who are communicating with those groups or people travelling to Australia who are associated with those groups.

As my colleague said, we do not accept as a safeguard that agencies have limited resources so there is no need to fear that they would misuse the powers available to them or use them for frivolous means et cetera. The safeguards need to be in the legislation itself.

Senator LUDLAM: The other obvious example that comes to mind in the civil society area of where ASIO would not be able to intervene at all, from reading the act as it stands, is in an industrial dispute involving trade unions, for example, where you might be able to mount a very coherent argument that Australia's economic wellbeing or interests are being impacted. Is that getting a bit far-fetched or is that really how broadly the net is being cast?

Ms Donovan: I do not know how far-fetched it is and whether that would actually happen in practice. I suppose that is what the department or agency will make submissions to you about. I think in theory the act as amended would allow that. Again, you can address that question to the department. If the amendments were passed, I am not sure what restraint there would be within the act on the gathering of that sort of intelligence.

Senator LUDLAM: I think one of the witnesses this afternoon is the Inspector-General and so I will address this question to her, but I would also like to put it to you. It is about how ASIO are overseen and the benchmarks against which they are tested as to whether they are acting appropriately. The parliament does not have access to the primary documents on which ASIO would make their case that they are acting appropriately and so we have delegated that power to the IGIS. If the mandate by which ASIO can operate is as broad as you are suggesting, what criteria would the IGIS be able to apply when deciding whether ASIO are acting within their powers?

Ms Budavari: I guess there are provisions within the IGIS Act that relate to how the IGIS carries out her functions. From our perspective, that is the only guidance that we are aware of.

Senator LUDLAM: She would normally test against the ASIO Act whether they are within or outside their mandate. Would that function of oversight be effectively meaningless if there is nothing against which to coherently gauge whether they are well within the realms of what they can do henceforth?

Ms Budavari: I suppose that is an extrapolation from the concerns that we have expressed about the lack of definition around the proposed amendments.

Ms Donovan: We acknowledge that the IGIS's role is to look both at the legality and the propriety of ASIO's actions, so the IGIS is not confined by what is in the act. But you are right, 'propriety' is much greyer. You will speak to the IGIS about it directly, but I suspect that word is one that that office continues to grapple with. In the circumstances where a minister has authorised the gathering of foreign intelligence or issued a warrant—and that is lawful within the ASIO Act—it is difficult to ask the IGIS to second-guess that and second-guess its appropriateness. The oversight role can be somewhat compromised if the tests that are contained within the act do not set out clear parameters.

Senator LUDLAM: What raised the red flag for me was in your original submission. You note that the role of the IGIS is seriously undermined.

Senator TROOD: Do you accept the proposition that the definition in the act is too narrow in the current circumstances that ASIO is trying to deal with?

Ms Budavari: In the absence of further detail of what those circumstances are—

Senator TROOD: The narrow definition in relation to state intelligence is in essence part of the issue, isn't it? Threats to Australia's national security are no longer emanating merely from states. They are emanating from a range of nongovernmental actors, from organisations not in any way connected with governments, and under the interpretation which ASIO is obliged to apply to the use of its powers, those organisations are essentially excluded from their mandate.

Ms Donovan: I think that is a misrepresentation of the ASIO Act as it currently stands. With respect, Senator, I do not suspect it is your misrepresentation; it is a misrepresentation that is contained in the explanatory memorandum. The definition of foreign intelligence already captures the activities of foreign political organisations which have connection with a state or are not state sponsored, and ASIO's ability to gather intelligence within Australia includes the ability to gather intelligence which is relevant to security. Security is defined as the protection of the Commonwealth and of the people of the Commonwealth and the several states and territories from things such as espionage, sabotage, politically motivated violence, promotion of communal violence, attacks on Australia's defence system whether the threat comes from within Australia or is committed within Australia or not, and whether it comes from an individual or a group or a foreign state. So there is already that ability to gather intelligence of that type within the act. That is some of the point we are making. In order to have a proper conversation about this and about why the amendments are needed and what they will achieve, we need to have an honest conversation about what the act already says.

Senator TROOD: I do not disagree with that, Ms Donovan. I think that an honest conversation is a helpful way of trying to resolve these matters. But if we are having an honest conversation, then you would be drawn to the conclusion, wouldn't you, that the act seems to now present a measure of ambiguity in relation to this threat? On the one hand it refers to threats emanating from states, while on the other hand it has, on your interpretation, a broad definition of security, which on one view makes one inconsistent with the other?

Ms Donovan: No, I do not think so, Senator. They address different matters. The definition of foreign intelligence is in the act to explain the circumstances in which ASIO can gather intelligence within Australia about activities abroad which do not relate to security—so what other matters about people's activities abroad can

ASIO gather intelligence about when they do not relate to security. It may be that the government and the parliament agree that there should be a shift in the sorts of work that ASIO does. It may be that the government and the parliament agree that ASIO should now be looking more at economic matters and that they are of a greater interest to Australia's national interest than they once were.

Senator TROOD: That indeed is a possibility, but the definition relates to the activities of a foreign power and, clearly, terrorist organisations unconnected with states, that are not state-sponsored terrorism, is clearly not terrorism emanating from a foreign power and it is not intelligence that is required in relation to a foreign power.

Ms Donovan: If there is information in Australia about a threat of politically motivated violence, whether it is a threat to Australia or a foreign country and whether it is happening within Australia or outside Australia, then ASIO is authorised to gather that information, and even under the definition of foreign power, foreign power includes a foreign political organisation that is not connected to a state or sponsored by state. It may be that the definition needs to be tidied up in some respects and that we need to use more consistent language within the act, but this conversation has not been had necessarily on that basis.

Senator TROOD: I think that part of the difficulty here is that ASIO is absolutely punctilious in following the obligations which it is required to follow under the act and because they are absolutely punctilious in that activity, they regard themselves as bound by the section 4 definition at the moment that says 'foreign power'. So it feels constrained by that obligation. You may have a broad interpretation of where its remit runs, but in fact, because it is concerned about acting completely within the law, ASIO is reluctant to extend its authority or use its powers in ways which it thinks are not authorised by its act. What ASIO is seeking to do, Ms Donovan, is to ensure that everything it actually does is everything that is mandated by law, so the accountability recommendations about which you are concerned—and may I say, rightly so—are ones that they can be absolutely confident that they are meeting.

Ms Budavari: My colleague may want to respond as well but, Senator, I would suggest we are in furious agreement about—

Senator TROOD: About that, yes.

Ms Budavari: ASIO needing parameters and needing to stick to those parameters. I suppose where the difference perhaps lies is in understanding the difficulty with the present definition and feeling or taking the view, which we take, that the proposed new definition is too broad. There may be some room for some clarification of the previous definition or some amendment to that but we would be arguing for that to be clearly defined and saying that the phrase 'intelligence about the capabilities, intentions or activities of people or organisations outside Australia' is just too broad.

Senator TROOD: We could meet your concerns in one of two ways. One could narrow the definition in ways in which you are encouraging us to think about, or we could allow the definition as it stands and then provide constraint on the way in which the powers are exercised in relation to the definition. Tell us whether or not you have a view as to which of those courses might be the preferable one, or whether you want to do both.

Ms Budavari: We would probably say it is a matter for you to address to government representatives.

Senator TROOD: We will certainly do that, but I would be interested in your view as to which of these courses you are pressing on the committee, if either one.

Ms Budavari: I think we are pressing on the committee to seriously look at the broadness of a proposed definition.

Senator TROOD: If we narrowed the definition in some way or recommended a narrowing of the definition, then you would be happy with the other constraints on the exercise of the power, is that right?

Ms Budavari: I think that the definition is fundamental to them—the way the power is exercised, yes—but my colleague may wish to add to that.

Ms Donovan: I think the threshold test remains important as well. With respect, Senator, without understanding why the current definition is inadequate—what particular threat or aspect of ASIO's mandate it cannot address because of the current definition—we cannot have a conversation about how to narrow the proposed definition or how to perhaps confine a threshold test that must be met. Senator, you suggested that perhaps the problem is not with the current definition, it is with ASIO's understanding of self-imposed limitations based on the current definition. Maybe that is the case, but at the moment we are all attempting to have a conversation about this on the basis of some pretty broad-brush-stroked statements—for example, the current act only really looks at state-sponsored threats or organisations—which are not accurate. We simply do not know what it is that ASIO wants to be able to do, needs to be able to do and cannot do because of the constraints of the

current legislation, so we cannot possibly sensibly discuss how the proposed amendment could be narrowed so that it only provides the additional flexibility that it needs to provide.

Senator TROOD: I must say, Ms Donovan, I do not find a mystery about this. It seems, to me, pretty clear what their need is and I can see why they see that this is a problem with the existing conditions under the act.

Ms Donovan: I cannot put it any more highly than that. I would suggest, if you asked the department or asked ASIO, for example, 'What threat which falls under the broad banner of a terrorist threat can you not address under the current provision, or cannot gather intelligence about under the current provisions?' there probably is not information of that type that cannot be gathered; it is information of a different type.

Senator TROOD: Okay. We will talk to the department about that.

Senator PRATT: Very briefly, Ms Donovan, you just spoke about the type of information that can and cannot be collected by ASIO. From your submission I gather that the department is acknowledging exactly what you are, which is that it is information of a different type. It could be for acts of people-smuggling, weapons proliferation or crime. You are basically arguing that we have not had a debate about the role of ASIO in broadening its powers to tackle such issues. Is that correct?

Ms Donovan: That is essentially it, yes. People-smuggling is an exception, because specific amendments were already made to the ASIO Act to cover people-smuggling and the definition of 'security' was expanded accordingly. In the case of transnational crime, for example, I think that, yes, these amendments are directed at giving ASIO a broader role. It is not for the Law Council, of course, to say whether or not that is appropriate; it is for the parliament to have that discussion about how it wants ASIO's resources to be directed and whether they think the sorts of powers ASIO has at its disposal should be used for those functions.

Senator PRATT: Would you also argue that, because ASIO may not have a discrete role, foreign intelligence would not necessarily need to be defined consistently across acts or could be constrained to certain purposes?

Ms Donovan: The Law Council would generally suggest that consistency across acts is a good thing, but using the consistency argument as a substitute for having a conversation about—

Senator PRATT: Purpose.

Ms Donovan: Yes, purpose. I think that means that important conversations are not necessarily had when they should be.

CHAIR: So, activities of a foreign power become activities of people or organisations outside Australia. You are saying that one is fairly broad and the other is too broad. What would you do to organisations outside Australia to satisfy your concerns? Do you not run into problems if you try to start to list the types of organisations or how they are derived?

Ms Budavari: We think that ASIO and the government need to do some thinking about that. We certainly see our role as one of raising questions when legislation or proposed legislation is drafted in what we perceive to be a very broad and unclear manner. Really, we think it is incumbent upon those who are putting forward the legislation to provide those examples to the committee and to the parliament to enable the parliament to debate and decide exactly how these sorts of matters should be defined. We are simply saying that the proposal is too broad.

CHAIR: Thank you very much Ms Budavari and thank you, Ms Donovan, for your time this afternoon and your assistance.

**MCDONALD, Mr Geoffrey Angus, First Assistant Secretary, National Security Law and Policy Division,
Attorney-General's Department**

**MUNSIE, Ms Laura Rosina, Principal Legal Officer, Security Law Branch, Attorney-General's
Department**

THOM, Dr Vivienne, Inspector-General, Office of the Inspector-General of Intelligence and Security

WILLING, Ms Annette Marie, Assistant Secretary, Security Law Branch, Attorney-General's Department

[16.39]

CHAIR: Welcome. We have your submission which we have numbered 4 and also a supplementary submission. I remind people here at the table about the standing orders of the Senate in regard to questioning officers about opinions on policy. Do you have an opening statement?

Mr McDonald: Thank you for giving us the opportunity to have this hearing. We did not have as much time as we wanted at estimates. I do have a few opening remarks. I will just focus on this foreign intelligence function aspect because that seems to be one of the main focuses.

First of all, I can assure the committee that the purpose and effect of these amendments is not to dramatically expand ASIO's foreign intelligence function but to provide consistency with the functions of Australia's foreign intelligence aims. The bill will amend the ASIO Act to align the definition of foreign intelligence and the collection of foreign intelligence under the ASIO Act with the Intelligence Services Act 2001 and the Telecommunications (Interception and Access) Act.

This is not consistency for the sake of consistency. It reflects that ASIO has long played a role that is intended to complement the foreign intelligence role of the other intelligence agencies. These roles have not been completely aligned in the past because legislation has—as with a lot of this legislation—been drafted over a long period of time, reflecting different environments.

ASIO's core function is to obtain and assess intelligence and advise government in relation to matters relevant to security which is defined in section 4 of the ASIO Act. That does include matters such as counterterrorism and counterespionage. In addition, ASIO has a limited function to obtain foreign intelligence within Australia at the request of Australian foreign intelligence agencies on the advice of the relevant responsible minister, so say if ASIS needs some assistance within Australia in relation to a foreign intelligence matter, the foreign minister and the Attorney-General would need to approve it.

It is possible that certain matters might meet both the definition of security and of foreign intelligence. However, in terms of ASIO's functions, security and foreign intelligence are actually separate matters. Security is ASIO's core business. The foreign intelligence role is, in essence, a role to assist the foreign intelligence agencies and support the government's foreign intelligence requirements. Foreign intelligence is obtained at the request of those other agencies; it is not instigated by ASIO. I make this point because some of the submissions have focused or speculated on what ASIO could or could not do under its security function.

When ASIO is obtaining foreign intelligence at the request of foreign intelligence agencies, it is preferable for ASIO to use its foreign intelligence function. By the way, when I am talking about foreign intelligence agencies I am talking about Australia's agencies that are interested in that. The collection of foreign intelligence outside Australia is and will continue to be the responsibility of Australia's foreign intelligence agencies under the Intelligence Services Act. It is only when it is necessary to collect foreign intelligence within Australia that consideration would be given to requesting ASIO to exercise its foreign intelligence functions, recognising that ASIO has capability on the ground within the country. If the definition of foreign intelligence in the ASIO Act continues to differ from the Intelligence Services Act, this limits what can be done by ASIO at the request of those other agencies to a narrower range of intelligence than they could obtain outside Australia and thus creates complications and the potential for intelligence gaps. I heard some testimony about ASIO being pedantic about

sticking within their legal requirements—they are really careful about this. This amendment is designed to prevent any anxiety about their authority in relation to the foreign intelligence function.

The non-alignment of foreign intelligence definitely has become more prominent over recent years with the rise of individual and non-state, non-political organisations engaged in activities. As I think I mentioned at estimates, one thing that comes to mind is the proliferation of nuclear, biological, chemical and conventional weapons and related technologies. I know of circumstances where people were actually trading in this stuff for the purpose of making money. They were not doing it out of ideological reasons or anything like that. The submission from the Castan Centre raises concerns that if ASIO's foreign intelligence function is used to obtain intelligence on Australia, it contains fewer safeguards compared to the requirements of the Intelligence Services Act. I would like to clarify that those safeguards, including the requirement for ministerial authorisation, would continue to apply. This is because ASIO obtains foreign intelligence at the request of those agencies; they cannot make the request unless it is within their requirements.

In relation to the proposed threshold, the Attorney-General will be required to be satisfied that collecting particular intelligence is in the interests of Australia's national security, Australia's foreign relations or its national economic well-being. In making the decision the Attorney-General receives advice from minister for defence or the minister for foreign affairs. This is only going to apply where there are serious matters of significant national interest. Proliferation of nuclear, biological or chemical weapons and the like clearly falls within the national interest. We just have to look at what has happened in recent months about what can happen with nuclear.

ASIO's foreign intelligence function is only exercised at the request of foreign intelligence agencies, and it is under a warrant and authorisation or authorisation signed by the Attorney-General on the advice of those ministers I mentioned, defence and foreign affairs. ASIO's foreign intelligence function, as with all of its activities, is subject to rigorous oversight by the Inspector-General of Intelligence and Security, whose role is to review the legality and propriety of ASIO's activities.

Finally, there has been some speculation that the amendments are connected with the WikiLeaks matter. I want again to reassure you that that is not the case. This whole process of trying to simplify the legal relationships between agencies has been ongoing for some time. You can go right back to the 2008 National Security Statement, which talked about the breadth and complexity of our emerging national security challenges and the range of interconnected policy responses they give rise to. It states

... Australia will need to develop a new level of coordination in national security policy matters both within the Commonwealth and across all levels of government.

It went on to say that in this:

... increasingly complex and interconnected security environment, we need a more integrated national security structure that enhances national security policy coordination.

And it includes a summary of the Ric Smith report which says:

The increasingly enmeshed nature of foreign, defence, security and law enforcement intelligence points to the need for a single, overarching framework for national intelligence coordination and priority setting. There is also a need for a closer relationship between Australian Intelligence Community agencies and the intelligence analysis units established within non-AIC agencies ... In an environment in which the sharing of intelligence data is critical, intelligence and law enforcement agencies must ensure that their relationships are seamless.

Here what we are doing is removing a legal impediment to ensure that we have a more seamless relationship between the foreign intelligence agencies and ASIO when ASIO is doing work for them.

The final thing is that section 17A of the ASIO Act makes it very clear that—I will read it out:

This Act shall not limit the right of persons to engage in lawful advocacy, protest or dissent and the exercise of that right shall not, by itself, be regarded as prejudicial to security, and the functions of the Organisation shall be construed accordingly.

And then in section 20:

The Director-General shall take all reasonable steps to ensure that:

- (a) the work of the Organisation is limited to ... its functions; and
- (b) the Organisation is kept free from any influences or considerations not relevant to its functions and nothing is done that might lend colour to any suggestion that it is concerned to further or protect the interests of any particular section of the community, or with any matters other than the discharge of its functions.

So the ASIO Act is very prescriptive about not going after people who are involved in protests and the sort of groups that Senator Ludlam mentioned.

CHAIR: Dr Thom, do you want to make some comments?

Dr Thom: Yes, I would, and thank you for inviting me to appear before the committee. I thought before turning to the provision of the bill it might be useful to briefly outline my role and the role of my office and how we carry out that role, in particular our inspection role.

The IGIS is an independent statutory office holder who refuse the activities of the six agencies which collectively comprise the Australian intelligence community. The IGIS Act provides the legal basis to conduct regular inspections of the AIC agencies and to conduct inquiries of various levels of formality. As an independent statutory office holder I am not subject to general direction from the Prime Minister or other ministers on how my responsibilities should be carried out.

The overarching purpose of these activities is to actively monitor whether each AIC agency acts legally and with propriety—and I will come back to that term in a minute; complies with ministerial guidelines and directives; and respect human rights. Usually the majority of the resources of the office are directed towards ongoing inspection and monitoring activities. We aim to identify issues, including about the governance and control frameworks within our agencies, before there is a requirement for major remedial action.

My office inspects records associated with a wide range of ASIO activities on a regular basis. We inspect records of warrant operations, approvals to commence an investigation, reviews of investigations, access to sensitive financial records, access to telecommunication related records and data, liaison with law enforcement agencies and the exchange of information about Australian persons with foreign agencies.

Our inspections are thorough and go beyond simply ticking off each warrant. For example, when we inspect warrant records we satisfy ourselves that the intelligence or security case that ASIO has made in support of the application is soundly based and all the legislative requirements are met; that the individuals named in these warrants are actually identical with or closely linked to persons of security interest; that the appropriate internal approvals for the request have been obtained; that the Director-General of Security has identified in writing those individuals who may execute the warrant; that reports to the Attorney-General on the outcome of executed warrants are factual and provided in a timely manner; and, importantly, that the activity concerned did not start before or continue after the period authorised by the warrant. I now turn to the provisions of the bill. In general, I consider that it is not my role to comment on government policy, the operational requirements of the intelligence agencies or the legislative amendments which might be required to meet those policy requirements. But if I formed the view, based on my oversight activities, that any proposed amendments might compromise oversight arrangements or pose risks to propriety or human rights that may not be apparent from the face of the amendments, or if I believe that the organisation might not have the adequate internal controls to implement new amendments then I would consider it appropriate that I should inform the committee of my views.

Turning to item 7, which would amend the test that must be applied in order to obtain a foreign intelligence warrant, the current condition is that the collection of foreign intelligence must be important in relation to the defence of the Commonwealth or to the conduct of the Commonwealth's international affairs. It has been raised already that if the proposed amendments are enacted the condition for the issue of a foreign intelligence collection warrant will be that the Attorney-General must be satisfied, on the basis of advice received from the relevant minister, that the collection of foreign intelligence relating to that matter is in the interests of Australia's national security, Australia's foreign relations or Australia's national economic wellbeing.

The submission from the Law Council asserts that the effectiveness of my oversight regime would be seriously undermined because the proposed amendments:

... would almost render meaningless the threshold test that must be met ...

So I really want to address my comments as to whether my oversight arrangements will continue to be workable.

While the new conditions recognise the broader nature of the contemporary threat environment, in my view the threshold of being in the interests of national security, Australia's foreign relations or national economic wellbeing are not insignificant or trivial. I would not paraphrase 'in the interests of' as 'somehow relevant to', as has been done in some of the submissions. When inspecting foreign intelligence collection warrant documentation, under the proposed regime we would be paying close attention to the documentation that addresses these criteria.

The committee has also noted that I can look at matters of propriety. 'Propriety' is an interesting term that is not defined in the legislation or any other relevant piece of legislation. The sort of standard I try to apply is that these are activities that cannot usually be made public, but what would be the community standard if such activities were to be made public? If they were to be made public, how would the parliament and the Australian public view these, and can I try to apply those standards?

I also refer to the sections that Mr McDonald referred to, particularly section 17A, that ASIO should not limit the right of persons to engage in lawful advocacy, protest or dissent, and section 20, that their work should be free from influence.

With any amendment that proposes changes to an agency's function or powers, I also pay close attention to any consequential flow-on effect to our inspection regime or resourcing for my office. I am pleased to note the assurance in the submission from the Attorney-General's Department that it is not expected that this amendment will result in significantly more foreign intelligence collection warrants or authorisations being issued under the ASIO Act. I will continue to monitor this closely, as not only will it affect my workload but also a significant increase in warrant applications could be an indicator of whether the relevant conditions are being applied too broadly.

CHAIR: Mr McDonald, I have one question I want to ask you. The bill provides a new ground for obtaining a ministerial authorisation for the purpose of producing intelligence on an Australian person. I understand that the new ground means that the minister has to be satisfied that that person is involved in or likely to be involved in activities related to the contravention of a UN sanction enforcement law. Can you give me an example of what that would be or how it would apply?

Mr McDonald: Let us say there is someone who is the subject of financial asset prohibitions. You might have heard recently in relation to some countries around the world where there are despots that the UN has taken measures against to ensure that they do not dissipate assets in other countries.

The UN can designate that. That would be one example. Another one is to do with unauthorised trade in certain goods and services that have been determined as contributing to the threat or breach of international peace and security. There is also stuff relating to sanctions and, as I started out, the movement of money and goods to specific countries in breach of UN sanctions. These are aspects which may not always come within existing grounds and so it is worthwhile to be specific about it. We are attempting to ensure there is proper legal authority in relation to this.

CHAIR: I think I get that.

Senator LUDLAM: I think all four of you were in the room when the Law Council was giving evidence so—to cut to the chase—is the Law Council wrong; is this expansion of the mandate somehow being misjudged?

Mr McDonald: The Law Council's testimony was interesting, because on the one hand they were suggesting the definition of security was very wide and sufficient to cover everything and on the other hand they were suggesting this would be quite a large increase in power. Like most things, it lies in between. As explained in my opening address, there is no question that this will give some extra coverage but, because you have that national economic interest control over it—economic wellbeing and national security—they are actually high-level statutory limits. Consequently, it is not something that can be used under this statute in a trivial way at all.

Senator LUDLAM: Okay, where is Australia's national economic wellbeing defined?

Mr McDonald: It is not defined and I will go through that. What we have in mind there is that it would include information about issues, such as the security of our resources, the security of major information networks and other major issues that may actually effect our national economic infrastructure. It is not about some minor matter. However—

Senator LUDLAM: That is really broad.

Mr McDonald: I mentioned, for example, major information networks. One example that I think I gave at Senate estimates, is that you could have some privately-inspired computer attack, which could actually do quite severe damage to our information networks. The phrase 'national economic wellbeing' has been used in section 11 of the Intelligence Services Act for quite some time—over 10 years—and applying this condition to the ASIO Act is consistent with that. When considering decisions made on the grounds of national interest, in other contexts courts have generally expressed views indicating that primary determination—what is the national interest—is for the minister, as you have seen in the national security statement outline and the sorts of priorities for national security in Australia. A supporting case for that position is called *Wang v MIMA*, dated 6 August 2002. Justice Tamberlin was the one who provided some information on that, that in democracy it is appropriate that the government of the day sets its priorities and determines what is in the national interest, and that the types of matters that might be encompassed by the term may include matters of sustaining the economy and national wellbeing.

Senator LUDLAM: It sounds massively discretionary and, with great respect to Dr Thom, I do not understand how you are going to be able to do your job and work out whether ASIO has strayed outside its box when you are benchmarking their movements against phrases like 'Australia's national economic wellbeing'. I suppose that was where the Law Council were heading in their comments that you cited before.

Mr McDonald: It has already been there for 10 years.

Senator LUDLAM: Not in the case of ASIO.

Dr Thom: No, but in other agencies. As Mr McDonald has put forward, that is ultimately a decision for the minister which I do not inquire into. What I would look at is the sort of case that ASIO have put forward, the information they have provided and, of course, the other agency that is involved, be it a foreign affairs agency or a defence agency. Is the information they have put forward to support the case balanced and thorough? Is the case that is put forward firmly based on the information they have?

Senator LUDLAM: I will run down some of the issues that Senator Trood was pursuing. Without verballing him, I got the sense that he said ASIO is constrained unduly in this kind of proliferation since 9/11 of non-state actors running about the place. Yet I still have not heard any example of what kind of non-state actor is meant. Terrorism is ASIO's full-time job and has been for many years, and I have never heard a compelling reason. Give us an example, if you can, of a group that ASIO could not currently pursue that it needs to.

Mr McDonald: The example that I gave just a little while ago was in relation to nuclear non-proliferation. You could have people involved in the trade of equipment and the like in relation to that.

Senator LUDLAM: And ASIO could not currently engage with that if it were commercial activity?

Mr McDonald: The focus has to be on whether it is a foreign political organisation in this context.

Senator PRATT: Rather than the commercial aspect.

Mr McDonald: I will just read you the definition of 'foreign power'. It covers:

... a foreign government, an entity that is directed or controlled by a foreign government or governments ...

You can get quite a few under entities controlled by foreign governments, because quite often you will have a company that is actually controlled—

Senator LUDLAM: North Korean.

Mr McDonald: Yes. Then there are what they call 'foreign political organisations'. Foreign political organisations could be—for example, going back in history to Iraq—the Ba'ath party. You could have something that you could not actually connect back to the government of Iraq, but in fact it can still pose a threat. That could cover some terrorist organisations.

Senator LUDLAM: Do you agree with the responses that I got from the Law Council around civil society organisations—that they will now be fair game if they meet these other criteria that we have seen?

Mr McDonald: I do not think that is the case with civil society organisations that are involved in protests and putting political viewpoints; I think I mentioned that section 17A of the ASIO Act is there to provide protection against that. Obviously, if the civil society organisation is involved in an activity that involves politically motivated violence or something like that, that is covered. If it were involved for some reason in massive computer attacks or something like that to bring down our whole telecommunications system—

Senator LUDLAM: But you are already covered. ASIO, I would have thought, could already go after those sort of folk. The question that I want to get to, which I was approaching during estimates as well, is to do with a group like WikiLeaks—let us take them as a specific example—with family and collegial ties to Australia. Are they fair game to ASIO now, or would they be post these amendments?

Mr McDonald: The interesting thing about that is that I just do not know enough about WikiLeaks to be giving opinions about whether they are covered by the existing legislation or not.

Senator LUDLAM: You need to take that on notice. That is something that I have been pursuing for weeks. It has all the high degree of interest around that, because you would not have considered a group like that, with respect, to be a legitimate target of ASIO. I would have thought that would have been well and truly outside ASIO's job now.

Mr McDonald: I would be surprised if a group like that would get caught by this. I suppose what I am saying is that it is sort of speculative for me to be talking about specific cases. In the same way, I think I got questions at estimates about whether people involved in that organisation had committed offences. It is the same sort of thing. I cannot; it is almost an opinion.

Senator LUDLAM: No, that is more concrete. Assessments were made and then they decided that they had not. I do not think it is that speculative at all to ask: is WikiLeaks currently—under the drafting of ASIO's act—a legitimate target that falls within the remit of ASIO? If they are not currently, will they be subsequent to the passage of this bill?

Mr McDonald: Anything that is done within the definition of security, which we heard from the Law Council, can already be caught. There are all sorts of allegations about what WikiLeaks have done and what they have not done and so on. Some of those things that people have said they have done would probably get caught up by the ASIO Act definition of security already. But, as I have said before, I cannot get into saying one way or the other, because that involves me making a judgment about what is true and what is not.

Senator LUDLAM: No, you are here to tell us how this act is going to operate in practice—how it is going to work in the real world. That is why you have come.

Mr McDonald: I have explained the parameters where it will work in the real world, and it is only appropriate for me to explain those parameters as I have, rather than in relation to whether a particular organisation is in or out. I really want to be careful about that because—

CHAIR: Is that really a matter for ASIO's call?

Mr McDonald: It is for them to make a judgment; that is right. At estimates they might have got a specific question about WikiLeaks, but I just cannot recall the answer.

Senator LUDLAM: It was put by me.

Mr McDonald: It was whether they were investigating them or not. I cannot recall whether there was a question like that. Here we have one:

Can you tell us when ASIO started monitoring the work of WikiLeaks?

Mr Irvine said:

I am not even confirming that we have monitored WikiLeaks.

Senator LUDLAM: It is a very characteristic response from Mr Irvine.

Mr McDonald: But it is appropriate, actually. That is what I have been trying to say to a few people—that it would be really inappropriate for me to be talking about a specific—

Senator LUDLAM: But we are here to find out how this act will work and how it will empower ASIO in ways it is not currently empowered, but your response is that you are not really able to tell us; it would be inappropriate to tell us.

Mr McDonald: I feel I have already put enough to suggest—

CHAIR: Mr McDonald, I think the issue is not in relation to specific real-life cases that might be before ASIO. I think that is your evidence.

Mr McDonald: It would be unfair to anyone involved with that organisation for me to be speculating. The other thing that I really worry about is the media suggesting that I am jumping one way or the other. That would be the end of me, because it just would not be appropriate.

Senator LUDLAM: We have not really addressed the potential these amendments have for involving ASIO directly in economic or industrial espionage. One example cited to me concerned issues that some of our big miners have with allegations, if you will, of Chinese cyber attacks or hacking of emails or espionage on behalf of foreign powers—commercial espionage. Are these amendments explicitly intended to give ASIO a leg into that domain?

Mr McDonald: If there is a foreign power initiating espionage against someone—

Senator LUDLAM: Against a company—

Mr McDonald: it is caught by our foreign intelligence agencies. They would be able to deal with that.

Senator LUDLAM: But specifically not against the Australia parliament but against BHP, for example? Would that be already caught?

Mr McDonald: One of the things that I was pointing out to you is that at the moment foreign intelligence agencies can already deal with circumstances like that outside Australia. All this does is enable us to provide the same coverage within Australia. I have been reminded of course that there is the ministerial authorisation, which I mentioned before, and of course the functions in the ISA, which apply to the those agencies, that can only be performed in the interest of Australia's national security, Australia's foreign relations and economic wellbeing,

and only to the extent that those matters are affected by capabilities and activities of people and organisations outside Australia. So you have got that covered.

Senator PRATT: I will ask about the alignment between the current definition of Commonwealth, international affairs and Australia's foreign relations and whether they do in fact mean the same thing.

Mr McDonald: They pretty well mean the same thing, as I understand it. But we figured to use exactly the same language as was in the other act so that no-one can have an argument about it.

Senator PRATT: I am somewhat confused about the definition of Australia's national economic wellbeing. I can understand it from the point of view that, yes, we have major infrastructure that is vital to our wellbeing but I would have thought that would have come under security in any case. What I am unclear about is that clearly there is a whole range of research activity that underpins Australia's economic wellbeing—when does it become an intelligence matter?

Mr McDonald: It has to be approved by the ministers and of course it has to be within the functions of the intelligence agencies. It has to be something that is going to affect our national economic wellbeing and only to the extent that those matters are affected by the capabilities, intentions or activities of people or organisations—

Senator PRATT: I understand that, but there is a great deal of intelligence that affects our economic wellbeing—university research, government departments' research—and they are all significant to Australia's national economic wellbeing. What I do not understand is when it becomes a question for an intelligence agency. Otherwise we could have intelligence agencies out there complementing—you would have a mandate to have ASIO assist Australian corporations to prosecute their individual economic agendas. That is very far fetched and clearly not what this intends, but I need to understand what the distinction is.

CHAIR: Doesn't it have to be a threat to the national security, Mr McDonald?

Mr McDonald: It has to affect our national economic well-being, and the national side of it is very important. Mere research—

Senator PRATT: Is it framed as 'a threat to' or 'in the interests of'?

Mr McDonald: It says the collection of foreign intelligence relating to matters 'in the interests of Australia's national security, Australia's foreign relations or Australia's national economic well-being.' This has been used for 10 years—

Senator PRATT: Can you repeat that.

Mr McDonald: It says that the ministers have to be satisfied that the collection of foreign intelligence relating to the matter is 'in the interests of Australia's national security, Australia's foreign relations or Australia's national economic well-being.'

Senator PRATT: So it does not necessarily have to be a threat to our national economic well-being; it just needs to be in—

Mr McDonald: Yes—in our interests. That has been used for—

Senator PRATT: Are there other restraints on that? That seems incredibly broad to me.

Mr McDonald: The main restraint—and it is an important one—is the one I mentioned in section 17A, which was about—

Senator PRATT: Could you read that one again.

Mr McDonald: making sure we do not cover critics. Section 17A of the ASIO Act reads:

This Act shall not limit the right of persons to engage in lawful advocacy, protest or dissent and the exercise of that right shall not, by itself, be regarded as prejudicial to security, and the functions of the Organisation shall be construed accordingly. So research or something like that which is done for reasons of critiquing practices or an organisation would clearly not be covered. Of course, the government has national intelligence priorities, which are set and reviewed by the government and which all the agencies follow, and these outline the priorities that they are supposed to be following. They would also operate to constrain, covering mere researchers.

I do not think there should be any concern about mere researchers. If there had been problems with the agencies doing that sort of thing, it would have come up in the context of ASIS and the other intelligence agencies in their work, and I am not certain whether it has ever come up as a problem or not.

Dr Thom: Not to my knowledge.

Senator PRATT: I am still not particularly clear. I will just ask one last question on that. ASIO could clearly work with other Australian agencies under this definition to address something like criminal activity attached to

organise crime that was of a major financial transaction. It could also use it to gather intelligence on whether a hypothetical state had a secret plot to buy up all of a particular industry within Australia and advance its own economic interests over and above ours, even though they might in a general sense be legitimate transactions. ASIO could hypothetically find itself working, for example, with the Foreign Investment Review Board. I am just—

Mr McDonald: If someone was going to do something, we do not actually proscribe what they are doing so much as what the effect of it is. If it is something that would affect the national economic wellbeing then that would be caught by it. It certainly would not cover just buying some shares or something like that, but it might cover something where someone was going to wipe out, for example, illegal fisheries—if you had that sort of problem, or something in the agricultural area.

Senator PRATT: In terms of the economic motivations or agendas of other nations as they relate to Australia's economic relations, is that generally to some extent already picked up within Australia's foreign relations? I assume we have some intelligence activities attached to working out what the economic agenda of other nations is. Do we do it all through diplomatic channels? Are we seeking to expand that kind of intelligence? We have had many public debates about state owned enterprises from various nations and that kind of thing. Is that part of what is supposed to be picked up here?

Mr McDonald: I said before that where there is a foreign government behind something then the legislation already covers that. But I was making the point earlier that you can have people for whom we cannot find a connection—

Senator PRATT: So it is crime?

Mr McDonald: to the foreign government doing stuff that might affect our economic wellbeing. On the point about crime, crime will vary hugely. If someone is involved in nuclear proliferation, that sort of crime or feeding that sort of crime is clearly the sort of thing that we are thinking of here. If someone is—

Senator PRATT: So a foreign country is already picked up under foreign relations but a corporation is not. If it is nuclear, then it is probably security anyway. What kind of intelligence might you want on a foreign corporation?

Mr McDonald: You could have someone where you cannot get any connection between the person and some foreign government trying to do the proliferation. The person could be part of the supply chain—

Senator PRATT: Sorry, Mr McDonald, can you use a non-proliferation example, or am I right in assuming that proliferation is not always going to be picked up through security?

Mr McDonald: No, you could get someone who is in the supply chain of that. It could be a supply chain to wherever it is going, whether it be a foreign government or whatever, where the item that is important to proliferation is going to be supplied from A to B and then B to C. Quite often it is covered like that so that they can conceal where it is going.

Senator PRATT: Is that economic or security, on that basis?

Mr McDonald: It could be national security, is one of the more likely ones; but it could also be economic, it could come under that too, depending on the circumstances.

Senator LUDLAM: I have a question on timing: what is the hurry? The original reporting date for this committee was September and this committee makes its own decisions—that is out of the hands of the government. Is this being driven by a particular case or a particular sense of urgency?

Mr McDonald: The idea of this amendment has been around for some time. In relation to amendments, we work through the priorities. This one has not got to the top of the list until fairly recently, but sometimes when things are lower on the list they increase in priority over time. While I cannot reasonably talk about specific cases here, I can assure you that it is very important.

CHAIR: It is needed sooner rather than later—is that right?

Mr McDonald: Yes. There are practical reasons behind it. I have been caught in that dilemma before.

Senator LUDLAM: That was kind of generic; I did not feel any better informed, I am afraid.

Senator BARNETT: Mr McDonald, I have a question on the definition of foreign intelligence. What is the definition in the UK, the US, Canada and/or New Zealand?

Mr McDonald: I am sorry, I do not have that with me. I will have to take that on notice.

Senator BARNETT: Is anybody at the table aware of the position in any of those countries?

Mr McDonald: I have just been told by one of my colleagues that the UK does have national economic wellbeing as a factor in theirs. I would be pleased to give you a copy of that.

Senator BARNETT: That is of great interest. Is that something you could respond to forthwith?

Mr McDonald: Yes, we will get that straight away.

CHAIR: You will need to get it to us tomorrow.

Mr McDonald: Yes, absolutely.

Senator BARNETT: Thank you. I also want to ask about the reviews, about checks and balances. A lot of these questions are a legitimate and I am interested in the checks and balances on the activities of ASIO. Does either the Inspector-General of Intelligence and Security or the Parliamentary Joint Committee on Intelligence and Security have an ability to review the operations of ASIO with respect to the matters at hand?

Dr Thom: My organisation certainly does. We would look at all the documentation regarding these warrants and authorisations on an ongoing basis.

Senator BARNETT: On an ongoing basis?

Dr Thom: Yes. We regularly review the documentation related to warrants for ASIO.

Mr McDonald: And of course, as was given in an earlier answer, this national economic wellbeing criterion has been used by those foreign intelligence agencies for 10 years.

Senator BARNETT: Dr Thom, when you see something perhaps that is inappropriate or untoward or outside the scope of the legal ambit or remit of ASIO, what do you do?

Dr Thom: Were I to see that, I would first of all raise it with the agency and the agency head. If I was not satisfied I could raise it with the minister and ultimately it would go in my annual report to the Prime Minister, of course depending upon the security related considerations to do with the issue. That is in my legislation; that is how I deal with things.

Senator BARNETT: Does that happen from time to time in various forms? How effective is that?

Dr Thom: With our inspection regime we really try to stop things becoming problems, so we constantly monitor it. We rarely find major issues. Certainly in our warrants inspections generally, ASIO have so many internal controls before the material reaches the minister that it would be highly unusual for us to find a significant issue in an ASIO inspection of warrants.

Senator BARNETT: Thank you.

Mr McDonald: In relation to the Parliamentary Joint Committee on Intelligence and Security, if there was a systemic problem or someone raised a systemic problem that parliamentary committee can look at those sorts of issues as well.

Senator BARNETT: They have the ability to look into it?

Mr McDonald: Yes.

Senator BARNETT: How does it come to their attention? Dr Thom, do you report accordingly? Mr McDonald, how does it come to their attention in the first place?

Mr McDonald: The existence of that committee is well known in this context.

Senator BARNETT: They can make their own inquiries and obtain information accordingly?

Mr McDonald: Yes, but if someone had a complaint and came to me, the first place I would send them would be the inspector-general. The functions of that parliamentary joint committee are that they can review the administration and expenditure of ASIO and ASIS and all those agencies and they can review any matter referred to them by ministers or by a resolution of either house of parliament. So if you had some scandalous incident that could be referred by resolution of parliament. They have the capacity to review the effectiveness of legislation as well.

Senator BARNETT: Thank you. Dr Thom?

Dr Thom: I would just add that, in addition to carrying out inspections, I can also investigate particular complaints and initiating inquiries of my own motion if I need to.

Senator BARNETT: Thank you.

CHAIR: We will wrap it up there because we have another bill to move on to. Thank you, Mr McDonald, and thank you to your colleagues Ms Willing and Ms Munsie for your assistance. I am sure Mr McDonald will thank you for your assistance too. Thank you very much, Dr Thom.

Committee adjourned at 17:36