



COMMONWEALTH OF AUSTRALIA

# Official Committee Hansard

JOINT SELECT COMMITTEE ON THE INTELLIGENCE  
SERVICES

**Reference: Review of intelligence services bills**

MONDAY, 20 AUGUST 2001

CANBERRA

BY AUTHORITY OF THE PARLIAMENT

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**JOINT COMMITTEE ON THE INTELLIGENCE SERVICES**

**Monday, 20 August 2001**

**Members:** Mr Jull (*Chair*), Senators Calvert, Coonan, Faulkner, Greig, Sandy Macdonald and Ray and Mr Andrews, Mr Brereton, Mr Forrest, Mr Hawker, Mr McArthur, Mr McLeay, Mr Melham and Mr O’Keefe

**Senators and members in attendance:** Senators Coonan, Faulkner, Sandy Macdonald and Ray and Mr Andrews, Mr Brereton, Mr Forrest, Mr Hawker, Mr Jull, Mr McArthur, Mr McLeay, Mr Melham and Mr O’Keefe

**Terms of reference for the inquiry:**

Review of intelligence services bills.

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**Committee met at 6.05 p.m.**

**BLICK, Mr William James, Inspector-General of Intelligence and Security, Office of the Inspector-General of Intelligence and Security**

**BONIGHTON, Mr Ronald Bruce, Director, Defence Signals Directorate**

**CARMODY, Mr Shane Patrick, Deputy Security, Intelligence and Security, Department of Defence**

**HOLLAND, Mr Keith Colin, Assistant Secretary, Attorney General's Department**

**McDONALD, Mr Geoffrey Angus, Assistant Secretary, Attorney-General's Department**

**MARSHALL, Mr Steven, Legal Adviser, Australian Security Intelligence Organisation**

**O'GORMAN, Mr Terence Patrick, President, Australian Council for Civil Liberties**

**PENFOLD, Ms Hilary Ruth, First Parliamentary Counsel, Office of Parliamentary Counsel**

**RICHARDSON, Mr Dennis, Director-General, Australian Security Intelligence Organisation**

**TAYLOR, Mr Allan Robert, Director-General, Australian Secret Intelligence Service**

**CHAIR**—I declare open this hearing of the Joint Select Committee on the Intelligence Services and welcome witnesses and members of the public. Today the committee will take evidence in a roundtable format from the Australian Secret Intelligence Service, the Australian Secret Intelligence Organisation and the Defence Signals Directorate and the Attorney-General's Department. The examination will focus on the operation of the immunity provisions under clause 14 of the Intelligence Services Bill 2001.

Although the committee does not require you to give evidence under oath, I should advise you that the hearings are legal proceedings of the parliament and warrant the same respect as proceedings of the House or the Senate. The giving of false or misleading evidence is a serious matter and may be regarded as a contempt of the parliament. Do you wish to make any introductory remarks before we proceed to questions?

**Mr Taylor**—Thank you, Mr Chairman. On 31 July and 1 August the joint select committee drew attention to a number of matters in the Intelligence Services Bill, in particular the possible extent of the immunity provisions under clause 14 and, secondly, who may seek immunity under these provisions. The committee's questioning led the agencies to explore the implications of the clause in particular subclause 14(2) in relation to activities conducted in Australia that went beyond the parameters of the agencies' operations under their directives.

Subsequent legal advice confirmed that immunity could theoretically be sought for certain acts in Australia to assist in the conduct of an overseas operation, but which were only loosely connected to that operation. The extension of immunities in this way was not intended or

desired by the agencies. This matter is addressed in more detail in my submission to the committee dated 15 August on behalf of ASIS, DSD and ASIO and possible revisions to clause 14 of the bill mentioned there.

These proposed revisions, together with an amendment of the explanatory memorandum, would make clear that immunity is only intended to be conferred in respect of acts inside Australia which are an integral part of an overseas activity. It is also important clause 14 be seen in the context of other parts of the bill which limit the agencies' functions and sets out approvals procedures. In short, the bill does not change the legal framework for the covert collection of intelligence in Australia through the ASIO Act and the Telecommunications (Interception) Amendment Act, and this is reinforced by clause 14(2)(c) of the bill which states that the act is done in the proper performance of the functions of the agency.

The second matter canvassed in my submission arose from discussion of the definition of persons in clause 14. An aspect of this discussion was just who might seek immunity under clause 14 of the bill and how this might be verified. The agencies have examined this issue and in the second part of my submission set out a possible approach which would involve the Office of the Inspector-General of Intelligence and Security being identified as an appropriate independent authority who may certify facts which may be relevant to the determination of immunity. This role for the Inspector-General would be consistent with the Inspector-General's existing functions under the Inspector-General of Intelligence and Security Act 1986. Thank you, Mr Chairman.

**CHAIR**—Thank you very much. If there are no further comments, maybe we can proceed to questioning. I do not ask this in a flippant sense, but on the further examination of the bill did you come across any further unintended consequences that we had not picked up?

**Mr Taylor**—In relation to the immunities?

**CHAIR**—Yes.

**Mr Taylor**—No. There is still a view that the original bill did cover the narrow immunities we sought, but saw the theoretical issue and sought to address that.

**CHAIR**—And everybody was involved in terms of the review of it?

**Mr Richardson**—Yes.

**CHAIR**—Mr Blick, in terms of that section 14(2), are you satisfied that the system that is being promoted in the submission will in fact be effective?

**Mr Blick**—Yes, I believe it will. I think the amendment that is proposed to the original formulation makes it abundantly clear that the only actions that would be attracting this immunity would be those that were directly connected with the proposed overseas operation. I also think that the second proposal—which is the one that relates to my office certifying, if necessary, that that was the case—would provide a safeguard that the public could be confident would be adequate.

**CHAIR**—Are you happy enough with that clause inasmuch as you would have sufficient power? Would you have sufficient knowledge of the proposed operations to make sure that you are absolutely confident that you are doing the right thing in issuing that certificate?

**Mr Blick**—Yes. Clearly there could be a situation where I did not have foreknowledge, because I do not monitor every operation every day, but I certainly have the power to look at the records of the operation and to question people in relation to it, so that I need to satisfy myself and would be able to satisfy myself before providing such a certificate.

**Mr BRERETON**—Mr Taylor, in 14(2) you have addressed this question of acts within Australia, and I want to put a number of questions to you in respect of 14(1). The first one was just to ask whether in drafting the provision contained in the legislation you had sought to examine comparable legislation overseas. Was looking at the UK equivalent provision part of the preparation of this?

**Mr Taylor**—Certainly we are aware of the UK legislation. There are however differences between the situation in the UK and in Australia in terms of the sort of framework that we set out in the bill here. For example, the functions of the UK agencies are set out much more broadly than they are in this bill. Flowing from that, the authorities provide the immunities that go for overseas acts. I am not an expert in the UK legal system, but my understanding of the immunities that are provided in the UK is that they are not specific in their legislation, as they are in our legislation. The concern that we have in the legislation is to narrow the immunities as far as necessary and to ensure that we pick up those acts overseas which require the immunity. They relate very much to the sorts of issues that we have discussed here before in relation to the extraterritorial nature of the law. So to the extent that we looked at it, yes, but I would not say we did a thorough, detailed look at it. Some of the lawyers might like to comment on that. Steven?

**Mr Marshall**—I would not really have anything to add to what the Director-General has said. I am aware from reviewing the records that the government did examine the UK legislation, but that legislation does reflect a fairly different framework overall in terms of the relationship of the intelligence and security agencies within the UK.

**Mr BRERETON**—Did we consider the New Zealand equivalent legislation in respect of its limitations on intelligence in respect of New Zealand citizens?

**Mr Taylor**—Not specifically, because the New Zealand organisation is more a counterpart of ASIO, and it deals with the internal things. So in so far as the internal relationship between that organisation and New Zealand citizens, I think it more reflects the ASIO relationship. Unlike the New Zealand one we, as you know, are aimed at collecting intelligence from overseas in relation to the capabilities and intentions of people overseas and organisations overseas.

**Mr BRERETON**—I suppose what I am getting at is: was any consideration given to excluding the scope of this from applying to Australian citizens out of the country? We have dealt with the question of acts in Australia, and now we are looking at not acts by foreigners overseas, but acts by Australian citizens overseas?

**Mr Taylor**—What our functions limit us to is the collection of information relating to the capabilities and intentions of people and organisations overseas and sometimes, as I think we have discussed before, we incidentally collect information about Australians and handle that in terms of our nationality rules, and they have very strict criteria. We do not set out to collect intelligence on Australians. For example, I think I mentioned to you before the mandate or the instruction we have in relation to working against people traffickers—in the intelligence collection priorities there are sometimes things on international crime and the effect of international crime on various countries. In the context of collecting information on some of these issues, we may incidentally collect on Australians in terms of them coming into our reporting, and then that is handled under the strict criteria that we have. I think that is what I do, to answer your question.

**Mr BRERETON**—Was any thought given to defining the circumstances under which that intelligence could be gathered in respect of Australian citizens in this legislation before us?

**Mr Taylor**—My own sense is that we do not set out to collect intelligence on Australian citizens—that is not the intention of the organisation. We set out to collect information on the capabilities of people and organisations overseas.

**Mr BRERETON**—But in putting the organisation on a statutory basis, in setting in train a framework for future operations, the question is: did we consider such a provision in the legislation as opposed to it remaining in the rules?

**Mr Taylor**—There are rules to protect the privacy of Australians, which is set out in clause 15, and the second of those is that in making the rules the minister must have regard to the need to ensure that the privacy of Australian persons is preserved as far as is consistent with the proper performance of the agencies of their function.

**Mr BRERETON**—Will the agencies be legally empowered to gather intelligence on an Australian citizen or organisation operating overseas if that is within the functions of the agency?

**Mr Taylor**—We are empowered to collect intelligence on the capabilities and so on. If an Australian, for example, were an agent of a foreign power then that would come within the terms of it. It does not rule out Australians—I suppose that is the fact—but it defines how they come into our collection processes.

**Mr BRERETON**—Are there limits to that? Is there any prescription?

**Mr Taylor**—There are limits in the nationality rules that we have in terms of the intelligence that we can report. There are strict categories under which we would have Australians in our reports, and they are limited to issues like national security, the protection of Australian lives and that sort of thing. They are very carefully defined.

**Mr BRERETON**—Would it be possible under those rules for the agency to undertake such actions as it saw fit—for instance, covert entry to premises, searches, listening and tracking devices and the like in certain circumstances?



**Mr Taylor**—Overseas?

**Mr BRERETON**—Yes, involving Australian citizens.

**Mr Taylor**—I think I would go back to the answer I gave you before. I know I seem to be going around in circles, but it comes back to the fact that the function of the agency is to collect this type of intelligence if an Australian happens to be engaged in something that is against the national security, but I cannot—

**Mr BRERETON**—I am not suggesting for a moment that there is anything that should prevent, in the interests of our national security, your pursuing all necessary measures. I am coming to the point of safeguards that might give Australian citizens confidence in the future—confidence that we are putting this on a statutory basis, that there are some limits and some clear definitions involved and that there is scrutiny of the process.

**Mr Taylor**—The nationality rules which govern what we can have in our reporting are very strictly limited. They are monitored and reported on constantly by the Inspector-General, who has access to all our reporting and particularly to all our reporting that mentions the name of an Australian. As I say, to name an Australian you have to meet very strict criteria. In terms of what you asked about the sorts of things we could do overseas against Australians, I would have to check with the lawyers but I do not think they are ruled out. But there are strict limitations on what we can report, and that in itself places an enormous restriction on us, because we do not go out to collect intelligence on Australians—that is not our role.

**Mr BRERETON**—But it is not precluded?

**Mr Taylor**—It is not precluded, but we would only do it and report on it in certain very strictly defined circumstances, which are set out in the rules which would come under clause 15 in the bill.

**Mr BRERETON**—Division 2 of the ASIO Act provides for special power warrants, does it not? Was any thought given to such a measure in this legislation in respect of your operations?

**Mr Taylor**—Of our operations overseas?

**Mr BRERETON**—Yes, involving Australian citizens.

**Mr Taylor**—Not specifically in relation to Australian citizens, but in terms of a warrant system for us overseas, yes, it has been looked at and not found to be particularly practicable because of the nature of the immunities that we are seeking—that is, narrow immunities relating to the extraterritorial application of Australian law or the territorial nexus. To seek a warrant for activities overseas which might bring the need for those immunities into play would be particularly difficult given the nature of a warrant, which, as I understand it, is for something specific for a particular time.

The sorts of things that we are looking at here in clause 14 are more the things that you cannot identify easily in advance, because you do not necessarily know all the legal issues that come into play in advance. For example, in some of these possible immunities one would have

to take into account the law in Australia—which can be the Commonwealth law or a state or territory law—and the law in the country where this might happen, and that constantly changes and we may not know it. These things would need to come into play before you had a warrant. The warrant system here is operated by ASIO. As I think we have made clear, that is the legal framework in which those types of operations would occur in Australia.

**Mr BRERETON**—We acknowledge, particularly with the amendments that have been suggested today, that there is quite a strong system of regulating those activities in Australia—but there is a different standard as far as monitoring the activities that might involve an Australian citizen involved in your activities outside the country. Would that be fair?

**Mr Taylor**—In terms of monitoring them?

**Mr BRERETON**—In terms of the standard that you apply. Is there tight monitoring with warrants for actions in Australia but a looser standard for Australian citizens outside country?

**Mr Taylor**—I do not think the situation arises in the same way as is arises in Australia. I am trying to think of an example.

**Mr BRERETON**—You would not be precluded from using a listening or a tracking device outside the country, whereas you would have the warrant provisions in respect of such an operation in Australia.

**Mr Taylor**—Yes, that is right.

**Mr Richardson**—In terms of monitoring—and I cannot speak for other people—the Inspector-General of Intelligence and Security has access to all the material held by intelligence agencies at any time. If you look at the overall accountability framework in respect of ASIS, there are real limits within that accountability framework in terms of what ASIS could properly do. If they were to engage in any intelligence activity in respect of Australians overseas, it would have to be directly related to the functions as defined in the legislation, and it would have to be carried forward in terms of the guidelines vis a vis the nationality rules. The Inspector-General sits behind that to ensure that agencies such as ASIS and DSD actually carry out their work consistent with the provisions of the nationality rules.

**Mr Taylor**—It also must take into account 14(2)(c), which underlines a lot of the immunity provision in the bill. That is, it must be an act ‘done in the proper performance of the function of the agency’.

**Mr BRERETON**—But in respect of liability, is it not the case that an ASIS officer, under section 14(1), would not be subject to any liability for an act done outside Australia under section 6(1)(e) as the other activities clause of the bill is presently drafted?

**Mr Taylor**—No, I do not think so.

**Mr Richardson**—No. Firstly, the function would have to be approved by the minister in accordance with the legislation and, secondly, anything done by an ASIS officer would have to be consistent with the proper performance of the organisation’s function as defined in the

legislation. And then you have the Inspector-General sitting behind that in terms of accountability.

**Mr BRERETON**—But, subject to the proper authorisations, there would not be anything to prevent an ASIS officer from, say, hacking into a computer of an Australian citizen overseas? I know there are safeguards and checks and the complete looking over the shoulder—

**Mr Taylor**—It would still have to be in the proper performance of the agency.

**Mr Richardson**—It would still have to be in the proper performance of ASIS's functions. Can ASIO officers abuse their authority? Yes, they can, because no law gives a guarantee that people will not break it or abuse it. Is it likely in terms of the approval process and the accountability arrangements? No, and I think a similar logic applies here.

**Mr BRERETON**—But would or would not an Australian citizen have access to the Australian courts in the circumstances of destruction of property, say the hacking into a computer or some other act, under this provision as it is presently drafted?

**Mr Holland**—No, it is not likely, if you are talking about the activity happening overseas—

**Mr BRERETON**—But is it possible that they might not have that access?

**Mr Holland**—Yes.

**Mr Richardson**—I might also make the point, for what it is worth, that ASIO sometimes gets told, 'Well, you have got the authority to access information in the computer. Therefore, ASIO can hack into anyone's computer.' In fact, we cannot. We have a definition of security in the act; we have to go through a particular arrangement to get authorisation for that. Quite apart from anything else, even though it does not provide much assurance to people, if you look at ASIO's budget and resources our capacity to hack into 19 million computers in the country is pretty damn limited.

**Mr MELHAM**—But, Mr Richardson, here there is no definition of national security, there is no definition of intelligence, there is no definition of police functions and there is no definition of serious crime. The way this act is drafted surely you could authorise people to engage in these other activities?

**Mr Richardson**—I do not think so. It would not be consistent with the proper performance of ASIS's functions.

**Mr MELHAM**—But if an assessment was made that it was in the national interest to monitor or intercept and do a whole range of things, this act gives broad immunities, as long as prior authorisation is given. There are now two classes of regime, which you acknowledged as a result of the proposed amendments to section 14(2)(b), I think.

**Mr Richardson**—Two classes of regime?

**Mr MELHAM**—In terms of the activities that you can authorise for overseas as against internally within Australia?

**Mr Taylor**—Yes, it is a foreign intelligence agency.

**Mr Richardson**—Yes, and there has always been that difference. That difference exists today.

**Mr MELHAM**—But what I am saying to you is there is no restriction, given the lack of definition in this bill on those functions and activities.

**Mr Taylor**—Except the framework in the bill itself for what the proper performance of the function is.

**Mr Richardson**—It would not be in the proper performance of ASIS's functions for an ASIS officer to take it upon themselves to target an Australian holidaymaker in Bali enjoying themselves, simply because the ASIS officer thought it would be fun to do it.

**Mr MELHAM**—I will accept that.

**Mr BRERETON**—What about an Australian citizen who may be involved in narcotics trafficking? Would the other activities in this legislation extend to include operations by ASIS officers in such circumstances if the trafficking were, say, the equivalent of what the AFP would need to use the controlled operations provisions of the Crimes Act to pursue? I am just seeing if there are a couple of different standards in this.

**Mr Taylor**—We do not have law enforcement or police functions, and that is set out clearly in the bill. Our current reporting rules are such that, if we come across incidentally an Australian who may be involved in criminal activity, that intelligence, under the monitoring of IGIS, is passed to the law enforcement agencies. I expect that any further action on that would not be taken by ASIS. It is not something that we, I think, could do because we are not a law enforcement agency.

**Mr BRERETON**—I was not thinking about the incidental opportunities; I was thinking about what is actually able to be done under this legislation.

**Mr Taylor**—I would not think—and here I am open to comment by a lawyer—that we would be able to then hack into the computer of an Australian who we had come across in our reporting as being involved in a criminal activity, given that we are not a law enforcement agency. That I would think would be more a law enforcement agency thing, but I am not a lawyer.

**Mr MELHAM**—Perhaps the officers—

**Mr Marshall**—I think it is clause 11 which tries to establish limits on agencies' functions. It makes clear for both ASIS and DSD that their functions do not include the carrying out of

police functions or any other responsibility for enforcement of the law. Normally with police functions they are actually set out.

**Mr MELHAM**—But that is subsequently qualified by the statement:

However, this does not prevent the agencies from:

(c) obtaining intelligence under paragraph 6(1)(a) or 7(a) ...

**Mr Marshall**—Yes, which is not so much law enforcement as it is, when intelligence is obtained, communicating it in appropriate circumstances. Similar provisions are made within ASIO's legislation. There might be circumstances when ASIO collects information for purposes relevant to security and in which ASIO obtains information which might reveal the indictable offence and parliament has sanctioned, subject to very strict safeguards, the provision of that information for law enforcement purposes.

**Mr FORREST**—There is no definition. Subclause 11(2) talks about serious crime. There is no definition for serious crime. Paragraph 11(2)(c) states:

obtaining intelligence under paragraph 6(1)(a) or 7(a) and communicating any such intelligence that is relevant to serious crime to the appropriate law enforcement authorities ...

**Mr Marshall**—That is correct. 'Serious crime' in various legislation takes on various meanings. Often it refers to an indictable offence, as it does in our legislation. I am not in a position to comment on exactly what that particular provision means. I would have to look at that and come back to you on that point.

**Mr FORREST**—Did you say there are definitions of 'serious crime'?

**Mr Marshall**—I do not know if there is a definition of 'serious crime' that applies to this particular legislation. I would need to check on that. As a lawyer, I would say it would almost certainly rule out misdemeanours and it would almost certainly cover most indictable offences, but I can check on that and advise.

**Mr BRERETON**—Let us test the limits if someone wanted to be critical of this. Under this bill could an ASIS officer be authorised to become involved in narcotics trafficking if that were considered necessary to obtain information in accordance with the functions of the agency? I am just pushing the outer limits of what might be possible under this.

**Mr Taylor**—I do not know the legal answer to that, but I can say that if you are looking at—

**Mr MELHAM**—The lawyers might be able to tell us. It is no disrespect to you. I am interested in the legal limits in relation to the way the legislation is drafted.

**Mr BRERETON**—You see, in the Crimes Act there are specific provisions that govern these controlled operations. They are very carefully regulated, and the question occurs to me of why there is not a comparable regime in respect of these operations undertaken by ASIS.

**Mr Marshall**—My impression with the controlled operations regime is that that is designed in relation to acts that occur within Australia or acts that are connected within Australia and there is a specific AFP regime required for that.

**Mr MELHAM**—It is also in relation to acts outside Australia in relation to the importation of the heroin as well, isn't it? We had this debate a couple of years ago as a result of the Ridgeway case.

**Mr Marshall**—Importation of heroin into Australia?

**Mr MELHAM**—Yes. My understanding was that the controlled operations act certainly allowed certain people to go very deep into operations and engage in activities that were otherwise unlawful and be indemnified.

**Mr Marshall**—Sure, but the immunities that would otherwise apply would be ones that apply under Australian law.

**Mr MELHAM**—Yes, I accept that.

**Mr Marshall**—I do not read clause 14(1)—the provision that we are referring to about acts overseas—as of itself authorising certain acts. What that clause is designed to do is to address the circumstances in which, by operation of Australian law, a person may be civilly or criminally liable for the acts that they have committed overseas. For example, certain acts overseas that private individuals might do would not attract liability within Australia. If I, as a private citizen, went to a foreign country and conducted a robbery, there would normally not be an offence under Australian law. My reading is that clause 14(1) is really just designed to say where Australian law has extraterritorial effect and so, if an act occurs solely outside Australia, where a member of an agency has performed that act in the performance of their functions or duties, then the liability which would apply under Australian law would not otherwise apply. I do not know whether this parliament can actually make a law which will render the laws of a foreign jurisdiction inapplicable to that person.

**Mr BRERETON**—That is why I asked that question earlier on about hacking into the computer or crashing a computer of an Australian citizen outside of the country and whether in those circumstances the Australian citizen would be precluded from taking some action in the Australian courts against the organisation in the face of the organisation saying it had complete immunity under this act before us.

**Mr Marshall**—My reading of that would be that if the conditions under clause 14(1) were met—that is that the act was done in the proper performance of the functions of the agency—the person committing those acts would not be subject to liability within Australia for doing those acts overseas.

**Senator COONAN**—But mainly overseas.

**Mr Marshall**—Yes.

**Senator COONAN**—So the Australian person overseas would presumably be able to make a complaint to the authorities overseas?

**Mr Marshall**—It would then be a matter for overseas law, which this legislation cannot affect.

**Mr BRERETON**—Mr Chairman, I had a couple of questions about definitions while we are at it. Was any thought given to under definition defining what paramilitary activities might be? If not, why not?

**Mr Taylor**—Yes, and I can give you the same answer I gave before on that. We have been defining paramilitary activities as ‘those activities which involve the use of any armed military like units or personnel to conduct particular actions.’

**Mr BRERETON**—Was any consideration given to banning activities which, while not involving violence against the person or the use of weapons, nevertheless might involve the damage or destruction of physical property? Was any thought given to that?

**Mr Taylor**—We are not able to use violence.

**Mr BRERETON**—Non-violent destruction of property, I suppose, is what I mean.

**Mr Taylor**—Non-violence against the person or the use of weapons?

**Mr MELHAM**—We are not talking about violence against the person.

**Mr BRERETON**—I am talking about the destruction of physical property.

**Mr Richardson**—It may help, certainly in respect of ASIO. We were asked that in a question about accessing data in a computer. Of course, when you are doing something for an intelligence purpose you have normally got a pretty strong reason for keeping what you are doing covert, so you do not have an interest in doing things that are going to give visible leads, because you are actually blowing your own operation. You are making a statement that you have been there, and you do not want to make that statement. It is not a legal answer, but there would be strong organisational interests in carrying out violence against property in a way which compromised an intelligence operation.

**Mr MELHAM**—But you would concede that there are ways of doing that, Mr Richardson, without compromising the operation. You are not telling me that it is something that would not happen in all circumstances? I am just talking theoretically.

**Mr Richardson**—I have not come across one in ASIO’s case.

**Mr MELHAM**—But it is certainly not prohibited by the legislation in the way it is currently drafted?

**Mr Richardson**—I will have to refer to the lawyers on that.

**Mr MELHAM**—Maybe the lawyers can answer it.

**Mr Holland**—I think the short answer is no.

**Mr O'KEEFE**—No, it is not prohibited. But, in your long experience, you have never come across it and Mr Taylor often says to us that in his experience he has never come across it, so we are talking theoretically. Theoretically, it is not prohibited under the act at the moment.

**Mr Holland**—I think the person who can talk practically is the Inspector-General, who would have had knowledge of any of these things had they actually occurred.

**Mr Blick**—I think that is a fair point, Mr Holland. Having now looked at some hundreds of operations conducted by ASIS, I have never seen anything remotely approaching the sorts of things you are hypothesising this evening.

**Mr BRERETON**—We take great comfort in that. We are just thinking hypothetically about what is going to be allowed under this legislative scheme. This committee has been charged with the responsibility of reviewing it and reporting to the parliament.

**Mr Richardson**—I could think of circumstances where it may be in the national interest to actually damage property. If you were aware of terrorists who were overseas and who had a target in Australia and had equipment with them, I can see circumstances in which the parliament would expect ASIS to be taking whatever action is necessary to stop that.

**Mr BRERETON**—You might wish to sabotage them before they hit?

**Mr Richardson**—Yes.

**Senator ROBERT RAY**—Every time examples are thrown up, what is put back to us—I think quite properly—is the elegance of the legislation, where each piece fits in to preclude, or block or otherwise do it. It just seems to me there is one hole there, and that is paragraph 6(1)(e). You have translated over what your existing functions are; you have then left a ‘what if conditions change’ question, which certainly should be covered somewhere, and it is covered in 6(1)(e). I think three things have to be done. Firstly, there is consultation with the other minister concerned. Frankly, if you are doing the wrong thing that is an absolute recipe because the other minister would be urging you to do it, so that is no safeguard. Secondly, you have to put it in writing—that is a restraint, I agree. Thirdly, IGIS has to be informed. But you are asking the parliament to give you not a carte blanche but just a very small possibility of different functions without the parliament necessarily knowing about it.

In those circumstances where 6(1)(e) is triggered would you object to informing the oversight committee that is being set up in this legislation, because that seems to me to be enough scrutiny, enough oversight, to cover that one off? You have all these protections in there but suddenly you can jump to a new function. The new function has to be reasonably consistent, as you would say, Mr Taylor, with the rest of the constraints in the bill. But there is a possibility there to go off in a different direction not authorised by parliament. True, it would need a minister's approval and you would need to notify IGIS; you do not need his approval though.



So would you be willing to at least allow a committee—because it is a function; it is not an operational matter—to be informed of what the new function is?

**Mr Taylor**—That is something the government would have to consider, but we have already mentioned to you the one area where that has been in operation. I would not see any real problem in that, but, as I say, I think it would need a policy decision.

**Mr MELHAM**—It does not compromise you.

**Senator ROBERT RAY**—No, I do not ask you to give us a policy decision on behalf of the government. I am actually asking: do you see any particular difficulty with it? It is up to us to consider whether that would be a recommendation we would make to government before the legislation proceeds.

**Mr Taylor**—As I indicated there, I do not particularly, but then a lot would depend on what it was. The reason for it is to maintain the current situation, where the government has the capability to move ASIS to do something in certain circumstances, and it is really a contingency to maintain the role of government. I understand the point you are coming to. If it were in a time of conflict, I think it would be okay. I really do not—

**Senator ROBERT RAY**—That is good. Thank you. Incidentally, as we were reminded before on a separate subject, has DSD thought up a better excuse for not coming under parliamentary purview yet? You have had a couple of weeks, or do you want to let the defence rest?

**Mr Bonighton**—I think we will let the defence rest.

**Mr BRERETON**—The defence rests, and you do not have a single substantial proposition or a single argument before we go off and consider our recommendations?

**Mr Bonighton**—I have already given the single argument, which I am afraid is a very parochial argument from my point of view, Mr Brereton.

**Senator ROBERT RAY**—You are under instructions, though.

**Senator COONAN**—I have a drafting question on 6(1)(e). When it says ‘to undertake such other activities’, is what is meant there ‘to carry out such other functions’?

**Mr Taylor**—The function is to carry out other activities, as I understand it.

**Senator COONAN**—That is pretty open, isn’t it?

**Mr Taylor**—Yes, it is. As I was saying earlier, it relates to what might happen. We do not know. It is a hypothetical in that sense, but, as I mentioned, the sort of thing might be what has already happened, which was to authorise ASIS to undertake work against people smugglers or traffickers.

**Senator FAULKNER**—Chair, I have a brief question. This goes to a question you asked very early in this hearing of Mr Taylor. Mr Taylor, I think the chair asked you about any unintended consequences—you would recall that question—and I think it was defined, possibly by you on behalf of other agencies, as whether there were any other unintended consequences with clause 14. You indicated that that was not the case. Because of that quite proper qualification, I was going to ask you the more open-ended question—not to limit you to clause 14 but just to indicate to the committee—whether you had established any other unintended consequences in the examination that your agency and other agencies have engaged in. I only ask because of the way the question was defined and answered. I am not critical of that, but it was just to qualify the answer.

**Mr Taylor**—No, I understand where you are coming from. I was focusing very much on that because the questions were like that. I think Mr Holland has already written to you in relation to a difference that we picked up in terms of the committee procedures, and that is in one of the submissions. I am not sure, Keith, whether there was anything else in relation to the actual detail of the procedures of the two committees, which was meant to be substantially the same. I think there were a couple of other points that had been picked up there. If that is what you mean—

**Senator FAULKNER**—Yes, but they have been formally communicated.

**Mr Taylor**—Have they all been? That is covered?

**Mr Holland**—Yes. And as far as I know, that is all.

**Ms Penfold**—Senator, I have had a look at the bill and the ASIO Act over the weekend, starting from the proposition: are there any differences that are not either obvious policy changes or, at the other extreme, mere drafting changes reflecting the fact that what we do now is different from what we did 21 years ago? I have come up with a small handful of differences where it is not absolutely clear to me what is going on and not absolutely clear to me that I could say there is no change through these. My feeling, working through them, is that there is probably nothing that is likely to excite the committee. But that is not much of an assurance, I guess, from your point of view.

**Senator FAULKNER**—You have done this in your role for OPC?

**Ms Penfold**—Yes.

**Senator FAULKNER**—Having identified those small areas, have you discussed that with either A-G's or any of the agencies, or is this just something that the OPC have played their cards pretty close to their chest on?

**Ms Penfold**—No, I have not deliberately played my cards close to my chest. I did discuss them with Keith very briefly before we came up, but I do not think that, in the time we had, we have completely resolved them all. There are a couple of ways we could deal with it. One way is that I could just take you through the lists.

**Mr MELHAM**—I would be interested in that but the reporting date is next week—or perhaps you want to give us a supplementary submission.

**Ms Penfold**—Alternatively I could give you a piece of paper in the next couple of days.

**Senator FAULKNER**—These may or may not, depending on their nature, be of substance. I think it gets down to determining how you work these through with your colleague in A-G's, as to whether they are of substance or not. But I suppose it comes down to a process matter, Mr Chairman, doesn't it?

**CHAIR**—I was just wondering if we could get an indication now of the sorts of things that you are alluding to.

**Mr MELHAM**—We can get the piece of paper later on.

**CHAIR**—Yes.

**Mr Holland**—If I might just interrupt, I do think that, in the time that we had before we came up, a number of these were very easily resolved. Nevertheless, I think that, given that Hilary has raised a couple of these others, we do need to talk about them. It is not a case of comparing the actual provisions just in relation to the committee provisions, but in a broader context.

**Mr MELHAM**—But you can tell us how they have been resolved later on—in a memorandum or whatever, which is not the problem.

**Mr Holland**—Absolutely.

**Mr Richardson**—Mr Chairman, I just might add in relation to Senator Faulkner's question: outside of that issue there are no unintended consequences which anyone along this side of the table has in their back pocket and which we have not brought forward.

**Senator FAULKNER**—Just so that you are clear, Mr Richardson, that was the answer I had expected. I had not quite expected Ms Penfold's response. It was just because of the qualification that was placed on the original question. I think when that occurs it is always easier to square these things away. As it turns out, sometimes when you ask an open-ended question you receive a somewhat unexpected answer. It is the old thing in politics, although in this case it doesn't matter: on some occasions one should never ask a question to which one does not know the answer.

**Ms Penfold**—I will start with a very simple, straightforward one. I think as soon as you hear it you will feel quite relaxed. Under the ASIO Act there is a notice which needs to go to the minister forthwith, and under the Intelligence Services Bill it has to go to the minister as soon as practicable. I think that is a difference. I think 'as soon as practicable' is a slightly lesser obligation. It probably gives you till Monday afternoon instead of having to do it Friday night, for instance.

**Mr MELHAM**—Or even longer, really.

**Ms Penfold**—It depends upon what happens on Monday afternoon, I guess.

**Mr MELHAM**—It depends upon the period we are talking about. It might not be practicable if the minister is overseas. Or would a delegate kick in then?

**Ms Penfold**—We could argue about details, but perhaps without arguing too much about those particular details you can see, I suppose, that that is a difference. It is not a difference that seemed to me when I saw it likely to excite anyone but it is a difference. What may be a more significant one—or it may just indicate that I am not yet familiar enough with all this material—is that in 92M of the ASIO Act, which relates to offences giving evidence, there is a defence of reasonable excuse. Reasonable excuse is then defined to include self-incrimination. In the Intelligence Services Bill, the defence is on the face of it only a self-incrimination defence. I do not know what has happened to whatever else might have been covered by reasonable excuse and I have not had time to talk to Keith sufficiently for him to say, ‘That’s because it is in such and such else.’ When we work through it we may be able to find the answer to that or we may have to come back to you and say that under the new provisions the only—

**Mr MELHAM**—Whereabouts is it in the act? Can you point me to that?

**Ms Penfold**—In the ASIO Act it is 92M(3A). If you go to (5) of that section, it says that one reasonable excuse is self-incrimination, but clearly it is not the only reason or excuse. There may be an answer—

**Mr McDonald**—We are not relying on reasonable excuse as a general defence or as a general policy nowadays because we have now got the Criminal Code, which has codified defences. Reasonable excuse was used as a catch-all, now the policy is towards being specific about the defences and the defences are in the code. So the code has a whole range of defences there, whether it be duress or whether it be self-defence, et cetera. It also has some emergency and necessity types of things—defence plus authorisation. Self-incrimination is mainly what is left. That is probably why that has been done.

**Ms Penfold**—That makes sense. I did look at the Criminal Code briefly to see if there was any obvious—

**Mr McDonald**—We have been doing it on quite a lot of stuff, because reasonable excuse is just so vague. But with the code with the specific defences you can rely on that.

**Ms Penfold**—But I suppose that still leaves us in the position of saying we do not know what might have been there that is not now—but probably nothing that matters.

**Mr McDonald**—The usual way in which courts have dealt with this is to say it is covering the general defences; that witnesses recognise common law defence. But that is the explanation as to why it is unlikely to be there.

**Ms Penfold**—Do you want more?

**CHAIR**—Yes, please.

**Mr MELHAM**—Of course we want more—absolutely.

**Ms Penfold**—This one might interest some of my colleagues on this side of the table. Under 92M of the ASIO Act, the arrangement seems to be that the committee can call the Director-General and the Director-General can nominate someone else to attend. If the Director-General nominates someone else to attend, it looks to me as if the Director-General can then comfortably stay away from the committee, despite having been given that initial notice. Under the bill, it is not so clear—and it is at clause 10 of schedule 1—what happens to the Director-General. It is not clear to me that in nominating a staff member to turn up instead, the Director-General gets out of the obligation to turn up.

**Mr Richardson**—Personally, I am relaxed either way, except to note that I do remember one specific instance over the last four years when the committee asked for a particular briefing on something, I was scheduled to be overseas at that time and the deputy director-general came along. That is the only circumstance which I can recall in which I have been asked to come along and I have not, but where I think it would have been reasonable to be represented.

**Mr Taylor**—Presumably, in those circumstances—at least it would be in the case of ASIS—there would be an acting director-general if the Director-General is out of the country, so it would be picked up.

**Ms Penfold**—The next one is section 92H, the power for the committee to obtain information and documents. Under the ASIO Act, the notice to the person—and I think this is also the same in 92J, but we will just look at 92H—is a notice requiring the person to appear to give evidence and to produce any such documents, being documents relevant to a matter that has been referred to the committee. That is a fairly general notice. Under the bill, clause 2(3) requires the committee to go into rather more detail to specify the nature of the evidence or the documents that are to be provided. That may limit a committee's ability to fish.

**Mr Marshall**—I do not think that the existing PJC on ASIO could be regarded as being able to conduct fishing expeditions because its functions are limited to functions which are conferred upon it by resolution of either house or by the Attorney-General. This particular committee has a standing function to review matters concerning the administration and expenditure of both agencies. I was not there for the drafting of that particular clause, but I would imagine that, when the ASIO PJC requests evidence, that is always within the confines of an inquiry that is being conducted, an inquiry with terms of reference, so that the need to specify what sort of evidence it is after is less apparent than would be the case with a standing committee which is authorised to review matters going to the administration and expenditure of the agency.

**Mr O'KEEFE**—Is that the end of that example?

**Ms Penfold**—Yes.

**Mr O'KEEFE**—Are you moving to the next one?

**Ms Penfold**—The next one is 92K. I am jumping around a bit, partly because I started with a couple of examples, rather than working through them. In 92K(1)(b), these are the certificates

given by the minister, preventing evidence being given. Under 92K(1)(b), the minister's reason is just stated as:

for reasons relevant to security.

In the equivalent provision in the bill, which is clause 4(1)(b) of the schedule, the reason is:

to prevent the disclosure of operationally sensitive information...

Those two things may come to exactly the same thing, but it is not apparent just from the words that that is what they do.

**Mr Marshall**—I think on that one it is necessary to bear in mind that what has been proposed under this bill is to take out all of the existing legislative regime applicable to the current PJC on ASIO and to put it into a different part of the legislation. It makes sense to have 'for reasons relevant to security' in the context of the PJC on ASIO, because 'security' is defined within the ASIO Act and that sort of information has a very specific meaning which the organisation and the committee are quite familiar with. You will note that there is a definition of 'operationally sensitive information' in the Intelligence Services Bill and again it will take in the broader ambit. I think it would be correct to say that the functions and information concerning ASIS and DSD might go beyond those relevant to security as defined within the ASIO Act.

**Ms Penfold**—Let us turn to 92S, which relates to secrecy provisions. Paragraph (1)(b) prohibits producing a document furnished for the purposes of this part. That is the part setting up the committee. In clause 12 of the bill, the restriction relates to:

a document provided to the Committee for the purposes of enabling the Committee to perform its functions...

Again, that is probably very close, but—

**Mr Holland**—But I am not in a position to say why those changes were made.

**Mr Marshall**—All I can suggest is that that would almost certainly be a change in drafting. A document furnished for the purposes of part VA is a document furnished for the purposes of the part of the ASIO Act which deals with the functions of the committee. Similarly, under the IS Bill, if it is a document provided for the purpose of enabling the committee to perform its functions, I do not see a substantive difference there.

**Ms Penfold**—There may well not be a substantive difference there.

**CHAIR**—Any more?

**Mr O'KEEFE**—Has that item, for instance, been covered in the second reading speech, or anything like that? Is that something you could cover easily in the minister's summing up: that it is intended that there is a complete flow-on of the processes provided for in that section of the ASIO Act to this act, rather than mucking around drafting changes to the legislation? Would that solve it? Where you are coming from, Hilary, would that solve it from your point of view?

**Ms Penfold**—Resolve it, perhaps, yes. If there was a statement saying, ‘This is only intended to mean the same thing.’

**Mr O’KEEFE**—That is what he was saying, isn’t it? I think he was saying it is only drafting; it is meant to mean the same thing.

**Mr Marshall**—Yes.

**Ms Penfold**—How helpful that statement would be, of course, is another question. I would have to say that the description in the bill is probably a more useful description than a document furnished for the purposes of this part. I would be a bit reluctant to see people being sent back to the earlier act to interpret that. I would be more inclined to have a look at how the thing is going to operate and say, ‘That, in fact, is all we need.’ That is what we mean at this stage.

**Senator FAULKNER**—The bill that we are dealing with was drafted by OPC, wasn’t it?

**Ms Penfold**—It was.

**Senator FAULKNER**—Are you aware of how closely the drafting instructions were to mirror the ASIO Act in this instance?

**Ms Penfold**—I am not aware of that. The reason I am here is that the person who was involved in drafting this has been in Zimbabwe since May and will be there for the best part of another three years.

**Senator FAULKNER**—That is not punishment, is it? You have to assure us of that.

**Ms Penfold**—It may be an indication of how desperate she felt after the drafting.

**Mr MELHAM**—Was this draft in accordance with plain English principles?

**Ms Penfold**—I would like to think so.

**Mr MELHAM**—Is that why there are some changes?

**Ms Penfold**—Yes.

**Mr MELHAM**—I am actually talking about the principles of the inquiry that we had some years ago.

**Ms Penfold**—The other thing I should say—again, I am not sure whether any of my colleagues will want to comment on this—is that I have not had access to any of our files, because they were removed from my office.

**Mr MELHAM**—This is the secret service, after all.

**Senator FAULKNER**—You can give them back.

**Mr MELHAM**—It is secret.

**Mr O'KEEFE**—Are they in Zimbabwe?

**Ms Penfold**—No, I do not think they are in Zimbabwe. They were in a safe that was, in effect, run by one of the agencies. When we undertook this drafting, there were a number of special arrangements put in place.

**Mr MELHAM**—And a number of restrictions?

**Ms Penfold**—The drafter involved had to get a higher security clearance than we would normally have. She was provided with a special safe, a special telephone line and so on. We do not have the combination to that safe and, in fact, we do not now have the safe either.

**Mr O'KEEFE**—Is it in Lake Burley Griffin, and what else is in it?

**Ms Penfold**—I have no idea.

**Mr MELHAM**—I do not think they are going to leave this unresolved.

**Ms Penfold**—The only contribution I can make on that is that I gave instructions that it was not to be blown up on my premises.

**Mr Bonighton**—I have just been advised by my staff that we in fact hold at least the combination to that safe. I have no problems whatsoever in making sure that Hilary has access to that safe. She can have it as soon as she walks out of this building if that would help. I am sorry; I was not aware that that—

**Ms Penfold**—If the committee wants me to go back and check against the instructions, then obviously I would need that.

**Senator ROBERT RAY**—Chair, haven't we got to the stage where, apart from Mr Melham, we are all struggling. The rest of us are getting completely fogged over by this. I think it would be better to get a written submission.

**CHAIR**—Yes, I think so.

**Senator ROBERT RAY**—After discussion with Keith and the others, because some of them may just get eliminated—I do not think it is suitable that this be in a minister's reading reply—

**CHAIR**—No, not on the public record.

**Senator ROBERT RAY**—If there are necessary amendments the government can introduce them when the bill gets to the Senate, if they are just minor ones, and they can be considered in that context.

**CHAIR**—All right. Let us leave it there.



**Mr LEO McLEAY**—I got here late and I apologise if you have already covered this question. My question is to Ms Penfold. The worry I have about this legislation, which I expressed at the last meeting, is that while people have a reasonable amount of confidence in the ASIO legislation—we have been using that for a while and we know what it means—if this bill exactly mirrored that, there would be a higher level of confidence about what you might be doing in a walk in the dark with what some of this seems to be. If in the submission you are going to provide us you could look at or assure us that there is a mirror-like image—or if there is not, where it departs and what could be the effects of that departure—I would be very interested in knowing that.

**Ms Penfold**—There are a few difficulties with undertaking that task in full. One difficulty is that, because of the different functions of ASIS, there will not be a mirror like relationship in a number of provisions. I suppose the other difficulty is that I am not sure I am really in a position to advise you on the effect of the differences.

**Mr LEO McLEAY**—I think the problem I have is that no-one seems to be able to tell us that. Until someone can properly tell me that, I will be a little bit worried about where we are going. We started out with this proposal and a bill before us that we were told was pretty nice and easy, but when I asked a silly question about what a person was I found out that a person could be any person, which could allow people to do nearly anything as long as they were aiding and abetting some properly organised overseas operation of ASIS. I think I can come back to that when we deal with this part. The worry I have with this piece of legislation is that there are unintended consequences coming out of it. If someone asked me whether I had agreed to that as a member of this committee, I would be horrified if I had agreed to it. If I were reasonably certain that the same sorts of safeguards are in this that people have been confidently working on the ASIO legislation with—and I only say ‘confidently’ because there has not been any significant argument with those arrangements—then I would feel a lot more confident about agreeing to the proposals in this legislation. If you cannot tell me that, can someone else tell me that?

**Ms Penfold**—I could give you a version of the document that I have constructed in the last couple of days, although it is not completely finished. It identifies everything that is remotely significant or potentially significant. It is quite a difficult exercise because of the way the form of the ASIO Act has been pulled to pieces and put back together in a different order. Leaving that aside, I identified, for my own purposes initially, where it seemed to me there was a clear policy change. I have got a list of those, and I am happy to produce them. Most of those have already been raised by Keith in his paper. There are a couple that he and I will need to talk about, and he may be able to explain to me where they come in.

Then there was this list, which we have just been going through and which you would have a feel for now, with the sorts of things that are being raised there. They are differences in the actual words of the two sets of provisions, but the differences tend to be able to be resolved either because of external factors—for instance, changes in other bits of legislation—or because, when you look carefully at the two sorts of words, they are not really all that different. It would be very difficult to identify a case where you could say, ‘It will fall within this, but it will not fall within that, even though the words are slightly different.’

Then there is a third category that I have put together—and I will not bother the committee with it for the time being—and that contains the ones that are clearly just drafting differences. They are things like the fact that we used to say ‘by reason of’ and now we say ‘because’. It appears that we used to say ‘amongst’ and now we just say ‘among’. I am happy to give you all that information with comments about whether it seems likely to be significant or not, but I do not think there is anything I can do with that information such that at the end I could say to you, ‘This will have an identical operation to the ASIO Act.’

**Mr LEO McLEAY**—I take you to one point about the submission that we had from the agency. The point is about changes to clause 14(2). What I was concerned about with 14(2) was that when one read 14(1) one saw that ‘The staff member or agent of the agency is not subject to criminal liability.’ Then you move on to 14(2) and you go from that being ‘staff members or agents’ to in fact nearly anybody—it may be anybody who is acting in support of an overseas operation.

ASIS came back with a way that they said they thought this could be reworded. I must say at first glance it looked as though it might have had some attraction, but in other ways it does not. For instance subclause 6(4) makes it clear ASIS is not permitted to engage in acts of violence. Then clause 7, in setting out the functions of DSD, makes it clear that its functions in relation to the gathering of intelligence are directed towards people or organisations outside Australia. They may not be able to go out with an aim of being involved in violence, but if they are involved in violence that occurs then these persons—whomsoever they are—will become immune from Australian law. This could be these persons doing things to Australians in Australia in support of or directly connected with some other operation that ASIS has going overseas. My worry with this major part of the legislation is that we should be giving any sort of blanket immunity to people who commit acts against Australian citizens which would be offences in Australia. Is there any other way that one could reword those clauses to make sure that that is self-evident—rather than relying on the fact that ASIS are not supposed to act violently and therefore they will not.

**Ms Penfold**—It is not so much a matter of saying that they are not supposed to act violently and therefore they will not as saying that they are not supposed to act violently and therefore, if they do, paragraph 2(c)—the requirement that the act in question is done in the proper performance of the function—is not satisfied. If the functions cannot involve violence then you cannot say, ‘Well, it turned violent but it is still in the proper performance of our functions.’ That is why to make sense of 14(2) you need to go and look at what the limitations are on the proper performance of the functions.

**Mr LEO McLEAY**—Which do not appear to be in here at present.

**Ms Penfold**—They are in the other parts of this bill, starting from 6 and 7 and working through also 11 and 12. That is where you look to see how far 14(2)(c) will take you. If you do not satisfy 14(2)(c) then the rest of 14(2) is not available.

**Mr LEO McLEAY**—It is interesting that that was never put by ASIS.

**Ms Penfold**—I think it is mentioned in their submission, although perhaps not as forcefully.

**Mr LEO McLEAY**—Are you satisfied that, with the changes that have been made, a person who committed a crime in Australia against an Australian citizen would not have immunity under this legislation? Or how narrow would that immunity be? I suppose my interest is this: I do not have a real problem if you separate planning from operational issues—people could sit around here in Canberra and plot and plan to their heart's desire. But I do get rather concerned that, in then pursuing these activities overseas, they might start to get involved in actions against Australian citizens here in Australia—or even against Australian citizens overseas, in some instances.

**Ms Penfold**—What I can say is that I am satisfied that the only acts for which there is immunity under 14(2) are those which can somehow be brought within the description of the proper performance of a function of the agency, and that the effect of these function provisions will be to exclude a lot of the sorts of activities that I think are concerning you. But I could not say that it will exclude everything that could possibly be an offence under Australian law, somehow.

**Mr LEO McLEAY**—Is there any way that one could reconstruct this to do that?

**Ms Penfold**—If that was what was wanted, then there probably would be.

**Mr LEO McLEAY**—To satisfy my curiosity, could you provide the committee with a suggestion on how one might do that—not now, but as a submission.

**Ms Penfold**—So the test, from your point of view, is that 14(2) should not cover any act that is an offence under any Australian law?

**Mr LEO McLEAY**—No. It is separating the operational from the planning. ASIS originally told us their concerns with this legislation were the outreach of, particularly, ACT laws about conspiracy. I suppose I have not too much concern about people conspiring, but I have got a lot of concern about people maybe acquiring immunity by going out and doing something to an Australian here in Australia.

**Senator ROBERT RAY**—Could we get Mr Taylor to respond to that, please? He has done so several times.

**Mr Taylor**—Under the terms of the bill, as Ms Penfold said, the only acts that can be carried out in Australia are interest the proper performance of the functions of ASIS or DSD. Those functions are as defined in the bill, and they are the collection of information that relates to the capabilities and intentions of people and organisations overseas.

The types of immunities that we feel are necessary—and which cover the situations that have arisen and led us to run up against a barrier in fulfilling our functions—are those which relate to conspiracy, as you have mentioned. They include the extraterritorial application of Australian laws, the territorial nexus that is contained in some Australian laws, and the need to be able to carry out a continuous activity to start in Australia and finish overseas. What we do in Australia would be an integral part of that.

The bill, as Ms Penfold said, is constructed to define the functions and the way in which they will be approved and the limits on those functions. When you come to clause 14, it is constructed to set out how all those things in 2—a, b and c—would have to be met, and not singly, for the immunity to be effective. The example you gave before of breaking and entering would not be possible here.

**Mr LEO McLEAY**—Why wouldn't it be possible?

**Mr O'KEEFE**—Are you saying it would be possible but you would not get the immunity?

**Mr Taylor**—If an ASIS officer goes out and breaks the law for speeding or something, and then claims to have been doing that in the proper performance of the function, he or she would not get that immunity, unless it were in the proper performance of the function. It would not be because we are not entitled to break the law in Australia. We are here looking for immunities in those limited cases where it is necessary for the sorts of functions you have already mentioned to have it.

The other point to make is one I made earlier. It is that the legal framework for covert collection of intelligence in Australia is that which is set out in the ASIO Act and the Telecommunications (Interception) Amendment Act. They remain the framework for covert collection in Australia. So a rogue officer will not get the immunities.

**Senator ROBERT RAY**—I am sorry to intervene, but Mr McLeay was drawing up the distinction between planning an operation and operational matters. You have answered the question appropriately but differently.

**Mr LEO McLEAY**—But I do not think he has answered the question. That is my problem.

**Senator ROBERT RAY**—I was getting to that. Are there examples in operational procedures within Australia that will get this immunity?

**Mr Taylor**—There is planning and preparation and then there is the continuous act. I might get Ron to say something on that.

**Mr Bonighton**—I could put this a bit delicately. Certainly there could be examples where DSD gains access to a high yield source of intelligence overseas. We would want to maintain access to that line of intelligence. That more than likely would be done from our headquarters on a continuous basis so long as we could maintain that sort of access. We would certainly be involved in planning and preparing, but we would then be involved in a continuous harvest of information.

**Mr LEO McLEAY**—As I said at the beginning, I do not have any particular problem with planning. I do have a problem if you are going to break and enter or tap someone's phone here in Australia. You say you cannot do that. What is to stop you doing that?

**Mr Taylor**—The fact that, if it is to be done in Australia, it is done through the ASIO Act and the Telecommunications (Interception) Amendment Act.

**Mr LEO McLEAY**—What if you decide not to?

**Mr Bonighton**—Then it would not be a proper performance of the functions.

**Mr Taylor**—And they would not get immunity from it.

**Mr Richardson**—What do you say to that, Ms Penfold?

**Ms Penfold**—I agree with that statement. If the ASIO Act and the Telecommunications (Interception) Amendment Act required that those activities be undertaken in accordance with those acts for the purposes of the functions of the agencies, if the agencies went outside that, they would not be acting in the proper performance of their functions, so there would be no immunity.

**Mr LEO McLEAY**—I have an electorate that has an eclectic collection of people who have interests in all sorts of things all over the world. What if ASIS was running an activity against, say, Hezbollah that was properly functioned, organised and ticked off everywhere, and in Sydney there were people who were intimately connected with Hezbollah who had a whole lot of information that could help them and did not give it? What would stop ASIS from acquiring that intelligence by burgling their place, entering it without their authority by trespass, or by getting in there and getting this information without the authority of the people who did not want to give it in proper support of some overseas activity which seemed to fall into their function?

**Mr Richardson**—The scenario you have described does not fall within the functions of ASIS. The scenario you have painted falls within the functions of ASIO, as set out in legislation. My understanding—and I think there is agreement along this side of the table on this—is that, as Allan said, we did look at the issue that you properly raised in respect of clause 14. We have suggested an amendment which the Office of Parliamentary Counsel has agreed to, and that tightens the ring around immunity.

The legal advice is that the bill, with the amendment proposed, would not enable DSD to intercept telecommunications in Australia outside the ASIO warrant arrangement. Nor would it enable ASIS to conduct covert operations in Australia involving listening devices, search and enter, remotely accessing data in a computer, use of tracking devices, mail interception and the like. In other words, the bill with the suggestion that is being put forward maintains the single legal framework for covert collection of intelligence within Australia. I think the advice from the Parliamentary Counsel is that what is proposed would not enable ASIS to conduct the sort of operation you are rightly concerned about, nor would it enable DSD to do anything improper in Australia.

**Senator Robert Ray**—Mr Blick, if you discovered that ASIS or DSD were doing breaking and entering—

**Mr LEO McLEAY**—Ms Penfold, do you agree with what has just been said?

**Ms Penfold**—Yes.

**Senator ROBERT RAY**—As a follow up to Leo's question to Mr Blick, Mr McLeay has outlined a variety of circumstances such as breaking and entering, telephone intercept and I think Mr Richardson added remote access to the computer. If ASIS was involved in any one of those activities within Australia, what series of acts would you then initiate on discovering that?

**Mr Blick**—In the first instance, it would be something that I would assume the Director-General would have no knowledge of, and I would draw it to his attention under the protocols that I have agreed with him. If no suitable action were taken as a result of that, I would draw it to the minister's attention and ultimately the Prime Minister's attention. As I think we discussed last time, I would contemplate whether to bring it to the attention of the law enforcement authorities if the matter was serious enough. I would also contemplate reporting on it and I probably would report on it in my annual report to parliament.

**Senator ROBERT RAY**—All right, that is directly on the matters that Mr McLeay has raised. But what I think he was moving towards—I do not want to put words in your mouth, Leo—were the more fringe area activities. Are there grey areas here between the definition that Mr Taylor has given us in terms of these immunities? I know you are going to have a discussion at some stage towards developing protocols in terms of what happens when seeking an immunity, but just prior to that, do you agree with the definition that has been given here today about what immunities are covered?

**Mr Blick**—I do. You asked a question about grey areas. From what I have seen I would be hard pressed to identify any grey areas at this stage. Inevitably, as one goes through looking at cases, one would assume that there would be issues around the margins that one might want to look at, but I would be very doubtful that they would be substantive issues—they would very much be definitional issues. As I think everyone has been saying, the functions of ASIS, which ASIS tries to carry out to the best of its ability, are to collect foreign intelligence, and the collection of foreign intelligence does not involve substantial activity within Australia other than planning for what they are going to do overseas.

**Mr O'KEEFE**—To build Mr McLeay's picture a little further and, in a sense, lock this in so that we all know that we are talking about the same thing: take the process that Mr Bonington was talking about whereby an important bit of information has been found overseas and is being sent to you. The agent is faxing it and it does not turn up. Your guy gets on the phone and says, 'Where is it?' He says, 'I sent it, it has gone,' and then he checks his machine and it has gone to the wrong number. You need it before anybody else lays eyes on it. You go off to Telstra and say, 'It's gone to this number,' and you use whatever powers you have to find out from Telstra where the thing has really gone. Before one of your agents goes and gets it out of that fax machine, what is going to happen?

**Mr Blick**—The regime that operates in Australia would require that, if something like that were going to be recovered in that way, this would be a responsibility of ASIO and they would have to use their special powers under their legislation which require warranting processes as set out in the legislation.

**Mr O'KEEFE**—So ASIS would contact ASIO and say, 'Hey, we have lost this document. Here is where we think it is. Will you go and get it for us?'

**Mr Richardson**—You would have two options. You could wait until the next morning and knock on the door. However, if you wanted to retrieve that information by going onto premises and committing a trespass without the approval of the person who owns the premises then the only way that you could legally do it would be under an ASIO warrant.

**Mr MELHAM**—On the definition of an Australian person, Ms Penfold, are you aware of the discussion that the committee had in relation to the minister coming within the definition of an Australian person? Has that been raised with you?

**Ms Penfold**—No.

**Mr MELHAM**—The current definition in the act of an Australian person means a person who is an Australian citizen or a permanent resident. There was some discussion with Mr Holland, I think—

**Mr Holland**—May I just clarify that? The question of the minister came in under clause 14(2) where a person is mentioned. That was the concern that was raised. That was where the minister fitted in. That is the subject of the second submission that Mr Taylor sent to the committee.

**Mr MELHAM**—Okay. Ms Penfold, have you seen submission No. 18 from Mr Taylor that was released tonight? I am interested in paragraph 4 in which he details what the immunity provisions are intended to deal with. He talks there about conspiracy, extraterritoriality, the territorial nexus provisions and also the continuous activity. We have now been given a revised clause 14(2)(b). In paragraph 14 of his submission, he also points out that we could add an additional paragraph in relation to the Inspector-General of Intelligence and Security and that that would help overcome our concerns about the generality of the immunity. There is also discussion there are about addressing some revisions in the explanatory memorandum. Have you had a chance to look at that?

**Ms Penfold**—I have looked at it briefly.

**Mr MELHAM**—What I am concerned about is probably the best approach. I am not a fan of just going to explanatory memorandums. I am just wondering if there are further amendments you could suggest that would mean that we do not have to rely on an explanatory memorandum to make sure that the immunity provisions in this act do reflect what is proposed in paragraph 4. Do you understand the question I am asking?

**Ms Penfold**—I think I understand that question, and I think the answer—

**Mr MELHAM**—I am concerned, under 4, that at the moment that is not really what is reflected in what we have been given and what is proposed.

**Ms Penfold**—I think it would be hard to say that what is covered by 14(2) is necessarily limited to the four points that you have got.

**Mr MELHAM**—That concerns me, because the agency tells us that that is all it is really interested in, that the immunity provisions are intended to deal with the following. What I am

trying to do is find out the best course to actually give the agency what they want but do not have any unintended consequences, and through a transparent process—legislation, obviously, being preferable even to protocols that are drawn up within the agencies.

**Mr LEO McLEAY**—Why don't you just say that that is what you want?

**Mr MELHAM**—They do say that is what they want.

**Mr LEO McLEAY**—No, why don't they just say it in the legislation, that the immunities apply to this, this and this? If that is what they say they want, why don't you exclude all the others?

**Ms Penfold**—That would be another approach.

**Mr Taylor**—I am not a lawyer, but I think I would find it very difficult to define those because of the complexities that you have been talking about—the different legal systems in place in all the jurisdictions that we are dealing with. There has to be this connection between the jurisdictions, and that is the complexity of the problem we have got. To go back to the question that Mr McLeay asked: it is not only 14(2); it is 14(2) with all the other things that go with it. It is a package, and it is that package that we think provides the limitations on the immunities. That is how we see it.

**Ms Penfold**—Sure, but that is not really the answer to the question.

**Mr MELHAM**—What I am trying to do is to find an approach that can closely mirror what the agency wants, to give them the flexibility but not have unintended consequences. I am concerned that, in the submission that we have been given, the terms of what is being asked for and how it is proposed to remedy the concerns of the committee do not quite marry up to some of the concerns of the committee. There still remain some unintended consequences, whether we like it or not, in the way it is presently drafted. I am wondering whether you can suggest further refinement or improvement that might allay some of our concerns.

I am not saying it requires radical revision, but the Director-General does suggest, for instance, in paragraph 14 something else that could go into the bill. That is:

... Clause 14 could include an additional paragraph which enables the Inspector-General of Intelligence and Security to give a certificate in writing certifying any fact relevant to the question of whether an act done inside Australia was done in the proper performance of a function of the agency concerned.

**Mr Taylor**—That was in response to discussions—I think in the committee, answering a question that Mr McLeay raised at the time—on the question of how you would know that a person was acting in the proper performance of a function. One of the processes that we thought might help was to have the Inspector-General given that role. It is trying again to tie it down.

**Mr MELHAM**—I accept that; I am not arguing against that. But the draft that we have got at the moment does not have that. It does not have a clause to that effect.

**Mr Taylor**—That is right. It came out of the discussions that you have had.



**Mr MELHAM**—That is right. That is why I am wondering as to whether a refinement like that and maybe another refinement or two might get us closer there.

**Mr Bonighton**—I think that latter addition works both ways and I think to the advantage of everyone in that it makes sure the agencies properly document who is involved in these. It also protects the agencies from Fred Bloggs putting his hand up and saying, ‘I was an ASIS’—or a DSD—‘operative’. So I would certainly welcome that addition.

**Mr MELHAM**—I accept that.

**Mr Marshall**—On the point you raised earlier about redrafting of proposed subclause (2)(b), I think the redraft that appears in paragraph 8 of the submission does represent a genuine effort on the part of all agencies.

**Mr MELHAM**—Yes. I am not saying it does not.

**Mr Marshall**—The issue you have raised about perhaps importing the language of paragraph 4 of that submission into the precise terms of the legislation—

**Mr MELHAM**—Mr McLeay raised that issue. What I was trying to do was come at it from another approach, not necessarily importing that language but trying to get those objects.

**Mr Marshall**—That list of what the immunity provisions are intended to deal with is a list. It becomes very difficult to give that definition. It is very difficult from a legal perspective to give, for example, a concept such as extraterritoriality or territorial nexus, more precise definition than appears within the subclause. The intention behind the suggestion of saying that the explanatory memorandum would make it clear is that in circumstances where there is any ambiguity in a legislative provision one of the first places that courts, lawyers and legislators are directed to go to is the explanatory memorandum. That particular clause refers to the link between the Australian act and the overseas act. As currently phrased it says:

(i) involves aiding, abetting, counselling, procuring or otherwise planning or attempting to carry out; or

... ..  
some other act outside Australia ...

The intention there is that, to the extent that the concept of where one act involves another act might be regarded as having any ambiguity, the explanatory memorandum can make clear that that is as an integral part of the functions of it. I am sorry if I jumped in on Mr McLeay’s point. I think that is why it was considered appropriate to have it in the explanatory memorandum—because it is very hard to give it definition within the context of a legislative provision. I can take you through the various concepts of ancillary liability and where liability may arise.

**Mr MELHAM**—I do not need that. That is why I was looking at the options.

**Ms Penfold**—On the face of it, it looks as if you could, for instance, start with this list in paragraph 4 and attempt to construct a different version of 14(2). The problem that I would see with that is that 14(2) is not really ambiguous, although we keep using that word. It is just that

the exact boundaries are not readily identifiable as we all sit here. You could have a go at, say, the list in paragraph 4 but I think you would very quickly find that what you came up with just had its own set of problems about where the boundaries lay. For instance, in:

... part of a continuous activity focussed on foreign intelligence collection overseas.

‘continuous activity’ is another one of those words where you may be able to say, ‘I know it when I see it,’ but you certainly cannot say, ‘This is exactly where the boundary lies. That falls outside; that falls inside.’ I am not convinced that we would really overcome the problem that you are seeing, which is that at the moment none of us really know exactly some of the things that might need to be covered, but we rely on the limitations of the proper performance of functions.

**Mr MELHAM**—Did you run past Parliamentary Counsel the additional paragraphs Mr Taylor referred to in paragraph 14 of your submission, in terms of Inspector General?

**Ms Penfold**—Again, I have had a very brief look at it. It looks basically okay. I would not see a problem with constructing a provision to add in along those lines.

**Mr MELHAM**—So it would not create more problems than it solves?

**Ms Penfold**—I do not think it would create more problems than it solves.

**Mr O’KEEFE**—Mr Taylor, we have you being in a sense legitimised legislatively with: ‘Yes, you do exist. Here are the powers. Here are the functions. Here are the processes.’ I am wondering whether we need to ensure that this act embraces the possibility of this going where I see it going—maybe it needs to be in the protocols phase. It has come out in your public evidence that people smuggling is one activity where you have been given a reference that is a bit broader than the normal activities. Whether it is paramilitary, whether it is drugs, whether it is people smuggling, whether it is defence intelligence, I am certain that as ‘birds of a feather flocking together’ come to be more of your brief you are going to come across more and more information about people engaged in other activities. Clause 11, which set out the limits, clearly makes it clear that you are not to be involved in police activities or law enforcement but you are permitted to transmit intelligence. I do not have any problem with that. But there is nothing in any of our legislation anywhere that relates to the relationship that other organisations, for instance the Federal Police, Customs, Defence or the NCA, might have with you and what they might ask of you. If you have broader powers than they have or if you are very good at the business and have very specialised resources, it would seem attractive for them to start asking you to do things for them which they have great difficulty doing themselves.

We might not in an overall sense have any problems with this. But the protocols we have been talking through for clause 14 really are about how the liability and the immunity provisions will operate. Do we also need to start thinking about how you will relate to all these other organisations that you have an informal relationship with at the moment? Is that something that needs to be on the table now and at least begin to be thought about now even if not necessarily legislated for now? Do you have a comment on that?

**Mr Taylor**—Could I make a point of clarification first. In the sorts of things you suggested might come up in future you mentioned paramilitary. That cannot because that is ruled out in the legislation and 6(1)(e) does not override the limitations on the functions of the act.

In terms of relations with others, the bill sets out a framework for cooperation with other authorities: clause 13. It provides that the minister may give directions in terms of cooperation with:

(a) Commonwealth authorities; and

(b) State authorities; and

(c) authorities of other countries approved by the Minister as being capable of assisting the agency in the performance of its functions;

All of these arrangements must be:

so far as is necessary for the agency to perform its functions, or so far as facilitates the performance by the agency of its functions.

So there is a framework there in which the sort of arrangements you are talking about could be made.

The other point I would make is that ASIS collects in terms of government priorities. If the AFP or the NCA or someone wanted ASIS to become involved in collection on an issue like drugs, that would need to be put through the priorities process which flows from the National Security Council through SCONS, ANA and the collection priority setting procedures.

**Mr Bonighton**—From our point of view, for any new activity like that or any grey area we would be going to the I-G to get his view on whether this was appropriate, on whether it fell within our proper functions. He might like to comment.

**Mr Blick**—I would endorse everything that has been said so far. I just want to make the point, too, that under the existing regime agencies seek assistance by way of information from the two agencies we are talking about. These agencies report and occasionally the other agencies seek further information. Under the rules that are provided for here, and which already exist of course, there are protocols for dealing with those sorts of issues. In my experience, the agencies are extremely careful about the extent to which they provide assistance, particularly in relation to Australians.

**Mr O'KEEFE**—Put yourselves down the road a bit, meeting with the committee and briefing us about the general operation of the show without going into operational matters. If we asked a general question such as, 'You are gathering 100 per cent of information. What percentages of it, roughly, seem to be being transmitted to this organisation or that organisation or the other organisation?' is that a briefing point that you would be comfortable in relaying to a parliamentary committee?

**Mr Richardson**—Yes.

**Mr Taylor**—I certainly would be.

**Ms Penfold**—Could I get some guidance: I am not quite sure where we are up to in terms of the document that you would like produced.

**CHAIR**—We would really need it tomorrow night.

**Ms Penfold**—That is all the material that I outlined?

**CHAIR**—Yes. Thank you all very much indeed for being here tonight. I am not quite sure how far down the track we have come, but we have come some of the way.

**Senator FAULKNER**—We went all the way down the track and then went back again.

**CHAIR**—That is right.

Resolved (on motion by **Mr O’Keefe**):

That this committee authorises publication, including publication on the parliamentary database of the proof transcript of the evidence given before it at public hearing this day.

**Committee adjourned at 8.09 p.m.**