

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

### **Background**

- 3.1 Part 4 of the IS Bill provides for the establishment and operation of a Parliamentary Joint Committee on ASIO and ASIS (PJCAA).
- 3.2 The PJCAA's key function is to review the administration and expenditure of ASIO and ASIS. The functions of the PJCAA do not include scrutiny of the agencies' activities or operations. The IGIS will be responsible for scrutiny of operational activities. Schedule 1 of the IS Bill sets out the procedure, offences and administration of the PJCAA.
- 3.3 The PJCAA will replace the existing Parliamentary Joint Committee on ASIO which is established under Part VA of the *Australian Security Intelligence Organisation Act 1979* (the ASIO Act). The Intelligence Services (Consequential Provisions) Bill 2001 provides consequential amendments to the ASIO Act arising from the establishment of the PJCAA in the IS Bill.
- 3.4 Some of the members of the Joint Select Committee on the Intelligence Services are also members of the Parliamentary Joint Committee on ASIO (the ASIO Committee). This allows us to compare the proposed arrangements for the PJCAA, as set out in the IS Bill, with those currently in place with the ASIO Committee.

## Clause 29 – Functions of the Committee

3.5 Clause 28 specifies that there will be a Parliamentary Joint Committee on ASIO and ASIS. The Committee will consist of 7 members, 3 of whom will be Senators and 4 will be members of the House of Representatives. Clause 29, shown in full below, specifies the functions of the Committee.

### ***29 Functions of the Committee***

- (1) *The functions of the Committee are:*
  - (a) *to review the administration and expenditure of ASIO and ASIS, including the annual financial statements of ASIO and ASIS; and*
  - (b) *to review any matter in relation to ASIO or ASIS referred to the Committee by:*
    - (i) *the responsible Minister; or*
    - (ii) *a resolution of either House of the Parliament; and*
  - (c) *to report the Committee's comments and recommendations to each House of the Parliament and to the responsible Minister.*
- (2) *The Committee may, by resolution, request the responsible Minister to refer a particular aspect of the activities of ASIO or ASIS (as the case may be) to the Committee, and the Minister may, under paragraph (1)(b), refer that aspect to the Committee for review.*
- (3) *The functions of the Committee do not include:*
  - (a) *reviewing the intelligence gathering priorities of ASIO or ASIS; or*
  - (b) *reviewing the sources of information, other operational assistance or operational methods available to ASIO or ASIS; or*
  - (c) *reviewing particular operations that have been, are being or are proposed to be undertaken by ASIO or ASIS; or*
  - (d) *reviewing information provided by, or by an agency of, a foreign government where that government does not consent to the disclosure of the information; or*
  - (e) *reviewing an aspect of the activities of ASIO or ASIS that does not affect an Australian person; or*
  - (f) *reviewing the rules made under section 15 of this Act; or*
  - (g) *conducting inquiries into individual complaints about the activities of ASIO or ASIS.*

*Note: For Australian person see section 3.*

- 3.6 The EM to the IS Bill explains that the PJCAA adopts the basic form of the existing ASIO Committee, but ‘expands its functions to examine expenditure and administration of both ASIS and ASIO.’ Section 92C(2) of the ASIO Act indicates that the existing ASIO Committee can conduct specific inquiries provided that the Minister or a House of the Parliament refers a particular aspect of the activities of the Organisation to the Committee for review.
- 3.7 The IS Bill, under paragraph 29(1)(b) reflects the provisions set out in subsection 92C(2) of the ASIO Act. In addition, paragraph 29(1)(a) indicates that the functions of the PJCAA are to review the administration and expenditure of ASIO and ASIS, including the annual financial statements of ASIO and ASIS. In effect, this clause sets out an annual expenditure review function for the PJCAA that the previous ASIO Committee was not required to undertake.
- 3.8 The PJCAA, in performing its functions set out in clause 29, may request, under clause 30, that the Directors-General of ASIO and ASIS, and the IGIS to brief the Committee.
- 3.9 The PJCAA, under clause 31, is required to give to the Parliament, each year as soon as practicable after 30 June, a report on its activities during the year. One of the functions of the Annual Report would be to inform Parliament each year on the outcome of its review of the financial statements of ASIO and ASIS.
- 3.10 The evidence received focused on two areas of the PJCAA’s operation: first is the inability of the PJCAA to review operational matters; and second is the omission of DSD and the other intelligence agencies from its mandate. Therefore, the two key focus areas are the powers and coverage of the PJCAA.

## **Analysis – powers**

- 3.11 Some groups in evidence suggested that the current ASIO Committee is ineffective because it cannot review operational matters. It was suggested that the PJCAA under the IS Bill would be similarly ineffective. Mr Mark Weeding stated:

There should be the recognition that they are not just answerable to their Ministers and that they have to front before a body like this to answer questions. That would be a stronger mechanism that what we have at the moment. I do not know where the line

should be drawn in respect of how much the Committee should do, but there is potential for it to do more.<sup>1</sup>

- 3.12 Dr David MacGibbon was even more critical of the existing ASIO Committee and suggested that the proposed PJCAA would be similarly ineffective. Dr MacGibbon commented that ‘with the possible exception of France, Australia has the lowest level of parliamentary scrutiny of its agencies of any comparable democracy.’<sup>2</sup> Dr MacGibbon stated:

The central point on which my argument is based and from which everything flows is the absolute requirement of effective parliamentary accountability. I will argue that the Intelligence Services Bill will provide no improvement or advance in parliamentary oversight, let alone accountability, of the intelligence agencies than what exists at present. What exists at present is quite unacceptable.<sup>3</sup>

- 3.13 The current accountability framework for the intelligence community includes financial audits by the Auditor-General and oversight and monitoring by the IGIS. In addition, Ministers for the agencies are responsible but, in this area, have minimal Parliamentary reporting requirements.

- 3.14 Dr MacGibbon suggested that in view of Minister’s heavy workloads this accountability framework is inadequate. Consequently, Dr MacGibbon suggested a Parliamentary committee with real powers could improve parliamentary accountability of the agencies and could enhance the overall accountability framework. Dr MacGibbon stated:

The other benefit of a committee is that it is a two-way channel of communication between the agency and the parliament. The committee provides a vehicle for the education of the parliament on the broad needs and objectives of the agencies. Conversely, there is often untapped in the parliament experience in life and public affairs in general which could usefully be brought to bear for the advantage of the agency.<sup>4</sup>

- 3.15 In addition, Dr MacGibbon suggested that the PJCAA should play an important role in ensuring that the privacy framework is effective.<sup>5</sup>

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1 Mr Mark Weeding, *Transcript*, p. 4.

2 Dr David MacGibbon, *Transcript*, p. 12.

3 Dr David MacGibbon, *Transcript*, p. 9.

4 Dr David MacGibbon, *Transcript*, p. 11.

5 Dr David MacGibbon, *Transcript*, p. 12.

3.16 The functions of the PJCAA, as set out under clause 29, were considered to be too restrictive. Dr MacGibbon suggested that the PJCAA's work would be ineffective if it could not examine some past operational matters. Dr MacGibbon stated:

I think it is highly desirable that current operations are beyond the committee, and that condition must be mandatory. However, an essential part of the accountability process includes an assessment of performance and effectiveness of the agency, and that is impossible without looking at past operations. Furthermore, any review of financial expenditure must be related to operational activities. No meaningful accountability can occur in a vacuum.<sup>6</sup>

3.17 During the public hearing it was suggested that paragraph 29(3)(c) could be amended to remove 'have been' so that the PJCAA could discuss with agencies past operational matters.<sup>7</sup> Under this proposal, the Committee's primary function specified in paragraph 29(1)(a) would still be paramount.

## Conclusions

3.18 The functions and powers of the proposed Parliamentary Joint Committee on ASIO and ASIS (PJCAA) provides some enhancements on the existing ASIO Committee. The new PJCAA will have to examine the annual financial statements of ASIO and ASIS. At the same time, the PJCAA will have to report to Parliament each year on its activities.

3.19 However, we agree that the capacity of the PJCAA to perform its accountability role would be enhanced considerably if it was able to examine the generality of past operations.

3.20 Accordingly, we support the proposal to amend paragraph 29(3)(c) of the IS Bill.

### Recommendation 10

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

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

6 Dr David MacGibbon, *Transcript*, p. 15.

7 Dr David MacGibbon, *Transcript*, p. 19.

- 3.22 The PJCAA, once it is formed, should develop a system of annual review which fulfils the needs of parliamentary accountability and provides confidence for both ASIS and ASIO.
- 3.23 The PJCAA should meet with ASIO, ASIS and IGIS as earlier as possible to develop and agree on protocols which will underpin the annual review of administration and expenditure. The IS Bill provides the overarching framework for managing the functions and procedures of the PJCAA. The protocols should seek to give effect to the provisions in the Bill and provide guidelines on their application. These protocols should address issues relating to:
- scrutiny through briefings and public hearings where necessary;
  - the provision of supporting information through submissions;
  - PJCAA security and secrecy obligations regarding classified information and the protection of the identity of ASIO and ASIS staff;
  - PJCAA secretariat security requirements; and
  - processes for the publication of evidence and Committee reporting to the Parliament.

## Analysis – coverage

- 3.24 While there was general support in the evidence for ASIS coming under the scrutiny of the PJCAA, questions were raised about the Parliamentary oversight of DSD, DIO, DIGO and the ONA. DSD indicated that it was one of six outputs of the Department of Defence (Defence) and there were sufficient accountability processes that already operated. DSD stated:

Under this bill, oversight for DSD will continue to be provided through our direct involvement in the Defence financial and administrative process, and through my line accountability to my deputy secretary, the secretary for Defence and, ultimately, parliament through the minister.<sup>8</sup>

- 3.25 In relation to possible oversight by the PJCAA, DSD indicated that because it was a program in the Defence portfolio it was already subject to Parliamentary oversight. DSD stated:

Parliamentary oversight for DSD will continue to be provided for through the hearings of the Joint Standing Committee on Foreign Affairs, Defence and Trade, the Senate Standing Committee on

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8 Mr Ronald Bonighton, Defence Signals Directorate, *Transcript*, p. 49.

Foreign Affairs, Defence and Trade, and the Parliamentary Joint Committee of Public Accounts and Audit, as is the case for the rest of the Defence Organisation.<sup>9</sup>

3.26 DSD did, however, admit that it had ‘very rarely’ been subject to parliamentary scrutiny by any parliamentary committee.<sup>10</sup>

3.27 During hearings, the suggestion was put that DSD and the other Defence intelligence agencies would be better off if they were under the Parliamentary scrutiny of an expert committee dealing in intelligence matters. It was suggested that if DSD was subject to a specialist intelligence committee then it would not be subject to scrutiny by at least four other parliamentary committees.

3.28 It was suggested that ASIO was not a target of estimates committees because the opportunity through the Parliamentary Joint Committee on ASIO provided a more effective forum for examination. It should be noted that Senate Legislation Committees performing their estimates functions must, under Senate standing order 26(2), hear evidence on the estimates in public session.

3.29 DSD acknowledged that the proposal to be subject to a specialist intelligence agency was cogent, but maintained that being part of the Defence portfolio provided sufficient accountability opportunities.<sup>11</sup> DSD stated:

All the intelligence output organisations, including DSD, DIO and DIGO, along with the other five outputs in Defence, are subject to a great deal of scrutiny within Defence. The same scrutiny that is applied to every other financial, budgetary and management program within Defence is applied to the intelligence group in the intelligence program. So there is considerable oversight already. There is also the Inspector-General’s mechanism, as you know very well.<sup>12</sup>

3.30 During the hearings, the position was put that, from a separation of powers perspective, there was a need for greater parliamentary oversight of the intelligence agencies. It was insufficient to just rely on the IGIS. IGIS is appointed by executive government and reports in the first instance to executive government. It was argued that if the Parliament was going to approve immunities for the intelligence agencies then by rights the

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9 Defence Signals Directorate, *Submission No. 6*, p. 4.

10 Mr Ronald Bonighton, Defence Signals Directorate, *Transcript*, p. 54.

11 Mr Ronald Bonighton, Defence Signals Directorate, *Transcript*, p. 55.

12 Mr Ronald Bonighton, Defence Signals Directorate, *Transcript*, p. 56.

Parliament must be involved in the scrutiny and accountability of these agencies. To do otherwise is an abrogation of the Parliament's responsibilities.

## Conclusions

- 3.31 We suggest that there is considerable merit in a specialised parliamentary committee having parliamentary oversight of all intelligence agencies. If the IS Bill is passed, in its current form, then DSD and the other intelligence agencies will, in practice, be free of Parliamentary oversight.
- 3.32 DSD claims that it is subject to scrutiny by the Joint Committee of Public Accounts and Audit, the Senate Foreign Affairs, Defence and Trade Committee, and the Joint Foreign Affairs and Trade Committee. In theory that is correct, but in practice there is minimal scrutiny of DSD, and it is not due to a failure by the Parliament. The total Budget appropriation for DSD, DIGO and DIO in 2001-02 is \$385 million. This amount is reported in the Budget documentation as a single line item, and is not subject to scrutiny by Senate estimates committees. It is essential, therefore, that there be a higher level of Parliamentary scrutiny.
- 3.33 DSD is the most significant Defence collection agency and should be subject to oversight by the proposed Joint Parliamentary Committee on ASIO and ASIS.

### Recommendation 11

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

## Procedural powers of the new parliamentary committee

- 3.35 The key procedural powers of the new parliamentary committee include the power to send for persons and papers, and to publish information. However, the provisions in the IS Bill provide caveats on the power of the PJCAA to publish information.



- 3.36 With the repeal of Part VA of the ASIO Act, relating to the PJCA, the IS Bill will provide the framework for the operation of the PJCAA. In the majority of cases, the provisions which apply to the PJCAA are described in the EM as being ‘substantially equivalent to’ the relevant section in the ASIO Act. This was tested during hearings and it became evident that there were differences in drafting which altered the effect of some provisions.
- 3.37 The Office of Parliamentary Counsel (OPC) provided a submission which identifies certain drafting differences between the provisions of the ASIO Act establishing the PJCA and the provisions of the Intelligence Services Bill establishing the PJCAA.<sup>13</sup> The OPC indicated that the drafting differences identified are divided into three classes:
- **Table 1:** Drafting differences that are attributable to deliberate policy decisions. This submission does not, however, refer to any of the policy changes identified in Keith Holland’s submissions dated 6 August and 20 August.
  - **Table 2:** Drafting differences that may cause differences in the operation of the two pieces of legislation concerned. In some cases, an explanation for the difference can be found elsewhere in the relevant legislation, or elsewhere, and those explanations have been included. **This submission does not deal with differences that were discussed and explained at the Committee hearing on 20 August.**
  - **Table 3:** Drafting differences that seem to be entirely attributable to changes in drafting style since 1979. It is highly unlikely that any of these changes will have any impact on the operation of the new legislation. The table identifies the kinds of changes made, without identifying every occurrence of each change.<sup>14</sup>
- 3.38 The three tables indicating drafting differences between the ASIO Act and the IS Bill are reproduced, in full, below.

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13 Office of Parliamentary Counsel, *Submission No. 20*.

14 Office of Parliamentary Counsel, *Submission No. 20*, p. 2.

**Table 1—Drafting differences that are attributable to deliberate policy decisions**

<b>ASIO Act</b>	<b>Intelligence Services Bill</b>	<b>Comments</b>
<p><b>1.1 Restrictions on disclosure to Parliament</b></p> <p>The Committee is precluded from disclosing classified material or information on methods, sources, targets or results of ASIO’s operations or procedures, disclosure of which would, or would be likely to, prejudice the performance of ASIO’s functions [92N(1)(b)]</p>	<p>The Committee is precluded from disclosing operationally sensitive information or information that would or might prejudice:</p> <ul style="list-style-type: none"> <li>• Australia’s national security or foreign relations; or</li> <li>• the performance of ASIO/ASIS’s functions [Sch 1, cl 7(1)(c)]</li> </ul>	<p>The new provision provides a more focussed restriction on disclosure, and avoids the inadequacies of the reference to classified material (which doesn’t necessarily cover, for instance, information, or documents that have been inappropriately left unclassified).</p> <p>The new provision also refers to information prejudicial to Australia’s national security or foreign relations.</p> <p>The test in the new provision that the disclosure “might” have the specified effect is probably easier to satisfy than the ASIO Act test, “would be likely to” have the specified effect. This will make the limitation on disclosure slightly more likely to apply.</p>
<p><b>1.2 Constitution of Committee</b></p> <p>The Committee consists of 7 members [92B(2)] and has a Presiding Member [92D(1)] and a quorum of 4 members [92E(6)(a)]</p>	<p>The Government is to have a majority on the Committee [Ss 28(3)], the Chair must be a Government member [Sch 1, cl 16(1)], and the quorum of 4 members must include a majority of Government members or an equal number including the Government Chair [Sch 1, cl 18]</p>	<p>This reflects a Government policy decision.</p>

<p><b>1.3 Committee procedures</b></p> <p>Recording of split or dissenting votes [92E(7)]</p>	<p>No equivalent</p>	<p>This is likely to be covered by standard committee procedures (see Odgers’ Australian Senate Practice, 9th edition, pages 379 (which states that, “by convention, joint committees follow Senate Standing Orders where their statutes or resolutions of appointment are silent”) and 401, and Senate Standing Order 38).</p>
<p><b>1.4 Dealing with documents</b></p> <p>The provision only applies to documents with a national security classification provided to the Committee [92F(4)]</p>	<p>The provision applies to all information held and records made by the Committee [Sch 1, cl 22(1)]</p>	<p>The new provision applies more broadly to ensure that all information relating to the agencies is properly secured. The issue is more significant in the Bill because the Committee’s powers have been expanded, both to cover ASIS and to provide a standing review function in relation to the administration and expenditure of both ASIO and ASIS.</p>
<p><b>1.5 Committee’s powers</b></p>	<p>Limit on Committee’s power to require disclosure of information [Sch 1, cl 1]</p>	<p>This provision reflects a Government decision to ensure that the expansion of the Committee’s powers to include the standing review function (in relation to the administration and expenditure of the two agencies) would not give the Committee a right to compel access to operationally sensitive information.</p>

<p><b>1.6 Committee's functions</b></p> <p>The Committee is to review <i>aspects of the activities</i> of ASIO referred to the Committee [92C(1)(a)]</p>	<p>The Committee is to review</p> <ul style="list-style-type: none"> <li>• <i>administration and expenditure (including annual financial statements)</i> of ASIO and ASIS [para 29(1)(a)] <b>and</b></li> <li>• <i>any matter in relation to ASIO or ASIS</i> referred to Committee [para 29(1)(b)]</li> </ul>	<p>The expansion of the Committee's review powers reflects a government decision.</p>
<p><b>1.7 Committee's functions</b></p> <p>Excluded activities for Committee—general [92C(4)]:</p> <p>The Committee is precluded from <i>originating inquiries</i> into individual complaints [92C(4)(d)]</p>	<p>Excluded activities for Committee—general [29(3)]:</p> <p>The Committee is precluded from <i>conducting inquiries</i> into individual complaints [29(3)(g)]</p>	<p>The obvious differences between the lists of excluded activities in subsection 92C(4) of the ASIO Act and subsection 29(3) of the IS Bill reflect specific government decisions.</p> <p>The new formulation reflects the current policy that inquiries into individual complaints should be conducted under the <i>Inspector-General of Intelligence and Security Act 1986</i>.</p>

**Table 2—Drafting differences that may cause differences in operation of legislation**

ASIO Act	Intelligence Services Bill	Comments
<p><b>2.1 Appearance by Director-General before Committee</b></p> <p>If the Director-General of ASIO nominates another officer to appear before the Committee [92J(2)], and doesn't appear initially, the DG is not then covered by the offence created by 92M(1). [92M(2)]</p>	<p>If the Director-General of ASIO nominates another officer to appear before the Committee [Sch 1, cl 3(5)], the other officer is covered by the offence created by Sch 1, cl 10(1), but the DG is not expressly freed of liability for that offence. [Sch 1, cl 10(2)]</p>	<p>There is an ambiguity in the drafting of Schedule 1, clause 10(2) of the IS Bill. The clause is not explicit whether liability is imposed on the nominated officer <b>as well as</b> the DG, or <b>instead of</b> the DG, and either reading would seem to be available.</p>
<p><b>2.2 Secrecy</b></p> <p>Recording or disclosure of certain information is restricted <i>except for the purposes of this Part</i>. [92S(1)]</p>	<p>Recording or disclosure of certain information is restricted <i>if the action of the person is not carried out for the purposes of enabling the Committee to perform its functions</i>. [Sch 1, cl 12(1)]</p>	<p>The new formulation reflects the new legislative structure (ie the Committee provisions are not collected in a single part of the Bill). It also provides a more specific description of the cases in which recording or disclosure is permitted.</p>

<p><b>2.3 Secrecy</b></p> <p>The effect of 92S(1) and (2), together with the definition of “information or document” set out in 92S(3) is to impose 2 criteria for the information or documents covered by the section. These criteria are</p> <ul style="list-style-type: none"> <li>• that the person acquired the information or gained access to the document by virtue of the person’s office or employment under the Part; and</li> <li>• that the information or document was supplied to the Committee for purposes of this Part.</li> </ul> <p>[92S]</p>	<p>Only one criterion is imposed for the information or documents covered by the section, namely that the person acquired the information or gained access to the document because of the person’s position as a member, or member of staff, of the Committee. [Sch 1, cl 12]</p>	<p>The second criterion in the ASIO Act provision appears to have been largely redundant. However, removing it may mean that another small class of information or documents is protected under the Bill (ie anything held by Committee members or staff but not “supplied to the Committee for the purposes of [Part VA]”).</p>
<p><b>2.4 Nomination of Committee members</b></p> <p>In nominating Committee members, the nominator must have regard to the desirability of ensuring that composition of committee <i>takes into account</i> representation of recognised political parties in Parliament [92B(6)]</p>	<p>In nominating Committee members, the nominator must have regard to the desirability of ensuring that composition of committee <i>reflects</i> representation of recognised political parties in Parliament [Sch 1, cl 14(5)]</p>	<p>The new provision might impose a slightly higher obligation on the nominators of committee members, although this is unlikely to make any difference in practice.</p>
<p><b>2.5 Committee’s power to seek reference</b></p> <p>The Committee may seek a reference re <i>an aspect of ASIO’s activities</i> [92C(3)]</p> <p>This provision reflects the description of the matters that the Committee may review under 92C(1)(a).</p>	<p>The Committee may seek a reference re <i>an aspect of ASIO’s or ASIS’s activities</i>. [subsec 29(2)]</p> <p>This provision reflects the Committee’s powers to seek a reference under the ASIO Act; it does not reflect the Committee’s broader review powers under the IS Act.</p>	<p>This means that the Committee’s power to seek a reference may not cover the full range of the Committee’s powers to review. Subsection 29(2) of the IS Bill could be amended to line up the Committee’s powers to seek a reference with the Minister’s powers to give a reference.</p>

**Table 3—Differences that reflect only developments in drafting style**

ASIO Act	Intelligence Services Bill
reason to believe	reasonable grounds for believing
divulge	disclose
by reason of	because
shall	must
effluxion of time	passing of time
amongst	among
by virtue of	because
by writing signed ... and delivered to	by giving a signed notice to
determines	decides
notwithstanding	even though

Source: Office of Parliamentary Counsel, *Submission 20*, pp. 3-8.

- 3.39 The information in tables 1, 2 and 3 provides an assurance regarding the degree of differences between the provisions in the ASIO Act and those in the IS Bill. Table 1 deals with a range of variations that reflect policy changes. We do not consider that these changes undermine the powers of the proposed PJCAA. Some of the provisions seek to expand the powers of the PJCAA. For example, 1.6 indicates that the powers of the PJCAA will be expanded to include review of the administration and expenditure of ASIO and ASIS.
- 3.40 Table 2 deals with drafting differences that may cause differences in the operation of the legislation. The key issue raised in table 2 relates to the power of the PJCAA to seek a reference from the Minister which is discussed in 2.5 of table 2. The OPC suggests that subsection 29(2) of the IS Bill could be amended to line up the Committee's powers to seek a reference with the Minister's powers to give a reference. Subsection 29(2) states that 'the Committee may, be resolution, request the responsible Minister to refer a particular aspect of the activities of ASIO or ASIS to the Committee.' The OPC is suggesting that 29(2) be amended to read that 'the Committee may, be resolution, request the responsible Minister to refer a *matter in relation* to the activities of ASIO or ASIS to the Committee.' We agree with this proposal.

## Recommendation 12

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

- **The Committee may, by resolution, request the responsible Minister to refer a ~~particular aspect of~~ *matter in relation to the activities of ASIO or ASIS (as the case may be) to the Committee, and the Minister may, under paragraph (1)(b), refer that aspect matter to the Committee for review.***

3.42 The Attorney-General's Department also identified a number of provisions in the IS Bill which were slightly different to those in the ASIO Act. These matters are discussed in the following paragraphs.

3.43 Schedule 1, clauses 6 and 7 set out provisions relating to the publication of evidence and documents, and restrictions on disclosure to Parliament. The EM states that clause 6 'is substantially equivalent to section 92G of the ASIO Act and provides for procedures to be followed in the publication of evidence and documents before the Committee.' Schedule 1, clause 6 is shown, in full, below:

***Schedule 1, clause 6 Publication of evidence or contents of documents***

- (1) *Subject to this clause, the Committee may disclose or publish, or authorise the disclosure or publication of:*
  - (a) *any evidence taken by the Committee; or*
  - (b) *the contents of any document produced to the Committee.*
- (2) *The Committee must not disclose or publish, or authorise the disclosure or publication of, the evidence or the contents of the document without the written authority of:*
  - (a) *if the person who gave the evidence or produced the document is a staff member of ASIO or ASIS—the relevant Director-General; or*
  - (b) *in any other case—the person who gave the evidence or produced the document.*
- (3) *The Committee must obtain the advice of the responsible Minister as to whether the disclosure or publication would or might disclose:*
  - (a) *the identity of a person who is or has been a staff member or agent of ASIO or a staff member or agent of ASIS (as the case requires); or*



- (b) *any information from which the identity of such a person could reasonably be inferred; or*
- (c) *operationally sensitive information or information that would or might prejudice:*
  - (i) *Australia’s national security or the conduct of Australia’s foreign relations; or*
  - (ii) *the performance by either ASIO or ASIS of its functions.*

*Note: For operationally sensitive information see section 3.*

- (4) *The Director-General of Security and the Director-General of ASIS may determine that paragraphs (3)(a) and (b) do not apply to the identification of specified staff members or agents of their respective agencies, and the determination has effect accordingly.*
- (5) *The Committee must not disclose or publish, or authorise the disclosure or publication of, the evidence or the contents of the document if the responsible Minister has advised the Committee that the disclosure or publication would or might disclose a matter referred to in subclause (3).*
- (6) *This clause has effect despite section 2 of the Parliamentary Papers Act 1908.*
- (7) *If the evidence, or the contents of the document, are disclosed or published under this clause, section 4 of the Parliamentary Papers Act 1908 applies to the disclosure or publication as if it were a publication under an authority given under section 2 of that Act.*

3.44 Subsection 92G(1) of the ASIO Act provides that the Committee cannot unilaterally publish documents or evidence taken *in private*. The Committee, in order to publish these documents, must receive written authority from the person who gave the evidence or produced the document. This provision is similar to subsection 11(3) of the *Public Accounts and Audit Committee Act 1951*. These provisions help to engender confidence in how sensitive material is treated by the various Committees.

3.45 The key factor in both the ASIO Act and the Public Account and Audit Committee Act is that written permission to publish is only required where information is taken *in private*. The ASIO Committee and the Public Account and Audit Committee have unilateral power to publish evidence taken in public and documents which have no confidentiality provisions applying.

3.46 The IS Bill as it stands prevents the proposed parliamentary committee from publishing any evidence without written consent. This includes information provided publicly. The Attorney-General’s Department, after

clarification on this matter, has confirmed that schedule 1, clause 6 should have been consistent with section 92G of the ASIO Act as stated in the EM. The Attorney-General's Department stated:

...the application of section 92G of the ASIO Act is confined to situations where the Committee conducts 'a review in private'. That limitation was inadvertently omitted from clause 6 and 9 of Schedule 1 and will be inserted in the Bill.<sup>15</sup>

- 3.47 The correct intent of clause 6, as is with the ASIO or JCPAA, is to ensure that the parliamentary committee receives written consent to publish from persons who provide any evidence or documents in private. Written consent is not required where persons provide information in public or provide documents where no confidentiality provisions apply.

### Recommendation 13

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

- 3.49 In view of this matter, the Committee wrote to the Attorney-General's Department seeking assurance that the procedural powers of the proposed parliamentary committee are not diminished in any way and reflect those powers that currently exist with the ASIO Committee. In responding to this request, the Attorney-General's Department drew attention to a number of provisions which diverge from current procedures which apply to the Parliamentary Joint Committee on ASIO. These provisions are shown, in full, below:

***Schedule 1, clause 2 Power to obtain information and documents***

- (1) *The Chair or another member authorised by the Committee may give a person written notice requiring the person to appear before the Committee to give evidence or to produce documents to the Committee.*
- (2) *The notice must specify the day on which, and the time and place at which, the person is required to appear or to produce documents. The day must not be less than 14 days after the day on which the notice is given to the person.*

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15 Attorney-General's Department, *Submission No. 19*, p. 1.

- (3) *The notice must also specify the nature of the evidence or documents to be provided to the Committee, and in the case of documents, the form in which they are to be provided.*
- (4) *A requirement under this clause must not be made of:*
  - (a) *the Director-General of Security or the Director-General of ASIS; or*
  - (b) *a staff member or agent of ASIO or a staff member or agent of ASIS; or*
  - (c) *the Inspector-General of Intelligence and Security; or*
  - (d) *a member of the staff of the Inspector-General of Intelligence and Security.*
- (5) *A requirement under this clause may only be made of a person if the Committee has reasonable grounds for believing that the person is capable of giving evidence or producing documents relevant to a matter that the Committee is reviewing or that has been referred to the Committee.*
- (6) *If a member gives a notice to a person, the member must as soon as practicable give a copy of the notice to the Minister responsible for ASIO or the Minister responsible for ASIS, as the case requires.*
- (7) *The Commonwealth must pay a person who has been given a notice requiring the person to appear before the Committee such allowances for the person's travelling and other expenses as are prescribed.*

3.50 The EM states that schedule 1, clause 2 'is substantially equivalent to section 92H of the ASIO Act and sets out the administrative procedure to be followed by the Committee in exercising its power to obtain information and documents from individuals, other than the Director-General of Security, the Director-General of ASIS, a staff member of ASIO or ASIS, the IGIS or a member of staff of the IGIS.' In particular, the EM states that 'unlike section 92H of the ASIO Act, the period within which either documents must be produced to the Committee, or a person appear before it, has been set at 14 days.'

***Schedule 1, clause 3 Provision of information to Committee by ASIO and ASIS***

- (1) *The Chair or another member authorised by the Committee may give a written notice to the Director-General of Security or the Director-General of ASIS requiring him or her to appear before the Committee to give evidence or to produce documents to the Committee.*
- (2) *The notice must specify the day on which, and the time and place at which, the Director-General is required to appear or to produce documents. The day must not*

*be less than 14 days after the day on which the notice is given to the Director-General.*

- (3) *The notice must also specify the nature of the evidence or documents to be provided to the Committee, and in the case of documents, the form in which they are to be provided.*
- (4) *A requirement under this clause may only be made of the Director-General if the Committee has reasonable grounds for believing that the Director-General is capable of giving evidence or producing documents relevant to a matter that has been referred to the Committee.*
- (5) *The evidence is to be given by:*
  - (a) *if the Director-General nominates a staff member to give the evidence—the staff member or both the staff member and the Director-General; or*
  - (b) *in any other case—the Director-General.*
- (6) *If a member gives a notice to the Director-General, the member must as soon as practicable give a copy of the notice to the responsible Minister.*

3.51 Again, the EM states that schedule 1, clause 3 ‘is substantially equivalent to section 92J of the ASIO Act and sets out the administrative procedure to be followed by the Committee in obtaining information or documents from the Director-General of Security or the Director-General of ASIS. In particular, the EM states that ‘unlike 92J of the ASIO Act, the period within which either documents must be produced to the Committee, or a person appear before it, has been set at 14 days.

***schedule 1, subclause 7 Restrictions on disclosure to Parliament***

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

***Schedule 1, clause 18 Quorum***

- (1) *At a meeting of the Committee, a quorum is constituted if:*
  - (a) *at least 4 members are present; and*
  - (b) *subject to subclause (2), a majority of the members present are Government members.*
- (2) *There may be an equal number of Government members and non-Government members if the presiding member is a Government member.*

***Schedule 1, clause 21 Staff of the Committee must be cleared for security purposes***

*Each member of the staff of the Committee must be cleared for security purposes to the same level and at the same frequency as staff members of ASIS.*

**Schedule 1, clause 22 Protection of information and documents**

- (1) *The Committee must make arrangements acceptable to the Director-General of Security and the Director-General of ASIS for the security of any information held and any records made by the Committee.*
- (2) *The Committee must ensure that any documents having a national security classification provided to the Committee are returned as soon as possible after the members have examined them.*

## Conclusions

- 3.52 Neither the EM, nor evidence presented during the inquiry makes a case for more restrictive operational procedures to apply to the PJCAA than currently apply to the ASIO Committee. They send the wrong message to the community about the intent of the legislation.
- 3.53 Schedule 1, subclause 6(3), if read literally, could create significant administrative restrictions on the PJCAA when it is conducting inquiries. For example, under 6(3) the Committee would need to seek advice from the Minister about the contents of every submission received and the background of every witness called before the Committee before it could publish the evidence. We do not believe that this is the intent of 6(3). For example, it is acceptable that the PJCAA seek advice from the Minister where the signatory of a submission has identified themselves or identifies others as, or having been, officers of the agencies. Therefore, 6(3) should be amended to ensure that the Ministers' advice is needed only in those cases where there is an explicit or implicit concern as determined by the PJCAA.

### Recommendation 14

- 3.54 **Schedule 1, subclause 6(3) of the Intelligence Services Bill 2001 be amended to read:**
- **The Committee ~~must~~ may, after examining its evidence, obtain the advice of the responsible Minister as to whether the disclosure or publication would or might disclose:**

- 3.55 In relation to the changes in procedural powers outlined under paragraph 3.40, we reject schedule 1, subclauses 2(2) and 3(2). Both these clauses specify that the PJCAA must give 14 days notice to a person, including the Director-General of ASIO and ASIS, who is called to appear before the PJCAA. These provisions in the IS Bill partly reflect subsections 92H(1) and 92J(3) in the ASIO Act. However, in those cases a person cannot be called before the committee earlier than 5 days after a notice is given.
- 3.56 In normal operating circumstances, it is expected that the proposed PJCAA would give sufficient notice to witnesses when they are called to appear before it as part of an inquiry. However, this may not always be possible. An event may occur where the PJCAA requires an urgent briefing by either the Director-General of ASIO or ASIS. Under schedule 1, subclauses 2(2) and 3(2) the PJCAA would have to wait 14 days for that briefing. This is unacceptable. We do not believe that a time frame of 14 days should apply.

### **Recommendation 15**

- 3.57 **Schedule 1, subclauses 2(2) and 3(2) of the Intelligence Services Bill 2001 be amended to ensure that a notice to appear must not be less than 5 days after the day on which the notice is give to the person.**
- 3.58 Schedule 1, subclause 2(6) requires a member who gives notice to a person to appear before the PJCAA to 'as soon as possible give a copy of the notice to the Minister responsible for ASIO or the Minister responsible for ASIS'. Subclause 3(6) is similar and requires a member who gives notice to the Director-General to appear before the PJCAA, to as soon as practicable after the event give a copy of the request to the responsible Minister. These provisions reflect subsections 92H(2) and 92J(4) in the ASIO Act.
- 3.59 We believe that schedule 1, subclauses 2(6) and 3(6) are unnecessary. In relation to subclause 2(6), the PJCAA should not be required to report to the Executive on who it is calling before it to give evidence. In relation to subclause 3(6), we consider that its is a matter for the relevant Director-General to advise their Minister, not the PJCAA.

### **Recommendation 16**

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

- 3.61 Schedule 1, clause 21 of the IS Bill, relating to the need for clearances for Committee staff, is new and does not currently exist in the ASIO Act. This issue, however, has been debated within Parliamentary departments. In the past, Parliamentary convention has rejected the need for Committee staff to be cleared. This argument draws on the separation of powers principle and suggests that it is inappropriate for Parliamentary staff to be subject to executive government clearance requirements. In addition, it is argued that Parliamentary staff are subject to Parliamentary privilege. In this case a Parliamentary officer would be in contempt of the Parliament if they released information that has not been reported to the Parliament.
- 3.62 While these arguments are sound, it is impractical to reject the need for security clearances for Committee staff. The agencies that come under the review have a legitimate concern about the need for security, and the future PJCAA has a responsibility for building confidence and trust in the review process. If staff of the Committee are security cleared then this will add to the overall effectiveness of the Committee's operations. Clause 21 is a reasonable and common sense approach which this Committee supports.