

Chapter 1

Introduction

Referral

1.1 On 14 August 2018, the Intelligence Services Amendment (Enhanced Parliamentary Oversight of Intelligence Agencies) Bill 2018 (the bill) was introduced into the Senate by Senator Rex Patrick.¹

1.2 On 23 August 2018, pursuant to the Senate Selection of Bills Report, the bill was referred to the Senate Finance and Public Administration Legislation Committee for inquiry and report by 12 November 2018.²

Purpose of the bill

1.3 This private member's bill seeks to 'amend the *Intelligence Services Act 2001* (the Intelligence Security Act) to extend parliamentary scrutiny over the activities of Australia's national security and intelligence agencies, including scrutiny and reviews of intelligence operations'.³

1.4 The bill proposes to amend the powers of the Parliamentary Joint Committee on Intelligence and Security (PJCIS) which is specifically precluded from reviewing operational matters such as intelligence gathering and assessment of priorities of intelligence and security agencies, sources of information and operational methods.⁴

Conduct of the inquiry

1.5 Details of the inquiry, including links to the bill and associated documents were placed on the committee website at: www.aph.gov.au/senate_fpa.

1.6 The committee directly contacted a number of relevant organisations and individuals to notify them of the inquiry and invite submissions by 30 September 2018. Submissions received by the committee are listed at Appendix 1.

1.7 The committee held a public hearing in Canberra on 26 October 2018. A list of witnesses who gave evidence at the public hearing is available at Appendix 2. The Hansard transcript may be accessed through the committee's website.

1.8 The committee thanks those who made submissions and appeared at the hearing.

1 *Journals of the Senate*, No 107–14 August 2018, p. 3445.

2 *Journals of the Senate*, No 113–23 August 2018, pp. 3606–3608.

3 Intelligence Services Amendment (Enhanced Parliamentary Oversight of Intelligence Agencies) Bill 2018, Explanatory Memorandum (EM), p. 1.

4 Parliament of Australia, Parliamentary Library, Research Paper Series 2017–1, *Oversight of intelligence agencies: a comparison of the 'Five Eyes' nations*, 15 December 2017, pp. 11–12.

Provisions of the bill

1.9 The PJCIS was established by section 28 of the *Intelligence Services Act 2001* (the Act). Section 29 of the Act sets out the functions of the PJCIS. Those functions include to review the administration and expenditure, including the annual financial statements, of the following agencies:

- the Australian Security Intelligence Organisation (ASIO);
- the Australian Secret Intelligence Service (ASIS);
- the Australian Geospatial-Intelligence Organisation (AGO);
- the Defence Intelligence Organisation (DIO);
- the Australian Signals Directorate (ASD); and
- the Office of National Assessments (ONA).⁵

1.10 The bill proposes to amend section 29 of the Act to allow the PJCIS to review the 'activities' of Australia's national intelligence and security agencies, in addition to its current power to review the 'administration and expenditure' of those agencies. The Explanatory Memorandum (EM) details the types of additional activities that the PJCIS would be able to review pursuant to this amendment:

Activities subject to potential PJCIS review would cover operational matters relating to the collection of intelligence as well as the assessment of intelligence and the broader questions of control of intelligence and security agencies including cooperation or relations with foreign intelligence and security agencies.⁶

1.11 Subsection 29(3) of the Act excludes from the functions of the PJCIS the review of operations of intelligence agencies. The bill proposes that the current subsection 29(3) be repealed and replaced with a new provision. Proposed new subsection 29(3) would remove most of the current restrictions on the scope of reviews and inquiries by the PJCIS, but would retain the following exclusions on the PJCIS:

- reviewing information provided by, or by an agency of, a foreign government where that government does not consent to the disclosure of the information to the PJCIS;⁷ and
- conducting inquiries into individual complaints about intelligence and security agency activities.⁸

5 Paragraph 29(1)(a) of the *Intelligence Services Act 2001*.

6 Explanatory Memorandum (EM), Notes on Clauses, p. 1. However, the bill does not include a definition of 'activities'.

7 Proposed paragraph 29(3)(a) of the bill.

8 Proposed paragraph 29(3)(b) of the bill.

1.12 In relation to excluding the PJCIS from reviewing information provided by foreign governments, where that government does not consent to the disclosure of the information, the EM states:

This exclusion is necessary in view of the sensitive nature of Australia's intelligence cooperation agreements with foreign countries which govern the sharing of intelligence information, in particular agreements between Australia and the United States, United Kingdom, Canada and New Zealand (the so-called "Five Eyes" countries), as well agreements with other countries.⁹

1.13 The EM notes that inquiries into individual complaints are more appropriately dealt with by the Inspector-General of Intelligence and Security (IGIS).¹⁰

Ceasing or suspending review of agency activities

1.14 The bill proposes a new section 29A, which establishes a mechanism allowing a relevant Minister to intervene to cause a PJCIS inquiry to be suspended or ceased.

1.15 Where the relevant Minister is of the opinion that a review by the PJCIS is of an ongoing operation and the review would interfere with the proper performance by the relevant body of its functions or otherwise prejudice Australia's national security or the conduct of Australia's foreign relations, the Minister may issue the PJCIS with a certificate in relation to the matter. The certificate states the Minister's opinion and the underlying reasons.¹¹

1.16 On receiving a certificate from the relevant Minister, the PJCIS must cease or suspend the review in question.¹²

1.17 The decision of a Minister to issue a certificate may not be questioned in any court or tribunal.¹³

Review by the Inspector-General of Intelligence and Security

1.18 The bill would also put in place provision for the PJCIS to refer the Minister's certificate to the IGIS.¹⁴ The IGIS has 30 days to review the certificate and consider whether the activity is:

- an ongoing operation; and
- whether it is reasonable to conclude that a review by the PJCIS would interfere with the proper performance by the relevant body of its functions or

9 EM, p. 5.

10 EM, p. 5.

11 Proposed subsection 29A(1) of the bill.

12 Proposed subsection 29A(4) of the bill.

13 Proposed subsection 29A(3) of the bill.

14 Proposed subsection 29A(6) of the bill.

otherwise prejudice Australia's national security or the conduct of Australia's foreign relations.¹⁵

1.19 The IGIS must then provide the PJCIS with written advice.¹⁶ If the IGIS provides advice that the activity is not an ongoing operation or that the review would not cause interference with the proper functioning of the relevant body or otherwise prejudice Australia's national security or the conduct of Australia's foreign relations, then the PJCIS may continue with the review of the activity or start another review of the activity.¹⁷

Background to the bill

1.20 The EM to the bill sets the context for the bill, noting the size and budgets of Australia's security and intelligence agencies:

Australia's ten national security and intelligence agencies employ more than 7,000 people and spend well over \$2 billion each year while they accumulate massive amounts of data at home and abroad. While Australia's intelligence community has grown rapidly over the past two decades, the mechanisms of accountability and review overseeing those agencies have received much less attention, resources and authority.¹⁸

1.21 The EM argues:

...the PJCIS can't...hold security and intelligence agencies properly accountable for their activities if the Parliament continues to ban its own committee from reviewing their operations and other activities. Nor can expenditure and administration be adequately examined without consideration of operational performance.¹⁹

1.22 The EM draws comparisons with other jurisdictions contending:

The complete exclusion of intelligence operations from parliamentary committee scrutiny is not an approach followed by some of Australia's closest intelligence partners.²⁰

1.23 The bill adapts the model of the Canadian parliamentary oversight legislation:

...to extend the functions of the PJCIS to examine and review intelligence agency operations and other activities including intelligence policy and coordination, subject to the opinion of relevant Ministers concerning potential impacts on ongoing operations, national security and foreign relations.²¹

15 Proposed paragraph 29A(7)(a) of the bill.

16 Proposed paragraph 29A(7)(b).

17 Proposed subsection 29A(8).

18 Explanatory Memorandum (EM), p. 1.

19 EM, p. 1.

20 EM, p. 2.

21 EM, p. 2.

1.24 The EM states:

Overall, the Bill provides a framework for the proper exercise of parliamentary scrutiny while enabling the government to act to protect the security of particularly sensitive ongoing intelligence operations...

This Bill provides a sensible and secure framework within which to extend parliamentary scrutiny to the operations of Australia's national security and intelligence agencies.²²

Scrutiny of Bills Committee

1.25 The bill was reviewed by the Senate Standing Committee on the Scrutiny of Bills (Scrutiny of Bills Committee).²³ The Scrutiny of Bills Committee reported that the intention of proposed subsection 29A(3) of the bill would be to exclude judicial review in relation to a minister's decision to issue a certificate, and as such, proposed subsection 29A(3) appears to be inconsistent with section 75(v) of the Constitution.²⁴

1.26 The Scrutiny of Bills Committee recommended that in the event that the bill progresses further through the Parliament, further information on the proposed exclusion of judicial review would be sought from the proponent of the legislation.²⁵

Reviews of the intelligence framework

1.27 In November 2016, the then Prime Minister announced that Mr Michael L'Estrange AO and Mr Stephen Merchant PSM would undertake an independent intelligence review (IIR) of the Australian Intelligence Community (AIC). The AIC currently comprises ASIO, ASIS, ONA, DIO, ASD and AGO.²⁶ The broader National Intelligence Community (NIC) includes parts of the Australian Federal Police, the Department of Home Affairs (formerly the Department of Immigration and Border Protection) which perform intelligence related functions, Australian Criminal Intelligence Commission and the Australian Transactions Reports and Analysis Centre.²⁷

1.28 An unclassified version of the IIR was released in July 2017. As part of that review the oversight role of the PJCIS and the IGIS were considered.

22 EM, p. 3.

23 Senate Standing Orders, Standing Order 24(1)(a)(iii): 'whether the bill by express words or otherwise (iii) make rights, liberties or obligations unduly dependent upon non-reviewable decisions'.

24 Section 75(v) of the Constitution confers jurisdiction on the High Court for judicial review of decisions made by officers of the Commonwealth.

25 Senate Standing Committee on the Scrutiny of Bills, *Bills Digest 9/19, Chapter 1*, p. 1–2.

26 Department of the Prime Minister and Cabinet, *2017 Independent Intelligence Review*, p. 34, note 3, available at: <https://www.pmc.gov.au/national-security/2017-independent-intelligence-review> (accessed 9 October 2018).

27 Department of the Prime Minister and Cabinet, *2017 Independent Intelligence Review*, p. 115, note 3, available at: <https://www.pmc.gov.au/national-security/2017-independent-intelligence-review> (accessed 9 October 2018).

The IIR recommended that the oversight role of the PJCIS and the IGIS be expanded to apply to all ten agencies within the NIC, but the IIR did not recommend any change in the scope of the role of the PJCIS.²⁸

1.29 The IIR also recommended a separate comprehensive review of legislative architecture governing the AIC:

A comprehensive review of the Acts governing Australia's intelligence community be undertaken to ensure agencies operate under a legislative framework that is clear, coherent and contains consistent protections for Australians.²⁹

1.30 On 30 May 2018, the Attorney-General announced that the government had commissioned a comprehensive review of the legal framework governing the NIC. Mr Dennis Richardson AO, former Secretary of Defence and diplomat, has been appointed to undertake the review. Submissions are due to close on 1 December 2018. The review will prepare a classified report for the government by the end of 2019.³⁰

28 Department of the Prime Minister and Cabinet, *2017 Independent Intelligence Review*, p. 22, available at: <https://www.pmc.gov.au/national-security/2017-independent-intelligence-review> (accessed 9 October 2018).

29 Department of the Prime Minister and Cabinet, *2017 Independent Intelligence Review*, p. 19, available at: <https://www.pmc.gov.au/national-security/2017-independent-intelligence-review> (accessed 9 October 2018).

30 Attorney-General's Department, *Comprehensive review of the legal framework governing the National Intelligence Community*, available at: <https://www.ag.gov.au/NationalSecurity/Pages/Comprehensive-review-of-the-legal-framework-governing-the-national-intelligence-community.aspx> (accessed 1 November 2018).