

Chapter 2

Key issues and committee view

Introduction

2.1 Two key issues were raised in written submissions. The Inspector General of Intelligence and Security (IGIS) expressed concern that by imposing a mandatory obligation on the IGIS to review a decision of the executive, the proposed bill jeopardised the independence of the IGIS.¹

2.2 The Department of the Prime Minister and Cabinet (PM&C) and the Department of Foreign Affairs and Trade (DFAT) each made the point that the government is currently considering its response to the 2017 Independent Intelligence Review (IIR), and until that process had been completed it was premature for the executive to comment on the bill.²

2.3 A further key issue raised during the committee hearing was the issue of the scrutiny of executive policy decisions in light of the current legislative prohibition on the PJCIS to review intelligence and security operations. The discussion also canvassed the unique role of the IGIS in the oversight of intelligence and security agencies.

The role of the Inspector-General of Intelligence and Security

2.4 The Hon. Margaret Stone, IGIS advised that her position is an independent statutory office established under the *Inspector-General of Intelligence and Security Act 1986* and located within the Attorney-General's portfolio. The IGIS is tasked to review the activities of intelligence and security agencies, and provide advice to the government. The IGIS advised that, as a statutory officer, the IGIS is not subject to any direction from any Minister on how she should carry out her responsibilities.³

2.5 The IGIS contended that the mandatory review function proposed by the bill would effectively confer an arbitral function on the IGIS to determine whether a Parliamentary committee may exercise its inquiry function in circumstances where the government opposes the conduct of the inquiry through the issuing of a Ministerial certificate.⁴

2.6 At the hearing, the IGIS, the Hon. Margaret Stone, explained that under the Constitution there are three arms of government—the parliament, the judiciary and the executive. Whereas the judiciary derived its independence from the Constitution,

1 *Submission 1*, p. 2.

2 Ms Kylie Bryant, First Assistant Secretary, National Security Division, Department of the Prime Minister and Cabinet, *Committee Hansard*, 26 October 2018, p. 7; Department of Foreign Affairs and Trade, *Submission 3*, p. 2.

3 *Submission 1*, p. 4.

4 *Submission 1*, p. 2.

Ms Stone advised that her office is a part of the executive.⁵ As such, Ms Stone emphasised that for her office to be the arbiter between the executive and the parliament would place her office in 'an invidious position', as the most important aspect of her office is its independence:

...The actual independence is very important there, but even more so, I think, is the perception of independence. If we were to arbitrate between a minister and a parliamentary committee it would be, 'Heads I win, tails I lose,' that we would be seen to be partisan. What we do would inevitably be able to be described as partisan and that would be the death knell for our independence.⁶

2.7 Ms Stone observed that capacity for her office to carry out its role derives from its independence:

We have to target what we do very carefully. We create a culture of compliance. One of the ways we get the intelligence agencies to trust us—so they can tell us about breaches, get anticipatory briefings with us and tell us what they're planning to do—is because they recognise our independence.⁷

2.8 The committee sought to address what may be perceived as an absence of an avenue of scrutiny of a government's policy decision on operational matters for which the PJCIS does not have a statutory right of review. Two alternative approaches were suggested to the IGIS. The first was that, rather than being the arbiter between the executive and the parliament, the IGIS could provide advice only on questions of fact, for example, whether there was a security operation on foot. The second was that the IGIS become an independent statutory officer akin to the Auditor-General.⁸

2.9 The IGIS, Ms Stone, agreed that for the IGIS to provide advice only would be very different to being an arbiter, however Ms Stone stated that both the suggested approach would change the whole status of her office. With respect to the provision on advice on specific questions of fact, Ms Stone said that for the advice to have any credibility, it would have to include information that would be difficult to disclose:

One of the problems is that as soon as you start going into that area you get into information that may well by itself compromise national security, or whatever—not all the intelligence agencies' operations are security based, but most of them are. But you would get into an area such that by merely confirming that an operation is in existence you'd give credence to one of the factors you were trying to decide.⁹

5 *Committee Hansard*, 26 October 2018, p. 1. *The Constitution*, s. 71: 'The judicial power of the Commonwealth shall be vested in a Federal Supreme Court, to be called the High Court of Australia...'

6 *Committee Hansard*, 26 October 2018, pp. 1–2.

7 *Committee Hansard*, 26 October 2018, p. 1.

8 *Committee Hansard*, 26 October 2018, p. 2.

9 *Committee Hansard*, 26 October 2018, p. 3.

2.10 As to the related suggestion that the role of the IGIS could be revamped to be more akin to that of the Auditor-General, Ms Stone stated that this was a matter for government policy, but noted:

...And I guess my view on that would really depend on what the provisions of a proposed bill were and the extent to which I think they might compromise the activities of my office—mainly its independence but also its own operational effectiveness.¹⁰

2.11 Ms Stone drew the committee's attention to other scrutiny mechanisms open to the PJCIS. She advised that her office regularly offered to brief the PJCIS. Ms Stone also noted that there is nothing in the IGIS empowering legislation that would prohibit the PJCIS from requesting, but not directing, the IGIS to undertake an inquiry. Ms Stone stressed that only the Prime Minister can 'direct' the IGIS to undertake an inquiry, but the Prime Minister cannot impinge on her office's independence:

Only the Prime Minister can direct my office to do an inquiry. That's been in the legislation for some time, and I have no difficulty with that. I think it's been exercised only three times. And 'request'—even when the Prime Minister directs, he or she is not entitled to say how we go about it, what priority we give it, what resources.¹¹

2.12 Ms Stone confirmed to the committee that the IIR had formally recommended that:

- The IGIS be required to brief the PJCIS at regular intervals on investigations; and,
- The Intelligence and Security Act be amended to enable the PJCIS to request the IGIS to conduct an inquiry and provide a report to the PJCIS, the Prime Minister and responsible Minister.¹²

Parliamentary oversight of security and intelligence operations

2.13 PM&C's submission to the inquiry focussed on the perspectives provided by the IIR on intelligence and security oversight. PM&C noted that the IIR had given considerable consideration to whether the role of the PJCIS should be expanded to directly oversee intelligence operations, but had ultimately declined to recommend this.¹³

2.14 At the hearing officials of PM&C advised the committee that their consideration of the bill was in the context of working within government policy. Ms Caroline Millar, Deputy Secretary, National Security and International Policy, PM&C commented:

10 *Committee Hansard*, 26 October 2018, p. 3.

11 *Committee Hansard*, 26 October 2018, p. 3.

12 *Committee Hansard*, 26 October 2018, p. 5.

13 *Submission 5*, p. 2.

...the government is still considering the integrity and oversight recommendations of the *Independent Intelligence Review*. While those issues are still before government, we're really not in a position to comment [on the bill].¹⁴

2.15 Ms Kylie Bryant, First Assistant Secretary, National Security Division, PM&C observed that the PJCIS currently has an extensive role in the oversight of intelligence and security agencies which operates within the overall institutional and legislative intelligence and security oversight framework.¹⁵

2.16 Mr Robert McKinnon, Assistant Secretary, National Security Strategy, Cyber and Intelligence Branch, DFAT, advised the committee that accountability for intelligence and security policy rests with the responsible Minister—and that ultimately the issue of the appropriateness of a policy is a matter for the executive and its broad accountability to parliament. Mr McKinnon advised:

There's no specific individual or function that would play into providing some sort of independent oversight of that particular relationship.¹⁶

2.17 However, Mr McKinnon placed the role of Ministerial responsibility for intelligence and security policy into its broader context:

That process [of ministerial responsibility] is also dealt with, in a broad policy sense, through the architecture that's built up around government national security decision-making—the National Security Committee of Cabinet, in particular, and its supporting instruments, the Secretaries Committee on National Security. Those processes are very well established to deal with overall policy determinations about the risks associated with various intelligence activities but not in a way that, in a sense, cuts across the traditional Westminster types of responsibilities and accountabilities that are vested in ministers.¹⁷

2.18 Mr McKinnon explained that the structure of Australia's intelligence and security arrangements is unique, being based on a legal structure authorisation:

So the legality of the types of activities that are undertaken by intelligence agencies, which are naturally difficult to accommodate in a democracy, are only lawful if they are authorised either by the legislation or by the minister acting under that legislation. To have an arrangement to ensure the compliance and propriety of that process, we've obviously got the IGIS function which, for all intents and purposes, is a standing royal commission. That's an incredibly powerful institution, in a sense, acting on behalf of the parliament and the public in terms of providing that very intrusive oversight of these processes to ensure compliance. So that in itself, I think, is the heart of the system. The challenge, of course, has always been what role parliament should play through the PJCIS...in this process. Clearly that's

14 *Committee Hansard*, 26 October 2018, p. 7.

15 *Committee Hansard*, 26 October 2018, p. 7.

16 *Committee Hansard*, 26 October 2018, p. 8, 9.

17 *Committee Hansard*, 26 October 2018, p. 8.

the issue that this bill addresses, but it's also the issue that each intelligence review since the establishment of our current architecture has addressed and seen some evolution in.¹⁸

Committee view

2.19 The committee noted that the IGIS has formidable powers equivalent to a standing royal commission to ensure the lawful conduct of intelligence and security agencies. The committee further noted the accountability of the executive to the Parliament through the institutions of ministerial responsibility and the separation of powers in the Westminster tradition.

2.20 Finally the committee notes the ongoing consideration by the executive of the 2017 Independent Intelligence Review, and the related comprehensive review of all legislation governing Australia's intelligence and security architecture. The committee considers these processes should be allowed to be completed, and on that basis considers the proposed bill to be premature, and should not be passed.

Recommendation 1

2.21 The committee recommends that the Senate does not pass the bill.

A handwritten signature in black ink, appearing to read 'James Paterson', with a long horizontal flourish extending to the right.

Senator James Paterson
Chair

18 *Committee Hansard*, 26 October 2018, p. 8.

