
The Parliament of the Commonwealth of Australia

Annual Report of Committee Activities 2005-2006

Parliamentary Joint Committee on Intelligence and Security

September 2006
Canberra

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Contents

Membership of the Committee	v
Terms of reference	vi
1 The Parliamentary Joint Committee on Intelligence and Security.....	1
Size and structure	1
Functions	2
Procedures and powers	3
Changes to the Intelligence Services Act	5
2 Reports and Activities 2005-2006	7
Reports	7
<i>Criminal Code Act 1995</i> – The proscription of terrorist organisations	7
Review of the listing of Tanzim Qa’idat al-Jihad al-Rafidayn (the al-Zarqawi Network).....	8
Review of the listing of seven terrorist organisations.....	9
Review of the listing of four terrorist organisations	9
Review of the listing of the Kurdistan Workers’ Party (PKK).....	10
Review of the Intelligence Services Legislation Amendment Bill 2005.....	12
ASIO’s Questioning and Detention Powers.....	14
Notifications under s6A of the <i>Intelligence Services Act 2001</i>	16
Inspections and briefings.....	17

Visit to Intelligence Services Facilities.....	17
Private Briefings.....	17
Conferences.....	18
3 Issues of Procedure and Practice	19
Secrecy provisions and the ASIO Act.....	19
Handling and retention of documents.....	21
The taking of evidence and report clearance	23
Support for the Committee.....	26
A Appendix A: Committee meetings and hearings for the year ending 30 June 2006	27
B Appendix B: Committee reports and inquiries.....	29
Reports tabled:.....	29
Current inquiries:	30



Membership of the Committee

Chair The Hon David Jull MP

Deputy Chair Mr Anthony Byrne MP

Members Mr Stewart McArthur

The Hon Duncan Kerr SC, MP

Mr Steven Ciobo MP
(from 8 December 2005)

Senator Alan Ferguson

Senator the Hon Robert Ray

Senator the Hon John Faulkner
(from 9 December 2005)

Senator Fiona Nash
(from 9 May 2006)

Senator the Hon Sandy Macdonald
(until 6 July 2005)

Senator Julian McGauran
(from 8 September 2005 to
28 March 2006)

Committee Secretariat

Secretary Ms Margaret Swieringa

Inquiry Secretary Ms Jane Hearn

Research Officer Dr Cathryn Ollif

Executive Assistant Mrs Donna Quintus-Bosz



Terms of reference

This report is made under the Part 4 section 31 of the *Intelligence Services Act 2001*:

As soon as practicable after each year ending on 30 June, the Committee must give to the Parliament a report on the activities of the Committee during the year.

The Parliamentary Joint Committee on Intelligence and Security

- 1.1 The Committee was established under the *Intelligence Services Act 2001*. The Act governs its size, structure, functions, procedures and powers. In its last Annual Report, the Committee noted that the functions of the Committee had expanded considerably. It has become regular practice to refer new anti-terrorist legislation to the Committee for review at set intervals. This expanded role has ensured a high level of activity for the Committee over the year. In addition, in line with the recommendations of the Flood inquiry and the Committee's own suggestions for changes, made as a result of the experience of its first Parliament in operation, the Intelligence Services Act was amended in 2005 to expand the Committee's size and structure. The name of the Committee changed from the Joint Parliamentary Committee on ASIO, ASIS and DSD to the Joint Parliamentary Committee on Intelligence and Security.

Size and structure

- 1.2 The changes in structure came into effect on 8 December 2005 with the appointment of two additional members. The Committee is a joint committee of the Parliament comprised of nine members, five government members and four opposition members. Of the five government members, three are from the House of Representatives and two are from the Senate. The Opposition members are comprised of two members of the House and two Senators.

- 1.3 Members are appointed by resolution of the House or the Senate on the nomination of the Prime Minister or the leader of the Government in the Senate. Prior to nomination, consultation must take place with the leaders of recognised parties in each of the Houses.

Functions

- 1.4 Under an amended section 29 of the Intelligence Services Act, the Committee is now charged with reviewing the administration and expenditure of all six intelligence agencies: ASIO, ASIS, DSD, DIGO, DIO and ONA. Other matters may be referred by the responsible Minister or by a resolution of either House of the Parliament. In addition to this function initially within the Act, the Committee is required to review the operation, effectiveness and implications of:
- the amendments made by the *Security Legislation Amendment (Terrorism) Act 2002* and the following acts:
 - ⇒ the *Border Security Legislation Amendment Act 2002*;
 - ⇒ the *Criminal Code Amendment (Suppression of Terrorist Bombings) Act 2002*; and
 - ⇒ the *Suppression of the Financing of Terrorism Act 2002*;
 - Division 3 of Part III of the *Australian Security Intelligence Organisation Act 1979*; and
 - the amendments made by the *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003*, except item 24 of Schedule 1 to that Act (which included Division 3 of Part III in the *Australian Security Intelligence Organisation Act 1979*).
- 1.5 Amendments to the *Criminal Code Act 1995*, made in March 2004, further tasked the Committee with reviewing regulations which specify organisations as terrorist organisations for the purposes of section 102.1 of the Criminal Code. The Committee's findings on its reviews of these regulations are to be tabled before the end of the disallowance period, 15 sitting days from the tabling of the regulation.

Procedures and powers

- 1.6 The Committee is a statutory committee. Unlike other statutory or standing committees of the Parliament, the Parliamentary Joint Committee on Intelligence and Security has very specific limitations placed on its operations, dictated by the nature of the agencies it scrutinises and the subject matters with which it deals. Balancing national security and parliamentary scrutiny remains a constant challenge for the Committee.
- 1.7 Limitations are broadly directed at Committee scrutiny of operational matters. Operational matters are monitored by the Inspector-General of Intelligence and Security, who operates under his own Act of Parliament. Specific prohibitions on the Committee's activities include the following:
- reviewing the intelligence gathering priorities of the agencies;
 - reviewing sources of information, other operational assistance or operational methods available to the agencies;
 - reviewing particular operations, past, present or proposed;
 - reviewing information provided by a foreign government or its agencies, without the consent of that government to the disclosure;
 - reviewing an aspect of the activities of the agencies that does not affect an Australian person;
 - reviewing rules within the Act relating to the privacy of Australian citizens; or
 - conducting inquiries into individual complaints in relation to the activities of the agencies.¹
- 1.8 For statutory committees of the Parliament, where its governing act is silent, a committee's powers and privileges are those of all committees of the Parliament. These powers include the power to require the attendance of witnesses and the production of documents. The Intelligence Services Act specifies that the Committee may give a person written notice requiring the person to appear before the Committee with at least 5 days notice, as well as notice of any documents required by the Committee.² However, the Minister may

1 *Intelligence Services Act 2001*, subsection 29(3)

2 *Intelligence Services Act 2001*, clause 2 of Schedule 1

prevent the appearance of a person (not an agency head) before the Committee or, in order that operationally sensitive information will not be disclosed, prevent the provision of documents to the Committee. To achieve this, the Minister must provide a certificate outlining his opinion to the presiding member of the Committee, to the Speaker of the House of Representatives, the President of the Senate and the person required to give evidence or produce documents.³

1.9 The Intelligence Services Act sets out that the Committee must not require a person or body to disclose to the Committee operationally sensitive information.⁴ There is also a protection against the disclosure in Committee reports of operationally sensitive information. Under subclause 7(1) of Schedule 1, the Committee must not disclose in a report to a House of the Parliament specified information, namely:

- the identity of a person who is or has been a staff member of ASIO, ASIS or DSD; or
- any information from which the identity of such a person could reasonably be inferred; or
- operationally sensitive information that would or might prejudice:
 - ⇒ Australia's national security or the conduct of Australia's foreign relations; or
 - ⇒ the performance by an agency of its functions.⁵

1.10 Unlike the reports of other parliamentary committees, which are privileged documents which may not be disclosed to anyone outside the committee itself until after tabling, the Intelligence and Security Committee must obtain the advice of the responsible Minister or Ministers as to whether any part of a report of the Committee discloses a matter referred to in subclause 7(1) of Schedule 1. A report may not be tabled until this advice is received.

1.11 Finally, to protect the national security status of the Committee's work and to maximise the Committee's access to information, the Intelligence Services Act requires that staff of the Committee must be

3 *Intelligence Services Act 2001*, clause 4 of Schedule 1

4 *Intelligence Services Act 2001*, clause 1 of Schedule 1.

5 *Intelligence Services Act 2001*, subclause 7(1) of Schedule 1.

cleared for security purposes to the same level and at the same frequency as staff members of ASIS.⁶

Changes to the Intelligence Services Act

- 1.12 As a result of the Flood review of the Australian Intelligence Agencies, released in July 2004, changes to the Intelligence Services Act were foreshadowed. In the last year, a number of amendments were made. Apart from the structural changes noted above, the amendments expanded the functions of the Committee to include oversight of the analytical intelligence agencies, the Office of National Assessment (ONA) and the Defence Intelligence Organisation (DIO) and included the Defence Imagery and Geospatial Organisation (DIGO). In 2006, the Committee conducted its first review of administration and expenditure of ONA, DIO and DIGO in conjunction with the three original agencies, ASIO, ASIS and DSD. On-going legislative review and the continuing review of terrorist listings have meant a high tempo of work in the last year.
- 1.13 The broader scope of the Committee's mandate, including wide ranging legislative review, the review of the listing of terrorist organisations and the review of the administration and expenditure of all six intelligence agencies, necessitated not only the enlargement of the Committee but also the power to form sub-committees to deal with the volume of work. The Committee has not yet availed itself of this power.
- 1.14 This year also saw the appointment of the Committee's first Deputy Chair, Mr Anthony Byrne, MP.

6 *Intelligence Services Act 2001*, clause 21 of Schedule 1.

Reports and Activities 2005-2006

Reports

- 2.1 Since the last annual report on the Committee's activities, tabled in May 2005, the Committee has tabled 6 reports: four reviews of terrorist listings under the Criminal Code and two reviews of legislation. Currently, under the requirement of section 29 (1)(a) of the Intelligence Services Act, the Committee is reviewing the administration and expenditure of all six intelligence agencies, with particular reference to recruitment and training. In addition, in order to inform new members of the Committee of the scope and nature of the work of the agencies, the Committee has conducted inspections of various intelligence agency facilities.

Criminal Code Act 1995 – The proscription of terrorist organisations

- 2.2 Four reports were tabled in the reporting period under the requirements of section 102.1A of the *Criminal Code 1995*. This review process has come to constitute a considerable part of the Committee's work load.

Review of the listing of Tanzim Qa'idat al-Jihad al-Rafidayn (the al-Zarqawi Network)

- 2.3 This report was tabled on 25 May 2005.¹ It was the third review of listings of terrorist organisations which the Committee had undertaken. This organisation had not been listed previously. The Governor-General made a regulation listing the al-Zarqawi Network on 24 February 2005. The Committee received notification of the proposed listing on 9 February, advertised an inquiry on 4 March 2005 in *The Australian* and on its web site and conducted a private hearing in Canberra on 2 May 2005. The Attorney-General's Department, the Department of Foreign Affairs and ASIO gave evidence at this hearing. Submissions were received from the Attorney-General's Department, the Department of Foreign Affairs and from a private citizen, Mr Patrick Emerton.
- 2.4 In its report, the Committee raised some concerns about the quality and timeliness of the prelisting consultation that had taken place both within government, with the Department of Foreign Affairs and State Governments, and with relevant community groups.
- 2.5 The Committee considered the listing against the criteria provided by ASIO at an earlier hearing into the listing process. This criteria was:
- Engagement in terrorism;
 - Ideology and links to other terrorist groups/networks;
 - Links to Australia;
 - Threats to Australia's interests;
 - Proscription by the UN or like-minded countries; and
 - Engagement in peace or mediation processes.
- 2.6 The Committee concluded that the al-Zarqawi Network met the criteria in major areas of the criteria supplied and therefore it did not recommend disallowance.

1 The last Annual Report covered the Committee's activities up to the beginning of May 2005. This report, therefore, covers those reports and inquiries not dealt with in that report.

Review of the listing of seven terrorist organisations

- 2.7 On 17 and 23 March 2005, the Attorney-General informed the Committee of the proposed re-listing of seven organisations previously listed in 2003. Under subsection 102.1(3) of the Criminal Code, the regulations cease to have effect on the second anniversary of the regulation being made. The seven organisations under consideration in this review were:
- Ansar al-Islam;
 - Asbat al-Ansar;
 - Egyptian Islamic Jihad;
 - Islamic Army of Aden;
 - Jaish-e-Mohammad;
 - Lashkar-e Jhangvi; and
 - Islamic Movement of Uzbekistan.
- 2.8 The Committee advertised the inquiry on its web site and in *The Australian* on 11 April 2005. A private hearing, involving ASIO the Attorney-General's Department and the Department of Foreign Affairs, was held in Canberra on 2 May 2005. Two submissions were received from the public.
- 2.9 In this report, procedural concerns relating to consultation remained. Public submissions raised broader questions about the need for the banning provisions in the Criminal Code and the appropriateness of the criteria used by ASIO for judging the necessity to ban a particular organisation. These were matters that the Committee will consider in its statutory review of the provision in 2007.
- 2.10 Within the seven organisations considered in this review, there were variations in the extent to which an organisation met the criteria and, in some areas, there was too little information supplied. On a number of occasions connections to Australia appeared to be tenuous. However, on balance, the Committee decided not to recommend disallowance of any of the seven organisations.

Review of the listing of four terrorist organisations

- 2.11 This review covered the re-listing of four organisations which had previously been listed in 2003 and 2004. They were:

-
- Hizballah External Security Organisation;
 - Hamas Izz al-Din al-Qassam Brigades;
 - Lashkar-e-Tayyiba;
 - Palestinian Islamic Jihad.
- 2.12 The last of these organisations, the Palestinian Islamic Jihad, had been reviewed by the Committee in 2004, in its first report under section 102.1A of the Criminal Code. The other three organisations had been the subject of specific legislation to ban them on 5 June 2003 in the case of the Hizballah External Security Organisation and on 9 November 2003 in the case of Lashkar-e-Tayyiba and the Hamas Izz al-Din al-Qassam Brigades.
- 2.13 The Committee held one private hearing with ASIO, the Attorney-General's Department and the Department of Foreign Affairs on 8 August 2005. Three public submissions were received.
- 2.14 In its conclusions to this report, the Committee asked that, in future statements of reasons on listings, ASIO and the Attorney-General's Department address each of the six criteria in setting out their reasons for a particular listing. The Committee did not recommend disallowance; however, some reservations were expressed. It was 'mindful of the role that these organisations [both Hamas and Hizballah] are playing, with the support of large numbers of citizens, in the changing political scene in that part of the Middle East.' One member put his view more strongly in saying that there was a lesser case made for the listing of Hamas, Hizballah and the PIJ than for the Lashkar-e-Tayyiba.

Review of the listing of the Kurdistan Workers' Party (PKK)

- 2.15 This review was the fourth review under the Criminal Code in the reporting period and the sixth review since the legislation was enacted in 2004. This was a new regulation made by the Governor-General on the advice of the Attorney-General, not a re-listing.
- 2.16 The Attorney-General wrote to the Committee on 2 December 2005 advising that a regulation specifying the PKK as a terrorist organisation was to be considered by the Federal Executive Council on 15 December 2005. The Governor-General made the regulation on the same day, 15 December.
- 2.17 The Committee advertised the review of this regulation on its web site and in the *Australian* on Wednesday 21 December 2005.

Seventeen submissions were received from both government agencies and the public. The Committee conducted a private hearing on the proposed listing on 6 February 2006, taking evidence from ASIO, the Attorney-General's Department, the Department of Foreign Affairs and the Federation of Community Legal Services (Victoria).

- 2.18 In its report, the Committee noted that the process of consultation between ASIO and the State Governments remained very brief, but that the consultation with the Department of Foreign Affairs had become more extensive. No information was provided to relevant community groups.
- 2.19 Concern raised with the Committee about the influence of foreign policy considerations in the decision to list the PKK was the subject of contradictory evidence from witnesses.
- 2.20 In conclusion, the Committee reiterated arguments it had made in previous reports:

The Committee has expressed concern in past reviews about the intervention by outside forces in complex internal conflicts which pose no direct threat to Australia or Australians and which rightly should be, and can only be, resolved by negotiation between the parties.²

- 2.21 The majority of the Committee supported the listing; however, they asked that the Government keep the matter under active consideration, taking into account:
- the number of Australians of Kurdish origin who may support the broad aims of the PKK without endorsing or supporting its engagement in terrorist acts;
 - whether it would be sufficient to proscribe the PKK's military wing, the Kurdistan Freedom Brigade (Hazen Rizgariya Kurdistan HRK) referred to in the Attorney's Statement of Reasons; and
 - the fluid state of moves towards possible ceasefires.³

2 Parliamentary Joint Committee on Intelligence and Security, *Review of the listing of the Kurdistan Workers' Party (PKK)*, p. 31.

3 Parliamentary Joint Committee on Intelligence and Security, *Review of the listing of the Kurdistan Workers' Party (PKK)*, p. 33.

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- 2.22 A minority of the Committee argued that the case for the listing had not been made and that the Government should reassess the listing. They argued that ASIO's criteria for a listing had not been met; that there were no direct security benefits from the listing; that, consistent with other listings, it might have been limited to the military wing; and that it had the potential to expose ordinary Australian citizens, unconnected to terrorist activity, to severe criminal penalties.⁴
- 2.23 This report represented the first occasion on which the Committee had been unable to reach consensus.

Review of the Intelligence Services Legislation Amendment Bill 2005

- 2.24 On 16 June 2005, the Minister for Defence, Senator the Hon Robert Hill, referred the *Intelligence Services Legislation Amendment Bill 2005* to the then Parliamentary Joint Committee on ASIO, ASIS and DSD for inquiry and report.
- 2.25 The Bill was a package of measures to amend the *Intelligence Services Act 2001* (ISA), the *Office of National Assessments Act 1977* (the ONA Act), the *Inspector-General of Intelligence and Security Act 1986* (IGIS Act) and related legislation. It gave effect to all of those recommendations of the Inquiry into Australian Intelligence Agencies, conducted by Mr Philip Flood AO in 2004 (the Flood Inquiry), which to be implemented required legislative changes.
- 2.26 The Bill also implemented recommendations of a review of the Intelligence Services Act conducted by the Department of the Prime Minister and Cabinet in late 2004. This review incorporated the experience of ASIS' and DSD's operations since the Act was introduced in 2001, including observations from monitoring by Inspector General of Intelligence and Security, both Mr Blick and Mr Carnell. Mr Blick, the previous IGIS, recommended in his 2002 and 2003 annual reports that such a review be undertaken.
- 2.27 In August 2004, the Hon David Jull, the Chair of the then Joint Parliamentary Committee on ASIO ASIS and DSD, also proposed to the Government that it consider a number of changes to the act as it related to the Committee. These proposals included an increase in the size of the Committee and other adjustments to help the PJCAAD

4 Parliamentary Joint Committee on Intelligence and Security, *Review of the listing of the Kurdistan Workers' Party (PKK)*, pp. 35-40.

respond to its increasing workload. The Government agreed to consider these proposals in the context of the review of the ISA.

- 2.28 On the whole, the changes to the Committee's structure and oversight were not contentious and the nature of these changes has been discussed in Chapter 1 of this report. Initially, the Bill required that the new position of Deputy Chair be filled by a Government member. The Committee recommended that that be altered to reflect normal Parliamentary practice of having the deputy chair position filled by a member of the Opposition. The Government agreed with this recommendation so long as, in a prolonged absence of the Chair, an acting chair be selected from the Government members.
- 2.29 Two requests of the Committee for amendments were not agreed or brought forward in the amendments to the act: one was the deletion in section 7 (1) (c) (i) of the words '[matters prejudicial to] the conduct of Australians foreign relations' thereby excluding foreign policy matters from those which Ministers might seek to have excluded from Committee reports prior to tabling; the second request was that the Committee be given access to the classified annual reports of the agencies.
- 2.30 A number of other matters were discussed in more detail in the Committee's report on this Bill. They included:
- **Definition of intelligence:** A broadening of the definition of 'intelligence information' from information about activities *outside* Australia to information that has been 'collected unintentionally in the proper conduct of the functions of the agencies.' Additionally, this re-definition related to a further amendment affecting the communication of intelligence to Commonwealth and State authorities.
 - **Communication of intelligence:** Schedule I Item 29 provided that intelligence 'unintentionally but properly collected' may be passed on to the appropriate authorities, in limited and defined circumstances. This was a widening of the previous limits that applied to the communication of intelligence in that it broadened the range of 'authorities' to which the information could be passed and, given the broader definition of intelligence information, a wider range of information that could be passed to those authorities.
 - **Assistance to Commonwealth and State Authorities:** Schedule 1 items 18, 19 and 20 seek to bring consistency between the agencies'

ability to assist not only the Defence forces in support of military operations but other State and Commonwealth authorities. This assistance is specified in the report.⁵

- **Ministerial authorisation:** Perhaps the most contentious amendment was in Schedule 1 Item 22 of the Bill which deleted the words 'who is overseas' from Part 2 Section 8 (1)(a)(i) and (ii) of the Intelligence Services Act. The Committee was concerned to ensure that this did not represent a weakening of the legislated control over the foreign collection agencies in relation to Australian citizens. The Committee was persuaded that the intention of the provision was to protect Australians in Australia in the same way as the current legislation protects Australians who are overseas. However, the Committee sought additional assurance with the following recommendation:

The Committee recommends that, as the regime moves from Ministerial direction to legislated Ministerial authority as proposed in Item 22, it should generally replicate the provisions of and have identical authorisation provisions to those that apply to ASIO.

This recommendation was not agreed by the Government.

- 2.31 Although other matters were discussed in the review, no other recommendations were made by the Committee. Further amendments to the Bill clarified the powers of the IGIS in respect of access to places where people were being detained under warrants executed under Division 3 Part III of the ASIO Act. They also related to the Inspector General's powers to initiate inquiries in relation to ONA and to consult with the Ombudsman in order to preclude duplication of effort.

ASIO's Questioning and Detention Powers

- 2.32 The most extensive review conducted by the Committee in the last year was the review of Division 3 Part III of the ASIO Act. This review, conducted under Section 29 (1)(bb) of the *Intelligence Services Act 2001*, examined the operation, effectiveness and implications of ASIO's questioning and detention powers in the first three years of its operation. The review also met a timetable under section 34Y of the ASIO Act which provided that these provisions would cease to

5 See Parliamentary Joint Committee on ASIO, ASIS and DSD, *Review of Intelligence Services Legislation Amendment 2005*, p. 10.

have effect on 23 July 2006. The Committee's review was designed to precede the lapse of the legislation under the sunset clause and sought to inform consideration by the Parliament and the Government of the need to legislate again for these provisions or some variation of them.

- 2.33 The inquiry was advertised in the *Australian* newspaper on 17 January 2005, as well as on the Committee's website. The Committee received 113 submissions and held hearings over six days. Some hearings were held in public and some in private.
- 2.34 The Committee was required to review the operations of the Act, but expressed concern about possible limitations on the taking of evidence created by the restrictions imposed by the secrecy provisions in 34VAA of the ASIO Act. An opinion sought from Mr Brett Walker, SC, advised 'that the provisions of section 34VAA of the ASIO Act have no effect whatsoever on the activities of persons including members of the Committee, the Committee staff, prospective witnesses, witnesses and persons assisting, for example, agency heads in providing information required by the Committee within lawful limits. So long as those activities comprise part of or are being engaged in for the purposes of conducting or complying with the requirements of the mandatory review entrusted to the Committee by Parliament in subpara 29(1)(bb)(i) of the Intelligence Services Act, those persons will not be committing any offence of the kind created by those provisions [section 34VAA].' However, the Committee was required to operate, in the taking of evidence, within the limits placed on it by the Intelligence Services Act. To allay fears that had been expressed to the Committee about the possible liability of witnesses, the Committee produced a statement to witnesses explaining their position and directing them to the legal opinion on the website.⁶
- 2.35 The Committee reported on 17 November 2005. It made 19 recommendations. A series of recommendations related to the clarity of the legal framework, the transparency of the procedures, particularly some limitations on the secrecy provisions and improved process – rights to legal representation and the supervision of the process by the Prescribed Authority.
- 2.36 The Committee concluded that the regime established by Division 3 Part III had been useful and administered in a professional way.

⁶ See also Chapter 3 of this report.

However, the Committee expressed some reservations about the purpose of the questioning under warrants, particularly if other law enforcement agencies were present and seeking to use the questioning for purposes other than the collection of intelligence in relation to a terrorist offence. The extraordinary nature of the powers given under Division 3 Part III were not subject to the same level of scrutiny as police powers and these needed to be kept separate. Finally, the Committee believed that, given the extent and nature of the powers and the secret nature of their use, scrutiny of the most rigorous kind must remain in place. As they should not be permanent and should be scrutinised as thoroughly as possible, it was the Committee's view that the sunset clause must remain, albeit at a slightly extended period of five and a half years.

- 2.37 The Government disagreed with nine of the nineteen recommendations, particularly those seeking less secrecy in the process. With regard to the major recommendation on the sunset clause, the Government inserted a new sunset clause, but made the applicable period ten years, with the next review of the legislation to take place in 2016.

Notifications under s6A of the *Intelligence Services Act 2001*

- 2.38 Section 6A of the Intelligence Services Act states that:

If the responsible Minister gives a direction under paragraph 6(1)(e), the Minister must as soon as practicable advise the Committee of the nature of the activity or activities to be undertaken.

- 2.39 Section 6(1)(e) states:

(1) The functions of ASIS are:

(e) to undertake such other activities as the responsible Minister directs relating to the capabilities, intentions or activities of people or organisations outside Australia.

- 2.40 In the last two years, the Committee has received no notifications under this provision.

Inspections and briefings

Visit to Intelligence Services Facilities

- 2.41 The Committee inspected major intelligence agency facilities in March. This was a general inspection; however, it also played a valuable role in the review of recruitment and training then being undertaken by the Committee.

Private Briefings

- 2.42 The following visitors briefed the Committee in the last twelve months:
- Hon James Sensenbrenner, Chairman, House Judiciary Committee, United States Congress, 31 May 2005;
 - Mr Andrew Metcalfe, Deputy Secretary, Department of Prime Minister and Cabinet; Mr Steve Merchant, Director DSD; Mr Ian McKensie, Director DIGO; Dr Brendon Hammer, Acting Director-General, ONA; Mr David Irvine, Director-General, ASIS; Acting Director-General ASIO; Mr Ian Carnell, Inspector-General of Intelligence and Security; Mr Geoff McDonald, Assistant Secretary, Security Law Branch, Attorney-General's Department, 16 June 2005.
 - Mr Stephen Merchant, Director, DSD, and staff; Mr Cameron Gifford and Ms Catherine Smith, Attorney-General's Department, 8 September 2005.
 - Rt Hon Paul Murphy, (Chair), Rt Hon Michael Mates, Rt Hon James Arbuthnot, Mr Ben Chapman, Mr George Howard, Baroness Ramsay, Intelligence and Security Committee of the United Kingdom and Rt Hon Helen Liddell, High Commissioner for the United Kingdom, 8 September 2005.
 - South African Intelligence Officials delegation: Mr Barry Gilder, Co-ordinator for Intelligence: National Intelligence Co-ordination Committee; Mr Mthuthuzeli Madikiza, Deputy Director General: South African Secret Service; Mr Loyiso LT Jafta, Chief Director: Presidency; Brigadier General Vele Simon Matshatshe, Director Counter Intelligence Collection: Defence Intelligence, Department of Defence; Ms Zodwa Lalli, Chief Director Asia: Department of Foreign Affairs; Ms Sharon Anastasia Thokozile Dennis, Unit

Head: Production and Liaison, National Intelligence Co-ordination Committee; Ms Valerie Maria Sedibelwana, Acting Portfolio Manager: Analysis and Interpretation, Tshwane Metropolitan Municipality, 11 October 2005.

- Defence and Security Committee of the Republic of Vietnam: Major-General Nguyen Kim Khanh MP, Vice Chairman of the Defence and Security Committee (DSC), Head of the Delegation; Lieutenant-General Pham Van Minh MP, Deputy Commander of Military Zone 4, member of the DSC; Major-General Tran Quang Khue MP, Deputy Commander of the Navy Forces, member of the DSC; Major-General Nguyen Van Nghinh MP, Deputy Commander of the Capital Military Zone, Member of the National Assembly of the Socialist Republic of Vietnam, Representative for Hanoi, member of the DSC; Major-General Le Thanh MP, Vice Director of the Police Bureau, Ministry of Public Security, member of the DSC; Senior Colonel Nguyen Huu Tinh MP, Deputy Commander of Military Zone 7, Member of the DSC; HE Mr Nguyen Thanh Tan, Ambassador of the Socialist Republic of Vietnam, 7 December 2005.
- Mr Paul O'Sullivan, Director-General of Intelligence and Security, 9 February 2006.

2.43 In addition, the secretariat met with Mr Richard Evans, Section Head for Terrorism and Insurgency, Jane's, 29 June 2006, and Canadian Officials, from the Middle East International Assessment Staff, 1 March 2006.

Conferences

2.44 Mr Kerr, MP, attended the Australian Law Reform Commission Conference, Sydney, 9 June 2005.

Issues of Procedure and Practice

- 3.1 The Parliamentary Joint Committee on Intelligence and Security is a relatively new committee of the Australian Parliament beginning its operations under a new act in March 2002. Because of the provisions of the act and because of the subjects it deals with and the agencies it scrutinises, it is much more constrained than other committees of the Parliament. It has over the last Parliament and a half, therefore, been dealing with the dilemmas of all committees which oversee intelligence agencies – the tension between proper scrutiny, public confidence and the protection of national security information. The Committee has always sought to provide the maximum reporting to the Parliament and to preserve the optimum powers and privileges of Parliament consistent with its national security obligations.
- 3.2 As discussed in the last Annual Report, the Committee continues to grapple with a number of procedural issues. These include: the application of the secrecy provisions of the ASIO Act to the Committee's review of the operations of Division 3 Part III of that act; the handling and retention of documents, particularly the maintenance of the records of the committee; and the procedures covering the taking of evidence and report clearance.

Secrecy provisions and the ASIO Act

- 3.3 An important issue which arose in the conduct of the Committee's review of Division 3 Part III of the ASIO Act was the application of the secrecy provisions of the legislation to the conduct of the inquiry itself.

Paragraph 29(1)(bb) of the *Intelligence Services Act 2001* requires the Committee to review the 'operation, effectiveness and implications' of the legislation. At the same time, however, it appeared that persons who had been subject to questioning warrants and their legal advisers would be severely constrained, if not prohibited, from disclosing publicly or privately any information relating to the issuing of a warrant or the questioning or detention of a person in connection with the warrant.

- 3.4 This was a matter of concern to the Committee as it sought to undertake as thorough a review as possible, while not wishing to expose individuals who might wish to give evidence before the Committee to any serious legal ramifications. While it was clear these secrecy provisions guarded against the release of information that might jeopardise or compromise sensitive intelligence collection operations, such secrecy associated with new and controversial legislation was of concern both for the Committee's review and for the longer term scrutiny of the legislation.
- 3.5 The Committee sought advice from the Clerks of both Houses and then asked Mr Bret Walker, SC, for an opinion on the rights of witnesses and the powers of the Committee to hear evidence, given the restrictions of both the *Intelligence Services Act 2001* under which the Committee operates and the *ASIO Act 1979*, with its strict secrecy provisions at section 34VAA.
- 3.6 The opinion from Mr Walker¹ advised the Committee that the provisions of section 34VAA of the *ASIO Act* have no effect whatsoever on the activities of persons including members of the Committee, the Committee staff, prospective witnesses, witnesses and persons assisting, for example, agency heads in providing information required by the Committee (within lawful limits as noted above). Mr Walker further advised that, 'so long as those activities comprise part of or are being engaged in for the purposes of conducting or complying with the requirements of the mandatory review entrusted to the Committee by Parliament in subpara 29(1)(bb)(i) of the *Intelligence Services Act*, those persons will not be committing any offence of the kind created by those provisions.' However, the Committee was required to operate, in the taking of evidence, within the limits placed on it by the *Intelligence Services Act*. This included the taking any evidence relating to

¹ The full opinion is available on the Committee's website at http://www.aph.gov.au/house/committee/pjcaad/asio_ques_detention/Walker%20opinion.pdf

operations of ASIO in-camera. To allay fears that had been expressed to the Committee about the possible liability of witnesses, the Committee produced a statement to witnesses explaining their position and directing them to the legal opinion on the website.

- 3.7 The Committee was grateful to Mr Walker for his opinion. The procedures developed for the taking of evidence on this inquiry, especially the capacity of the Committee to talk to practitioners dealing with Division 3 Part III, worked well and provided essential evidence to the review.

Handling and retention of documents

- 3.8 In the last Annual Report, the Committee noted the procedures it had developed for the handling of sensitive national security information. Systems were set up and documented in line with the requirements of the Protective Security Manual and the requirements of the Intelligence Services Act. Schedule 1 Clause 22 of the *Intelligence Services Act 2001* states:

Protection of information and documents

(1) The Committee must make arrangements acceptable to all of the agency heads 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.

- 3.9 On two occasions since the establishment of the Committee, ASIO has inspected the secretariat to ensure that our systems complied with these requirements for the storage and disposal of classified material. This involved safes, swipe pass access into rooms, off-line printers, copiers and Hansard recording and a secure phone. Distribution of documents is by safe hand in double envelopes which are wafer sealed and registered. Documents are also collected from members and deregistered as soon as they have finished with them. Approved shredding mechanisms have been acquired.
- 3.10 The agencies supply the Committee with multiple copies of documents and disposal is conducted under approved and registered conditions.

- 3.11 Until this year, agencies have not acted on part 2 of this clause, requiring the return of documents containing a national security classification. The procedure the Committee put in place, in the absence of a recall, was that all multiple copies of documents, except an archive copy, would be shredded as soon as members were finished examining them.
- 3.12 This year the Committee received a request from ASIO under Schedule 1 Clause 22 (1) (2) for the return of all 8 copies of the ASIO submission to the questioning and detention review. The copies were at that time retained under secure conditions in the secretariat.
- 3.13 The request was proper within the Act. However, as far as the Committee was concerned, there appeared to be two main difficulties associated with this section of the Act. This involved the preservation of a complete parliamentary record both for long term historical purposes and for more immediate on-going reference for the Committee itself and secondly the preservation of the integrity of the Committee's internal deliberations. Namely:
- That the return of all copies would leave the Committee records incomplete for future reference and archive purposes. This is especially significant in PJCIS inquiries as so little of the classified submissions can be used in a report. In historical terms, much of the evidence upon which the Committee bases its findings is in the classified material. As distinct from most parliamentary committees, the PJCIS also has an ongoing oversight role in relation to the AIC and the ability to refer to earlier evidence is therefore of greater importance. Loss of such materials may have a detrimental impact of the capacity of the Committee to perform its role.
 - That both members and the secretariat annotate submissions, so to return them to agencies is to reveal the internal deliberations of the Committee to the agency that they are overseeing.
- 3.14 The Committee was disappointed that it was unable to reach agreement with ASIO to maintain the existing practice or at least to retain a single copy for secretariat and committee purposes. Ultimately it was agreed that all 8 of the Committee's copies would be shredded by ASIO. The shredding was witnessed by secretariat staff.
- 3.15 The Committee may seek an amendment to the Intelligence Services Act to allow the Committee to preserve an archive copy. The Committee notes that records presented to a committee in-camera or on a confidential or restricted basis and not authorized to be published are

Class A records for the purpose of the *Archives Act 1983*.² Class A records are exempt from public access thereby protecting the interests of national security.

The taking of evidence and report clearance

3.16 A complicated and somewhat circular difficulty became evident to the Committee during the course of the last year. The intersection of the requirements regarding the taking of evidence in public or private, the requirement to seek permission from responsible ministers to hold hearings in public, and the disclosure provisions within the Act seem to the Committee, in the light of the Committee's expanded role, to be inappropriate and inconsistent with normal parliamentary procedures.

3.17 The relevant parts of the Intelligence Services Act are as follows:

Schedule 1 clauses 20, 6 and 7

20 Proceedings

(2) The Committee must not conduct a review in public without the approval of:

- (a) the Minister responsible for ASIO; and
- (b) the Minister responsible for ASIS; and
- (c) the Minister responsible for DIGO, DIO and DSD; and
- (d) the Minister responsible for ONA.

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) If the evidence is taken, or the document is produced, in a review conducted in private, 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 an agency – the agency head; or
- (b) in any other case – the person who gave the evidence or produced the document

2 See also the *Archives (Records of the Parliament) Regulations SR 1995 No.91*.

- 3.18 It would appear that the insertion of section 6 was made as a direct transfer from the old ASIO Act. Under this act, the Committee had more limited functions, conducted fewer inquiries and held few hearings in public or otherwise. The expectation of those establishing the new committee in 2001 was that its main role would be to review the administration and expenditure of the intelligence agencies, something that of necessity happens in private. However, these reviews have not constituted the major part of the Committee's work since 2001. Section 6 now represents an excessive abundance of caution and could usefully be reconsidered. Indeed 'review' now applies not only to reviews of administration and expenditure in section 29 of the act, but also to reviews of terrorist listings and reviews of legislation. In the case of legislation, there is no reason why the default position should not be public hearings, as it is with most parliamentary committees.
- 3.19 Section 6 of the Intelligence Services Act goes further than normal parliamentary procedure whereby a committee would inform a person who gave in-camera evidence that they wish to use any of that evidence, the committee would take account of any views put to them by a witness, but the final discretion rests with the committee as to the use of the material.
- 3.20 Under the Intelligence Services Act, if no permission is given to hold a hearing in public, s.6 effectively gives a veto over the Committee's evidence to all witnesses appearing in a private review. Section 6 applies to all witnesses including, those who are private citizens, representatives of NGOs, academics and public servants representing line departments, which are not part of the AIC. This places the Committee in a subordinate position which is not consistent with parliamentary sovereignty.
- 3.21 The Committee is considering whether there needs to be further amendment to the act to accommodate periodic legislative review or whether it should regularly seek to take more evidence in public where there is no national security reason to conduct a review in private. The Committee is aware that even within a legislative review it may be necessary to take some evidence in-camera to protect confidentiality or national security. In this respect, the Committee is mindful that section 7 of the act provides an additional mechanism to prevent any unintended disclosures of security sensitive information.
- 3.22 That said, the operation of section 7 raises additional issues. Under section 7 of the Act, the agencies have a veto power over any matter

that they define as national security or prejudicial to Australia's foreign relations. This is potentially a very broad and somewhat vague range of material and has been the source of some differences of opinion between the Committee and the agencies. Section 7 states:

7. Restrictions on disclosure to Parliament

(1) The Committee must not disclose in a report to a House of the Parliament:

- (a) the identity of a person who is or has been a staff member of ASIO or ASIS or an agent of ASIO, ASIS, DIGO or DSD; 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 an agency of its functions.

(2) An agency head may determine that paragraphs (1)(a) and (b) do not apply to the identification of specified staff members or agents of his or her agency, and the determination has effect accordingly.

(3) The Committee must obtain the advice of the responsible Minister or responsible Ministers concerned as to whether the disclosure of any part of the report would or might disclose a matter referred to in subclause (1).

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

- 3.23 At the end of the first parliament of the Committee's operation, the Committee sought modification to clause 7 to remove or refine the foreign policy exclusions from its reports. The Government did not agree to the proposed change. However, the Committee is considering both the scope and the application of section 7 again in the light of some requests made by agencies.

Support for the Committee

- 3.24 The Committee wishes to reiterate the comments it made last year about the difficulties of staffing the secretariat for the PJCIS. It is complicated by the need (Schedule 1, clause 21) for high level clearances for members of the secretariat. This is a time consuming process and makes staff changes difficult, especially at a time when the demand for clearances within the intelligence agencies is rapidly expanding along with the expansion of the agencies themselves. Clearances for members of the Hansard staff have added to the complexity of running the Committee. The Committee is grateful to all the staff of the Parliament who contribute to its efficient operation. There are currently four staff in the secretariat.
- 3.25 The Chairman thanks the members of the Committee for their time and their cooperative approach to the Committee's work over the past year.

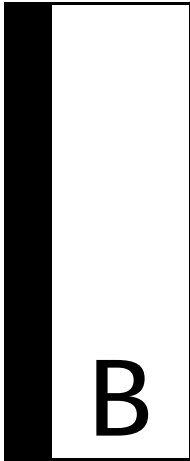
The Hon David Jull, MP
Chair



Appendix A: Committee meetings and hearings for the year ending 30 June 2006

Type	Location	Date
Private briefing: The Hon James Sensenbrenner, Jr, Chairman, House Judiciary Committee, United States of America Mr Tom Schreiber, Chief of Staff Mr Bill Stanton, Charge d'Affaires, United States Embassy Mr Woo Lee, Counsellor Political, United States Embassy Mr Matt Matthews, Counsellor Economic, United States Embassy Mr David Fetter, First Secretary Economic, United States Embassy Mr Brett Mattei, First Secretary Political, United States Embassy Mr Brendan O'Brien, Political Officer and Vice Consul, United States Embassy Mr Michael Baume AO, American Australian Association Mr Tim Toomey, Executive Officer, United States and Canada Section, DFAT Mr Matthew Tinning, Congressional Liaison, Embassy of Australia, Washington DC	Canberra	31 May 2005
Private/Public hearing on Division 3 Part III, ASIO Act	Sydney	6 June 2005
Private/Public hearing on Division 3 Part III, ASIO Act	Melbourne	7 June 2005
Private meeting Briefing Director DSD, Director DIGO, Acting Director General ONA, Director-General ASIS, Acting Director- General ASIO, IGIS, PM&C, Attorney-General's Department on proposed amendments to the Intelligence Services Act	Canberra	16 June 2005
Private Meeting	Canberra	23 June 2005
Private hearing on the listing of four Terrorist organisations	Canberra	8 August 2005

Private hearing on Division 3 Part III ASIO Act	Canberra	8 August 2005
Private meeting.	Canberra	11 August 2005
Private meeting.	Canberra	18 August 2005
Private briefings: UK Intelligence and Security Committee Rt Hon Paul Murphy, Chair Rt Hon Michael Mates Rt Hon James Arbuthnot Mr Ben Chapman Mr George Howard Baroness Ramsay Rt Hon Helen Liddell, High Commissioner for the UK	Canberra	8 September 2005
Director DSD and staff on the Intelligence Services Amendment Bill		
Private meeting	Canberra	15 September 2005
Private meeting/briefing Mr Paul O'Sullivan, Director General of Intelligence and Security,	Canberra	6 October 2005
Private briefing: Officials from the South African Intelligence Agencies	Canberra	11 October 2005
Private meeting	Canberra	13 October 2005
Private meeting	Canberra	1 December 2005
Private briefing: Defence and Security Committee of the National Assembly of the Republic of Vietnam	Canberra	7 December 2005
Private meeting	Canberra	8 December 2005
Private hearing: Listing of the PKK as a terrorist organisation	Canberra	6 February 2006
Private meeting and briefing Mr Paul O'Sullivan, Director-General of Intelligence and Security	Canberra	9 February 2006
Private meeting	Canberra	2 March 2006
Private meeting	Canberra	23 March 2006
Private hearing: review of administration and expenditure	Canberra	23 March 2006
Private hearing: review of administration and expenditure	Canberra	24 March 2006
Private meeting	Canberra	30 March 2006
Private meeting/hearing review of administration and expenditure	Canberra	8 May 2006
Private meeting	Canberra	11 May 2006
TOTAL		26



Appendix B: Committee reports and inquiries

Reports tabled:

- Review of the listing of Tanzim Qa'idat al-Jihad fi Bilad al-Rafidayn (the al-Zarqawi network) as a Terrorist Organisation under the *Criminal Code Act 1995*; Tabled 25 May 2005
- Review of the listing of seven terrorist organisations; Tabled 9 August 2005. This review included consideration of the following organisations:
 - ⇒ Review of the listing of the Egyptian Islamic Jihad as a Terrorist Organisation under the *Criminal Code Act 1995*
 - ⇒ Review of the listing of the Lashkar-e Jhangvi (LeJ) as a Terrorist Organisation under the *Criminal Code Act 1995*
 - ⇒ Review of the listing of the Islamic Movement of Uzbekistan as a Terrorist Organisation under the *Criminal Code Act 1995*
 - ⇒ Review of the listing of the Jaish-e-Mohammad as a Terrorist Organisation under the *Criminal Code Act 1995*
 - ⇒ Review of the listing of Asbat al-Ansar as a Terrorist Organisation under the *Criminal Code Act 1995*
 - ⇒ Review of the listing of Ansar al-Islam as a Terrorist Organisation under the *Criminal Code Act 1995*
 - ⇒ Review of the listing of Islamic Army of Aden as a Terrorist Organisation under the *Criminal Code Act 1995*

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- Review of the listing of four terrorist organisations, tabled 5 September 2005. The listings are as follows:
 - ⇒ Review of the listing of the Hizballah External Security Organisation as a Terrorist Organisation under the *Criminal Code Act 1995*
 - ⇒ Review of the listing of the Hamas Izz al-Din al-Qassam Brigades as a Terrorist Organisation under the *Criminal Code Act 1995*
 - ⇒ Review of the listing of the Lashkar-e-Tayyiba as a Terrorist Organisation under the *Criminal Code Act 1995*
 - ⇒ Review of the listing of the Palestinian Islamic Jihad as a Terrorist Organisation under the *Criminal Code Act 1995*
 - Review of the Intelligence Service Legislation Amendment Bill 2005; Tabled: 12 September 2005.
 - Review of Division 3 Part III of the *ASIO Act 1979* – ASIO’s questioning and detention powers; Tabled: 30 November 2005
 - Review of the listing of the Kurdistan Workers Party (PKK) as a Terrorist Organisation, presented to the Speaker/President, out of session: Wednesday 26 April 2006.
 - Review of Administration and Expenditure No. 4 – Recruitment and Training
Under Part 4 section 29 (1) of the *Intelligence Services Act 2001*.

Current inquiries:

- Review of Security and Counter Terrorism Legislation
Under Part 4, section 29 (1)(ba) of the *Intelligence Services Act 2001*.