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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

INTELLIGENCE SERVICES BILL 2001

EXPLANATORY MEMORANDUM

(Circulated by authority of the Honourable Alexander Downer MP)

GENERAL OUTLINE

The Intelligence Services Bill had its genesis in the recommendations of the judicial inquiry into the Australian Secret Intelligence Service (ASIS), conducted by the Honourable Gordon J. Samuels AC and Mr Michael H. Codd AC, which reported to Government on 31 March 1995. In the Inquiry's Public Report the Commissioners made a number of recommendations, which they termed, "recommendations for enhancement". These included placing ASIS on a statutory basis, expanding the role of the Inspector-General of Intelligence and Security (IGIS) through the conduct of retrospective audits of ASIS' compliance with Ministerial authorisations and the establishment of a Parliamentary Committee to oversee aspects of ASIS and the Australian Security Intelligence Organisation (ASIO).

After consideration, these recommendations have been adopted. This Bill seeks to continue the existence of ASIS by placing it on a statutory basis, and to establish a Parliamentary Committee which is to oversee the expenditure and administration of ASIS and ASIO. In addition to these elements, other accountability and oversight mechanisms have been included. These emphasise the lines of authority in place for the agencies and the level of ministerial responsibility for their conduct.

In placing ASIS on a statutory basis and setting out its functions, the Government also took the decision to include the Defence Signals Directorate (DSD) as both agencies have an external focus in advancing Australia's national security, foreign relations and national economic well being. DSD's functions are detailed in this Bill. While DSD remains a core component within the Department of Defence, its accountability regime has also been explained.

The services provided by ASIS and DSD are vital to the interests of the country. However, there are occasions when these agencies are inhibited in the conduct of their activities by the unintended consequences of Australian laws. This Bill provides limited immunities to the agencies, in respect of these unintended consequences of Australian legislation, to enable the proper conduct of their functions. Importantly, the legality and propriety of the agencies' activities will continue to be overseen by the office of the IGIS, an independent watchdog who reports to the Prime Minister and the Parliament. This oversight combines with an extensive authorisation regime associated with the proper conduct of the agencies' functions.

Consistent with the mechanisms of accountability for an agency's actions, the Bill imposes a statutory obligation on the agencies to respect the rights of Australians to privacy. The responsible Ministers for ASIS and DSD are required to make written rules to ensure that the activities of the agencies are carried out with due regard to those rights. The IGIS will also monitor compliance with these rules.

Finally, the accountability of ASIO and ASIS is extended through the establishment of a new Parliamentary Committee to oversight the expenditure and administration of these agencies. The Committee is based on the existing ASIO Committee established under Part VA of the ASIO Act. This Committee will be disbanded and the new Committee, with expanded jurisdiction, established under this Bill.

Through these statutory mechanisms, it is intended that this Bill will provide a workable framework for the oversight and accountability of the intelligence services, achieving a balance between accountability and transparency and necessary secrecy.

FINANCIAL IMPACT STATEMENT

It is not expected that the Bill will have a direct financial impact.

Part 1 - Preliminary

Clause 1: Short Title

Clause 1 is a formal item which provides for the short title of the Bill.

Clause 2: Commencement

The Bill commences 28 days after the day on which it receives Royal Assent.

Clause 3: Definitions

This clause defines a number of terms used in the Bill. The defined terms are expressed as having the meaning set out in this clause unless the contrary intention appears in the Bill. This is an expression of a standard principle of interpretation and means that the terms must be read in the context within which they appear.

Clause 4: Extension to external Territories

The Bill is intended to apply to all of Australia's external territories including Norfolk Island and the Territories of Christmas Island and the Cocos (Keeling) Islands.

Clause 5: Application of *Criminal Code*

Chapter 2 of the *Criminal Code*, which sets out the general principles of criminal responsibility, applies to all offences under the Bill. This is standard practice for all new offences.

Proposed sub-clause 5(2) nominates extended geographical jurisdiction category D for the purposes of Part 2.7 of the Criminal Code. This means the offences apply whether or not any part of the offences occur in Australia or the alleged offender has a connection with Australia. The offences concern issues related to national security. For a long time, offences of this nature have been given extended reach under section 3A of the Crimes Act 1914. Like theft of Commonwealth property, which is extended in the same

way (subsection 131.1(4), Criminal Code), a victim of these offences is the Australian Government. It is also inevitable that, in the course of the performance of the functions envisaged under this Act, that the activities covered by the offences may be carried out wholly outside Australia by people who are not Australian nationals.

Part 2 - Functions of the agencies

Clause 6: Functions of ASIS

Subclause (1) (a) to (d) reflect the central functions of ASIS.

- sub-clause (a): the collection of intelligence information relating to people or organisations outside Australia;
- sub-clause (b): the distribution of that intelligence information in accordance with Government requirements.
- sub-clause (c): counter-intelligence activities. Such activities are designed to protect the agency's activities and national security, in conjunction with relevant Australian agencies.
- sub-clause (d): liaison: To engage authorities in other countries, in the furtherance of Australia's national interests.

Subclause (1)(e) is intended to provide a degree of flexibility for Government in its tasking of ASIS. It allows Government to modify ASIS' functional activities, under very limited conditions, should the need arise.

6(2) details these limited conditions. Subclause 6(2)(a) states that the responsible Minister must consult other Ministers with related responsibilities prior to directing ASIS to undertake activities under subclause 6(1)(e). Additionally, subclause 6(2)(b) requires the Minister to be satisfied there are arrangements in place to ensure there are defined limits to the activity in question. Subclause 6(2)(c) further requires the Minister to be satisfied that acts done in relation to the activity must be reasonable.

6(3) specifies that the direction under subclause 6(1)(e) must be in writing.

6(4) emphasises that in relation to the planning and conduct of all the functions of ASIS, para-military activities or activities involving personal violence or the use of weapons are not to be undertaken.

Notes 1 and 2 draw attention to other limits to the agency's functions and activities and to the fact that a copy of a direction issued under subclause 6(1)(e) must be given to the IGIS as soon as possible after it is given to ASIS.

Clause 7: Functions of DSD

This clause outlines the functions of DSD.

- sub-clause (a): relates to the collection of intelligence information by DSD in relation to people or organisations outside Australia.
- sub-clause (b): enables the distribution of that intelligence information in accordance with government requirements.
- sub-clauses (c) and (d) are not related to the collection of foreign intelligence but rather provide for DSD to give assistance to Commonwealth and State authorities, on matters within Australia, in relation to information security, cryptography and communications technologies.

Clause 8: Ministerial directions

The Ministerial Directions set parameters for activities within the ambit of the functions of the agencies. Certain activities conducted in pursuance of a function of an agency need to be approved by the Government. The directions specify those circumstances where the relevant agency head must seek authorisation for certain activities pursuant to the agency's functions. The directions are classified to enable an agency to effectively perform its functions, however the IGIS will oversight compliance with the directions.

Clause 9: Ministerial authorisation

The Minister must be satisfied of the criteria specified in sub-clause (1) prior to an authorisation being issued. This requirement for express ministerial authorisation is a formal exercise of the Minister's supervisory responsibilities of the agency. An authorisation is not in force indefinitely and must stipulate a period for which the authorisation is effective. The authorisations will be held by the agency and may be accessed by the IGIS who is empowered to review compliance with the authorisations.

Clause 10: Period during which authorisation has effect etc.

This clause provides the Minister with the discretion to renew, vary or cancel an authorisation.

Clause 11: Limits on agencies' functions

Sub-clause (1) sets the limits on the functions of the agencies as established under clauses 6 and 7, consistent with the recommendations of the Samuels' Inquiry.

This clause provides that the intelligence functions of ASIS and DSD are performed only in support of Australia's national interests and only in so far as those interests are affected by people or organisations outside Australia. Subclause 2 stipulates that the agencies do not have a policing or law enforcement role. Nevertheless, the agencies are permitted to obtain and communicate intelligence relevant to serious crime to police and law enforcement agencies.

DSD also provides an important support service to other agencies and authorities in relation to information security and other forms of technical assistance as set out in subclauses 7(1)(c) and 7(1)(d). Accordingly, this clause provides that the restrictions contained in sub-clauses one and two do not apply to functions of DSD that are unrelated to intelligence collection.

Clause 12: Limits on agencies' activities

Just as clause 11 sets limits on the functions of an agency, clause 12 sets limits on the activities carried out by an agency in the course of the performance of its functions.

Clause 13: Co-operation with other authorities

The co-operation permitted under this clause is intended to be mutually beneficial for the performance of the functions of the specified authorities and agencies.

Clause 14: Liability for certain acts

This clause provides immunity from civil and criminal liability for staff or agents of the agencies whose activities, carried out for the purpose of collecting intelligence information about the capabilities, intentions or activities of people or organisations outside Australia, as intended and required by the Government, might otherwise be prohibited by the unintended consequences of certain Australian laws.

The purpose of the clause is to provide immunity in a limited range of circumstances directly related to the proper performance by the agencies of their functions. It does not provide a blanket immunity from Australian laws for all acts of the agencies. This limited immunity is necessary as certain Australian law, including State and Territory law, could impose liability on the agencies.

Clause 15: Rules to protect privacy of Australians

The agencies are required to take all possible measures to ensure that their activities are undertaken with due regard to the rights of Australians to privacy. This provision states that the responsible Minister must make written rules regarding communication and retention by agencies of intelligence information concerning Australians. These rules ensure the agencies act with propriety and in accordance with Government commitments

to protect Australians' privacy. The IGIS must be consulted prior to the implementation of the rules. The **office of the** IGIS also monitors agency compliance with the rules as an independent watchdog.

Part 3 - Establishment of ASIS and the role of the Director-General

Division 1 - Establishment and control of ASIS

Clause 16: Establishment of ASIS on a statutory basis

This clause continues the existence of the organisation **known as** the Australian Secret Intelligence Service.

Clause 17: Appointment of Director-General

This clause provides for the position of the Director-General and the procedure for his or her appointment by the Governor-General.

Clause 18: Control of ASIS

This clause provides that ASIS is to be under the control of the Director-General who is responsible to the Minister on matters concerning ASIS.

Clause 19: Briefing the Leader of the Opposition about ASIS

This clause provides that the Director-General may brief the Leader of the Opposition in the House of Representatives about ASIS. The Director-General may only do so with the authorisation of the Prime Minister, but the Leader of the Opposition may request a brief at any time.

Division 2 - Administrative provisions relating to the Director-General

Clause 20: Period of Appointment

This clause limits the period of appointment for the Director-General to five years, but allows the Director-General to be reappointed.

Clause 21: Remuneration **etc.**

This clause provides for the remuneration payable to the Director-General.

Clause 22: Resignation

The Director-General may resign by signed notice to the Governor-General.

Clause 23: Termination of appointment

Sub-clauses 23(1) and (3) outline those circumstances where the Governor-General has a discretion to terminate the appointment of the Director-General. **Sub-clause 23(2)** outlines those circumstances where the Governor-General must terminate the appointment of the Director-General.

Clause 24: Acting Director-General

This clause allows for the **appointment of an Acting Director-General by the Minister** where there is a vacancy in the office of the Director-General or where the Director-General is, for any reason, unable to perform the duties of the Director-General.

Section 33A of the *Acts Interpretation Act* applies in relation to acting appointments. This section provides how an appointment may be expressed, what conditions the appointer may determine and confers upon the appointee the powers, duties and functions of the holder of the office. Section 33A limits the period in which an appointee may act in an office which is vacant, or becomes vacant, while the appointee is acting.

Clause 25: Outside employment

This clause prevents the Director-General from entering into paid employment which, in the Minister's opinion, conflicts or may conflict with the proper performance of the Director-General's duties.

Clause 27: Disclosure of interests by Director-General

The Director-General must disclose pecuniary or other interests to the Minister which could conflict with the proper performance of the Director-General's functions.

Clause 27: Delegation

This clause outlines which of his or her powers the Director-General may delegate in writing to a staff member, who is an employee (ie other than a consultant).

Part 4 - Committee on ASIO and ASIS

Clause 28: Committee on ASIO and ASIS

This clause provides for the establishment of a committee on ASIO and ASIS **and details its composition**. In relation to ASIO, this committee replaces the committee on ASIO established under Part VA of the *Australian Security Intelligence Organisation Act 1979*. Part VA is to be repealed under the *Intelligence Services (Consequential Provisions) Bill 2001*.

Clause 29: Functions of the Committee

The new Parliamentary Committee adopts the basic form of the existing Parliamentary Joint Committee on ASIO, established under Part VA of the *Australian Security Intelligence Organisation Act 1979*, but expands its functions to examine expenditure and administration of both ASIS and ASIO.

The Samuels' Inquiry recommended that the Committee oversight the activities, expenditure and administration of ASIO and ASIS. This recommendation has been adopted in relation to expenditure and administration but not in relation to activities. The oversight of operational activities falls within the province of the IGIS who acts as an independent watchdog and reports to the Prime Minister. Similarly under this clause the Parliamentary Committee is not able to examine the agencies' compliance with the rules under clause 15 as this is a responsibility of the IGIS, who separately reports to the Government, the Parliament and the public on this and other matters.

Clause 30: Directors-General and Inspector General of Intelligence and Security to brief the Committee

Subject to the limitations on disclosure of operationally sensitive information set out in clause 1 of Schedule 1, the Committee may request that the IGIS and the Directors-General brief the committee.

Clause 31: Annual report

This clause provides a mechanism whereby Parliament is informed of the Committee's activities via an annual report.

Clause 32: Schedule 1

Schedule 1 provides further provisions about the Committee.

Part 5 - Staff of ASIS

Clause 33: Employment of Staff

This clause allows the Director-General to employ the staff necessary, to carry out the

functions of ASIS, pursuant to the Bill and establishes the staff as being Commonwealth employees of the Director-General. The clause allows for staff to be consulted by the Director-General in relation to the determination of terms and conditions of their employment.

Clause 34: Engagement of consultants

This clause allows ASIS to obtain the expertise of persons with specific qualifications and experience by engaging them on a consultancy basis.

Clause 35: Applicability of *Public Service Act 1999*

Although ASIS staff are Commonwealth employees, they are not employed under the *Public Service Act 1999*. However, this clause ensures that ASIS staff are not disadvantaged as Commonwealth employees by providing that the principles of that Act must be adopted by the Director-General where the **Director-General considers** their adoption is consistent with the functions of ASIS.

Clause 36: Special provisions relating to existing staff

This clause preserves employment agreements of ASIS staff, in existence prior to the commencement of the Act, until such time as the staff member agrees to accept other terms and conditions.

Clause 37: Staff grievances

This clause provides internal procedures within ASIS for the consideration of grievances of staff and former staff of ASIS, including the establishment of grievance review panels chaired by independent chairs.

Clause 38: Application of Crimes Act

Clause 38 confirms that the Director-General and staff of ASIS are Commonwealth officers for the purposes of the *Crimes Act 1914*.

Part 6 - Miscellaneous

Clause 39: Communication of certain information – ASIS

Subclause (1) relates to persons who acquired or came into the possession of information as a result of being a staff member or working under a contract with ASIS. Subclause (1) prohibits the communication of information which relates to the performance of agency functions unless communicated in a manner as specified in sub-clause (1)(c).

Due to the national security ramifications of the disclosure of information of this kind, which could potentially endanger ASIS and its agents, breaches of this provision attract a criminal penalty.

Clause 40: Communication of certain information - DSD

Subclause (1) relates to persons who acquired or came into the possession of information as a result of being a staff member or working under a contract with DSD. Subclause (1) prohibits the communication of information which relates to the performance of agency functions unless communicated in a manner as specified in sub-clause (1)(c). Due to the national security ramifications of the disclosure of information of this kind, breaches of this provision attract a criminal penalty.

Clause 41: Publication of identity of staff

This clause makes it an offence, subject to limited exceptions, to identify a person as an agent or staff member of ASIS or make information public from which the identity of such a person could reasonably be inferred or that could reasonably lead to the identity of such a person being established. This clause relates specifically to maintaining the secrecy of the identity of ASIS staff who require the nature of their employment to remain undisclosed in order to effectively carry out authorised activities pursuant to their functions.

Clause 42: Annual Report

This clause requires the provision by the Director-General of ASIS of an annual report to the Minister.

Clause 43: Regulations

This provision sets out a general regulation making power for the Bill.

Schedule 1 - Committee on ASIO and ASIS

Part 1 - Procedure

Clause 1: Committee must not require certain information to be disclosed

This clause prevents the Committee from requiring the disclosure of operationally sensitive information or information that would or **might** prejudice national security or the conduct of foreign relations. The Committee's functions do not extend to

investigating such information which remains within the jurisdiction of the IGIS. In addition, as outlined in clauses 39 and 40, the agency depends on being able to conduct the authorised activities in accordance with its legislative functions. Such activities would be jeopardised by the disclosure of information related to those activities.

Clause 2: Power to obtain information and documents

This clause 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. 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.

Clause 3: Provision of information to Committee by ASIO and ASIS

This clause 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. Unlike section 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.

Clause 4: Certificates by Minister

This clause is substantially equivalent to section 92K of the ASIO Act and provides for a situation where a person is giving evidence, about to give evidence or about to produce a document to the Committee which the Minister for ASIS or ASIO considers may result in the disclosure of operationally sensitive information. In such a case the Minister may issue a certificate to the Committee stating that in the Minister's opinion, the Committee should not continue to take evidence of the type considered to reveal operationally sensitive information. The Minister is still accountable to Parliament for a decision under Clause 4 of Schedule 1 and must table the certificate in both houses of Parliament. As emphasised in clauses 39 and 40, the agency depends on being able to conduct the authorised activities in accordance with its legislative functions. Such activities would be jeopardised through the disclosure of information related to those activities.

Clause 5: Evidence

This clause is substantially equivalent to section 92L of the ASIO Act and provides that evidence may be given to the Committee under oath or affirmation. The clause provides

that the Committee is not to be taken to be an Australian Court for the purposes of the *Evidence Act 1995*.

Clause 6: Publication of evidence or contents of documents

This clause 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. Evidence and documents received from ASIS or ASIO staff cannot be disclosed or published without the written authority of the relevant Director-General. In addition sub-clauses 3(a) - (c) specify when the Committee is required to seek advice from the responsible Minister in relation to disclosure or publication and must not disclose or publish where the Minister so advises. This is intended to ensure that the authorised activities related to the functions of the agency under the Act are not compromised through disclosure.

Clause 7: Restrictions on disclosure to Parliament

This clause is substantially equivalent to section 92N of the ASIO Act. Sub-clause 7(1) of Schedule 1 restricts the nature of what the Committee may publish subject to the discretion of the respective Directors-General under sub-clause 7(2) of Schedule 1 and upon the advice of the responsible Minister. This is intended to ensure that the authorised activities related to the functions of the agency under the Act are not compromised through disclosure.

Clause 8: Continuation of evidence

This clause is substantially equivalent to section 92P of the ASIO Act and covers a situation where a Committee has taken evidence, but prior to the reporting of that evidence, the Committee as constituted ceases to exist. In such a situation, the subsequent committee may consider the evidence taken by the former.

Part 2 - Offences

Clause 9: Offences relating to publishing or disclosing evidence or documents

The offences in this clause are substantially equivalent to the offences under section 92G of the ASIO Act. Sub-clause (1) prohibits the publishing or disclosure of evidence or documents before the Committee unless one of the exceptions in sub-clause (1) (b) applies.

Clause 10: Offences relating to giving evidence or producing documents

This clause is substantially equivalent to section 92M of the ASIO Act. The clause

creates offences in relation to the giving of evidence, the production of documents and attendance before the Committee, unless one of the exceptions applies.

Clause 11: Protection of witnesses

This clause is substantially equivalent to section 92Q of the ASIO Act. The clause prohibits the commission of certain acts against a person who has appeared or is due to appear before the Committee as a witness or to produce evidence or documents before the Committee. The offences draw on the Model Criminal Code protection of witnesses offences by also covering reprisals against witnesses.

Clause 12: Secrecy

This clause is substantially equivalent to section 92S of the ASIO Act. The clause relates to current and former members and staff members of the Committee and makes it an offence for such people to treat information in a manner described in sub-clause (1). Sub-clause 2 provides that current and former members and staff members of the Committee cannot be required to produce, disclose or communicate in court documents or information which were obtained through his or her employment.

Clause 13: Prosecution of offences

This clause is substantially equivalent to section 92T of the ASIO Act and requires prosecution to be instituted by the Attorney-General or with the Attorney-General's consent.

Part 3 - Administration

Clause 14: Appointment of members

The appointment of members is similar to the appointment system currently in place under section 92B(3) -(7) of the ASIO Act for the appointment of members to the PJC on ASIO. This clause provides procedures for the appointment of members from the House of Representatives and the Senate and excludes Ministers, the President of the Senate and the Speaker of the House of Representatives from membership. The Prime Minister and the Leader of the Government in the Senate must have regard to the desirability of ensuring that the composition of the Committee reflects the representation of recognised political parties in the Parliament and must consult with the leader of each recognised political party in both Houses of Parliament before appointing Committee members.

Clause 15: Term of office

The clause provides for the term of office, when the member ceases to hold office, resignation and appointments to fill vacancies. The clause is substantially equivalent to the terms of office currently in place under sub-sections 92B (8) - (11) of the ASIO Act.

Clause 16 : Chair

The term “Chair” replaces the term “Presiding Member” as used in the PJC on ASIO under section 92D of the ASIO Act. This clause provides for the election, term of office and resignation procedures for the Chair, who must be a Government member.

Clause 17: Meetings

This clause provides for the time, place, keeping of minutes and who should be the presiding member at meetings of the Committee. The meetings of the Committee are to be conducted in an equivalent fashion to that established under subsection 92E (1) - (5) and (8) of the ASIO Act.

Clause 18: Quorum

The quorum of the meeting is four as under subsection 92E(6)(a) of the ASIO Act. A quorum is constituted if, of the members present, a majority are Government members. There may be an equal number of Government and non-Government members present if the presiding member is a Government member.

Clause 19: Voting at Meetings

This clause establishes the voting procedure which is substantially equivalent to the procedure in place for the PJC on ASIO under subsections 92E(6)(b) and (c) of the ASIO Act.

Clause 20: Proceedings

This clause establishes how the proceedings of the Committee are to be conducted. The proceedings of the Committee are substantially equivalent to the proceedings of the PJC on ASIO under section 92F(1)-(3) of the ASIO Act.

Clause 21: Staff of the Committee must be cleared for security purposes

This clause specifies the level of security clearance necessary for the staff of the Committee to engage in the review of matters which concern ASIS. This procedure was not required for the PJC on ASIO, but the nature of the functions of ASIS warrant that

such security is now required.

Clause 22: Protection of information and documents

This clause relates to the secure holding of documents and the return of classified material and is equivalent to subsection 92F(4) of the ASIO Act.