

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

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(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