

PARLIAMENTARY JOINT COMMITTEE ON INTELLIGENCE AND SECURITY

Intelligence Services Legislation Amendment Bill 2023

Questions taken on notice by the Office of the Inspector-General of Intelligence and Security during the Public hearing on Tuesday 12 December 2023.

Question 1 (page 14 of the Hansard transcript)

CHAIR: In your submission, you raise some issues around oversight of ACIC and AFP with regard to surveillance – some inconsistencies around that, with regard to surveillance devices and some agencies on sex discrimination and Public Interest Disclosure Act matters. Could you outline, for the committee’s benefit, what these issues are? How would you suggest dealing with them? Would it be by way of amendment? What would your view on that be?

The response to the question is as follows:

The reference to *“some issues around oversight of ACIC and AFP with regard to surveillance”* presumably picks up paras 74-75 of the Submission. The point made here is that, because in some respects ACIC and AFP have access to the same powers, when exercising them these two agencies will be subject to oversight by different bodies (the IGIS and the Ombudsman respectively). This does not of itself give risk to inconsistency, so long as it is recognised that the Ombudsman’s concern is with matters of administration, while the IGIS’s concern is with matters of legality, propriety, etc. There may indeed be questions – such as those involving an understanding of the way a particular statute operates – which arise in relation to matters of both kinds, but that is no more problematic than, for instance, the situation which arises when an oversight body takes a view of the law which is not the same as that taken elsewhere. However, where one oversight body – the Ombudsman or the IGIS – has had cause to take a particular view in relation to a power when resorted to by agency A, the other oversight body may find it useful to come to an understanding of that view when exercising its own jurisdiction in relation to agency B. This is the point sought to be made in the last sentence in para 75 of the submission. No amendment is suggested.

The reference to *“some inconsistencies ... with regard to ... some agencies on sex discrimination”* presumably picks up para 64 of the Submission. The point made here is that, although ACIC is brought wholly within the oversight remit of the IGIS in terms similar to those that apply to the six agencies mentioned in the first sentence of para 64, the *“respect at work”* function, which was legislated in relation to those agencies, has not been echoed in the amendments in the Bill which relate to ACIC. If that was the intent of the drafters of the Bill, it was presumably a matter of policy and no further comment is made about it. If it was the result of an oversight, however, the possibility of an amendment (for which the Respect at Work Act provides a readily-accessible precedent) is something that might warrant the Committee’s attention.

The reference to *“some inconsistencies ... with regard to ... Public Interest Disclosure Act matters”* presumably picks up para 67 of the Submission. By the use of the word *“inconsistent”* in the second sentence of para 67 it is not suggested that the terms of the amendments in relevant respects would be problematic or lead to difficulties in practice. The intent of the Submission was merely to draw attention to a point of difference – one which appears to have been made consciously and as a matter of policy. There is no reason to suggest any amendment on this aspect of the Bill.

While dealing with para 67 of the Submission, it should be said that the statement that “items 224 to 227, which amend the definition of ‘intelligence information’ under section 41(1) of the PID Act, makes clear that the definition does not capture information concerning the ACIC” is too sweeping. Those items relate only to so much of subs 41(1) of the PID Act as make status as an “intelligence agency” relevant to the question whether particular information is “intelligence information” as defined. ACIC information would still be captured under paras (d), (f), (fa), (g) and – to the extent that para (d) information is relevant – (e) of the subsection.

Question 2 (pages 17–18 of the Hansard transcript)

Paraphrased questions of Mr Hill: Can you please expand further upon what happens should a legal disagreement occur between the IGIS and the agencies regarding the laws that govern them, in particular in respect of their operations. Does it occur, what happens if it does occur, and how is it resolved?

The response to the question is as follows:

Much of the detail was discussed in the hearing. In summary, from time to time there have been instances where an agency’s interpretation of the law has differed from that of the Office of the Inspector-General of Intelligence and Security (the Office). Where that has occurred, the Office has raised that inconsistency firstly with the agency involved and then, where appropriate, with the responsible Minister and Attorney-General, through the provision of an inspection or inquiry report.

Most inconsistencies are resolved at the agency-level through discussion and subsequent policy or procedural change in the agency as required. This can involve consultation with the Australian Government Solicitor for legal advice.

The responsible Minister is ultimately accountable for the legality of the actions of the agency. The Office is a source of independent assurance to the Minister in executing that accountability, therefore our reporting informs the Minister’s view, consideration and decisions regarding the issue, and whether internal policy and procedure or legislative change should be pursued to address the potential lack of clarity.

Legislative change (either urgent or routine) has been progressed, in some instances, where interpretation of the law has differed between the Office and an agency (or agencies) and where seen as necessary to ensure the intent of Parliament is clear in the legislation.