

AUST-INTEL Powers

Parliamentary oversight of intelligence agencies

Australia's parliamentary oversight of its intelligence community is weak compared to that of other countries in the Five Eyes. Most significantly, parliamentarians in the UK, USA and Canada have oversight over the operations and activities of intelligence agencies, which Australia and New Zealand lack.

Discussion paper

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Summary

In Australia, trust in Parliament and government is low and generally declining, and dissatisfaction with government and democracy is rising – apart from a COVID-19 related boost in public trust in government over the last few months. Events over the past 12 months – including police raids on journalists and the secret prosecution of intelligence whistleblower ‘Witness K’ and his lawyer Bernard Collaery – have also provoked concern about how our national security institutions are operating.

In this context of low trust and serious concern, expanded accountability and oversight measures must be considered – both general measures, like a National Integrity Commission to investigate corrupt conduct, and specific ones focused on the intelligence community. By some important measures, Australia lags behind other like countries in its parliamentary oversight of intelligence agencies.

In each of the Five Eyes countries (Australia, Canada, New Zealand, the UK and the USA; the alliance of English-speaking countries that share intelligence), parliamentarians sit on committees that have oversight over intelligence and security agencies.

Oversight can include any or all of a number of accountability mechanisms, including receiving general information, requesting specific information and having findings be reviewed and – where appropriate – implemented by the overseen agency.

Parliamentary committees sit alongside a variety of other oversight mechanisms: ministers, review bodies and independent agencies are responsible for executive oversight, and there is “limited” judicial oversight through courts and tribunals. Parliamentary committees, since they are made up of elected representatives, come the closest to citizen oversight of the intelligence apparatus.

Australia’s oversight committee is the Parliamentary Joint Committee on Intelligence and Security. Its precursor was created in 1988 to oversee ASIO, and over the intervening years the committee has been reformulated to cover more intelligence agencies – with the current committee created in 2005 and covering six agencies.

Across the Five Eyes countries, parliamentary committees are structured in a variety of ways, with various roles and jurisdictions.

All have the power to initiate at least some inquiries. In the US, UK and Canada, this power is broad. In Australia, it is limited to inquiries into administration and expenditure only.

All have oversight over the core intelligence agencies in their jurisdiction. Some committees – those in the US and Canada – also have oversight over all bodies with an intelligence function in their jurisdiction; or over the intelligence community as a whole.

In Australia, the committee has oversight over the six main intelligence agencies, and limited oversight over the Australian Federal Police – but not over other bodies with intelligence functions (ACIC, AUSTRAC, Department of Home Affairs and the other security functions of the AFP).

Some include minor party members. Committees in Canada, New Zealand and the UK have at least one minor party or independent member. The US has an independent member who caucuses with the Democrats.

Australia's committee does not have a minor party or independent member; the only time it did was when Andrew Wilkie was nominated to the committee by Prime Minister Julia Gillard between 2010 and 2013.

There are also some significant differences in jurisdiction and scope between the committees in terms of categories of oversight: oversight of operations/activities, of administration, of finances/budget and of policy/legislation.

Each parliamentary committee has **oversight of the administration and finances/budget** of intelligence agencies.

Most committees have **oversight of policy/legislation**. In some cases, the legislation has to be referred to the committee or, as in the case of Australia, a review by the committee is legislated for some specific legislation rather than an automatic function of intelligence or security legislation being proposed.

The most significant difference in oversight is **oversight of operations or activities**.

Australia's committee cannot review particular operations that have been undertaken, are being undertaken or may be undertaken; or intelligence gathering, assessment priorities, sources of information or operational methods; or complaints about individual activities. It can review other activities of intelligence agencies, if the matter is referred to them.

The committees in US, UK and Canada *can* review operations/activities, including current/ongoing operations. In some of these cases, the executive can limit the committees' inquiries around ongoing operations, but if the executive does not do so then the inquiry can proceed.

Table: Parliamentarian oversight by structure

| | Australia | Canada | NZ | USA | UK |
|--|------------------|---------------|-----------|------------|-----------|
| Sets own work program/initiates inquiries | Partial | Yes | Partial | Yes | Yes |
| Includes all intelligence bodies | No | Yes | No | Yes | Most |
| Minor party members | No | Yes | Yes | Partial | Yes |

Table: Parliamentarian oversight by category

| | Australia | Canada | NZ | USA | UK |
|------------------------------|------------------|---------------|-----------|------------|-----------|
| Operations/activities | No | Yes | No | Yes | Yes |
| Administration | Yes | Yes | Yes | Yes | Yes |
| Finances/budget | Yes | Yes | Yes | Yes | Yes |
| Policy/legislation | Yes | Yes | Yes | Yes | No |

Introduction

Public faith in Australia's public institutions is declining. Polls undertaken by several organisations, including The Australia Institute, show low and generally declining trust in Parliament and government and rising dissatisfaction with government and democracy¹ – although there has been a recent increase in trust in politics as a result of the governmental response to COVID-19. Nonetheless, new transparency and accountability measures are widely supported, most notably a National Integrity Commission.²

At the same time, there is growing concern about how our national security institutions are operating. Australian Federal Police raids on the ABC and another journalist have raised concerns around media freedom.³ The secret prosecution of lawyer Bernard Collaery and 'Witness K', the intelligence whistleblower, over the East Timor bugging scandal⁴ adds to the perception of declining transparency around, and accountability of, security agencies.

Former diplomat and senior public servant John Menadue has expressed long-term concerns with security agency culture and accountability, including the promotion of key players in the East Timor bugging scandal, spying on Indonesian trade negotiations to the benefit of US companies, the growing policy influence of collection agencies, and the close relationship between security agencies and some politicians and journalists.⁵

¹ Cameron & McAllister (n.d.) *Australian Election Study*, <https://australianelectionstudy.org/>; Markus (2014) *Trust in the Australian Political System*, https://www.aph.gov.au/~/~/link.aspx?_id=1713CA0133C845D8B54945046F5C7B8B; The Australia Institute (2019) *Poll: 80% of Australians support a Federal Integrity Commission with strong powers*, <https://www.tai.org.au/content/poll-80-australians-support-federal-integrity-commission-strong-powers>

² The Australia Institute (2019) *Poll: 80% of Australians support a Federal Integrity Commission with strong powers*

³ Remeikis (2019) *Police raid on Annika Smethurst shows surveillance exposé hit a nerve*, <https://www.theguardian.com/australia-news/2019/jun/05/police-raid-on-annika-smethurst-shows-surveillance-expose-hit-a-nerve>; Worthington, Blumer, & Investigations (2019) *What do the AFP raids mean for journalists and their sources?*, <https://www.abc.net.au/news/2019-06-06/abc-raids-what-they-tell-us-about-press-freedom/11187364>

⁴ Knaus (2019) *Witness K and the "outrageous" spy scandal that failed to shame Australia*, <https://www.theguardian.com/australia-news/2019/aug/10/witness-k-and-the-outrageous-spy-scandal-that-failed-to-shame-australia>

⁵ Menadue (2020) *We need a standing Royal Commission to supervise our intelligence agencies*, <https://johnmenadue.com/we-need-a-standing-royal-commission-to-supervise-our-intelligence-agencies/>

Australia has seen a proliferation of national security and anti-terrorism legislation in the past twenty years. There are now 82 separate anti-terrorism statutes, about equal to the number of people who have received terrorism convictions.⁶

The federal government is currently considering whether to allow the Australian Signals Directorate (“ASD”) to spy on Australian citizens. By law, the ASD is currently limited to obtaining intelligence about people or organisations outside of Australia, although it can provide technical assistance to those security agencies with a domestic remit (ASIO and the Australian Federal Police).⁷

Similar, if more extreme, proposals for ASD involvement in domestic surveillance were being contemplated by the Home Affairs and Defence secretaries in 2018.⁸ In response to journalist Annika Smethurst’s exposure of the leaked proposals, then Foreign Minister Julie Bishop said:

I don’t see any national security gap and I certainly believe that the current laws safeguard the privacy of Australians and keep Australians safe.⁹

Australia’s spy agencies should receive substantial, public and democratic scrutiny. With the government considering further expanding their powers and scope, it is time to consider how robust Australia’s current accountability and oversight systems are.

Australia has taken different approaches to oversight of security agencies at different times, some triggered by particular scandals. Justice Robert Hope conducted two royal commissions into Australia’s national security agencies. The first Hope royal commission was called by Prime Minister Gough Whitlam, after a period of rising tensions between the Labor Government and ASIO in the 1970s over leaks of ASIO material to journalists and

⁶ Blackburn & McGarrity (2019) *Australia has enacted 82 anti-terror laws since 2001. But tough laws alone can’t eliminate terrorism*, <http://theconversation.com/australia-has-enacted-82-anti-terror-laws-since-2001-but-tough-laws-alone-cant-eliminate-terrorism-123521>; Renwick (2019) *Encryption and citizenship-stripping legislation: Are Australia’s latest security laws necessary and proportionate?*, <https://www.lowyinstitute.org/publications/encryption-and-citizenship-stripping-legislation-are-australia-s-latest-security-laws>

⁷ *Intelligence Services Act 2001* (Cth), sec.7; Probyn & Borys (2020) *Government considering bringing foreign cyber spy powers onshore to hunt Australian paedophiles*, <https://www.abc.net.au/news/2020-02-19/powers-for-asd-spy-dark-web-australians/11980728>

⁸ Smethurst (2018) *Spying shock: Shades of Big Brother as cyber-security vision comes to light*, <https://www.dailytelegraph.com.au/news/nsw/spying-shock-shades-of-big-brother-as-cybersecurity-vision-comes-to-light/news-story/bc02f35f23fa104b139160906f2ae709>

⁹ Remeikis (2018) *Peter Dutton denies plan to expand cyber spies’ powers – but says it would be good idea*, <https://www.theguardian.com/australia-news/2018/may/01/peter-dutton-denies-plan-to-expand-cyber-spies-powers-but-says-it-would-be-good-idea>

suspicious that ASIO was withholding information from the government.¹⁰ The second was called by Prime Minister Bob Hawke in the 1980s, after the Ivanov affair in which lobbyist and Labor figure David Combe was cultivated by Soviet diplomat and spy Valery Ivanov.¹¹ The formation of the first joint parliamentary committee with an intelligence oversight role followed the second Hope royal commission, although it was not one of Hope's recommendations.

All public agencies are ultimately accountable to the responsible ministers. In the Australian constitutional system as originally envisaged, the executive would then, by convention, be responsible to Parliament.¹²

However, in practice ministers control "the Parliament's agenda, its legislative program, order of business and even frequency of meeting".¹³

The parliamentary committee system represents a rare exception to the dominance of the executive in federal politics. In the 1960s, committees expanded beyond their previous focus on dealing with administrative matters to also conduct sensitive investigations. Reforms in 1987 introduced standing committees explicitly responsible for oversight of government agencies. And while the government may control the House of Representatives, Senate Estimates continues to serve as an important check on the government.¹⁴

It is in this context that Australia's Parliamentary Joint Committee on Intelligence and Security is particularly significant. It represents the main source of non-executive oversight over Australia's intelligence and national security agencies.

Prime Minister Bob Hawke in 1985 outlined his government's plans to introduce a parliamentary committee overseeing ASIO (what would expand to become the Parliamentary Joint Committee on Intelligence and Security). At the time, he acknowledged the important distinction between an independent oversight body and the oversight provided by a parliamentary committee, and noted that examples from other countries of parliamentary oversight informed the decision:

¹⁰ Stokes (n.d.) *A brief history of the Royal Commission on Intelligence and Security*, <http://www.naa.gov.au/collection/publications/papers-and-podcasts/intelligence-and-security/rcis-historyppaper.aspx>

¹¹ Maiden (2012) *Labor mates and the Russian spy*, <https://www.dailytelegraph.com.au/news/opinion/the-russian-spy-scandal-that-threatened-to-bring-down-the-hawke-government/news-story/79b9c2219d1d0990802afc9b2f42f2db>; National Archives of Australia (n.d.) *Parliament and government*, <http://www.naa.gov.au/collection/explore/cabinet/by-year/parliament-government.aspx>

¹² Chalmers & Davis (2000) *Relations Between the Parliament and the Executive*, https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp0001/01RP14

¹³ Chalmers & Davis (2000) *Relations Between the Parliament and the Executive*

¹⁴ Chalmers & Davis (2000) *Relations Between the Parliament and the Executive*

The Government accepts that these measures will be improved by the creation of the Office of Inspector-General. Nevertheless, it believes a further improvement can be obtained by directly involving the Parliament-on both sides and in both Houses-in imposing the discipline of an external scrutiny of the intelligence and security agencies quite independent of the Executive. While the Government has been conscious also of the need to carefully protect intelligence and security information, it believes that appropriate arrangements can be made to ensure that a small but informed parliamentary committee would operate effectively in the public interest. It notes, in this regard, relevant overseas experience of parliamentary scrutiny of intelligence and security agencies.¹⁵

The 2017 Independent Intelligence Review emphasised the importance of the committee, saying:

The PJCIS and its predecessors have played a critical role in overseeing Australia's intelligence agencies for around 30 years.¹⁶

Australia, Canada, New Zealand, the United Kingdom and the United States are the "Five Eyes": the English-speaking countries that cooperate in the interception of communications and electronic signals ("signals intelligence") and that share some intelligence (including human intelligence; the scope of the arrangement is not limited to signals intelligence).¹⁷

Since the five countries share intelligence, it makes sense for the countries to have similarly rigorous oversight regimes: they will be looking at some of the same intelligence and intelligence-gathering practices, which will raise the same ethical, strategic and democratic concerns in each country (and often similar legal concerns as well).

In comparing the intelligence committees of Five Eyes countries, we follow the lead of the 2017 Independent Intelligence Review, which in making its recommendations "considered the remits of Parliamentary Committees in the Five Eyes partners that have oversight of the activities of intelligence agencies, including their operations".¹⁸

¹⁵ Hawke (1985) *Royal Commission on Australia's Security and Intelligence Agencies: Report and Ministerial Statement*, <https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansard%2F1985-05-22%2F0059%22;src1=sm1>

¹⁶ L'Estrange & Merchant (2017) *2017 Independent Intelligence Review*, <https://www.pmc.gov.au/national-security/2017-independent-intelligence-review>

¹⁷ Blaxland (2018) *Explainer: how the Australian intelligence community works*, <http://theconversation.com/explainer-how-the-australian-intelligence-community-works-94422>; Cox (2012) *Canada and the Five Eyes Intelligence Community*, p. 10, <https://web.archive.org/web/20190214150000/http://cdfai.org.previewmysite.com/PDF/Canada%20and%20the%20Five%20Eyes%20Intelligence%20Community.pdf>

¹⁸ L'Estrange & Merchant (2017) *2017 Independent Intelligence Review*, p. 121

Our review shows that in some important ways Australia’s Parliamentary Joint Committee on Intelligence and Security, which is responsible for Australia’s parliamentary oversight of the intelligence community, has limited powers and scope compared to its counterparts in other Five Eyes countries.

TYPES OF INTELLIGENCE

The intelligence communities categorise intelligence based on its source; agencies may be responsible for collecting or analysing information from just one or a few categories.

Human intelligence or HUMINT is intelligence collected from human sources: people acquiring material like documents or photographs; contacts within foreign governments who pass on information; “overt collection” by overseas agents and “debriefing” people who have returned from travels abroad.¹⁹

Signals intelligence or SIGINT is intelligence collected from intercepted communications (radio or electronic) or other signals, e.g. information collected by radar.

Open source intelligence or OSINT refers to intelligence from public sources, like the media, the Internet, academic conferences or geospatial information (maps, nautical charts, satellite and aerial photography). Geospatial intelligence (GEOINT), foreign instrumentation signals intelligence (FISINT) and/or imagery intelligence (IMINT) are also sometimes treated as a separate category of intelligence.²⁰

TYPES OF OVERSIGHT

Several models of oversight have been proposed by political theorists and commentators. In this paper, “oversight” by a committee is used to mean that the overseen agency is accountable to the committee: the agency must (a) update the committee on relevant concerns, (b) provide further information when asked for it and (c) respond to the committee’s concerns by reviewing and – where necessary – changing its practices.²¹

¹⁹ Central Intelligence Agency (2013) *INTelligence: Human Intelligence*, <https://www.cia.gov/news-information/featured-story-archive/2010-featured-story-archive/intelligence-human-intelligence.html>

²⁰ Central Intelligence Agency (2013) *INTelligence: Signals Intelligence*, <https://www.cia.gov/news-information/featured-story-archive/2010-featured-story-archive/intelligence-signals-intelligence-1.html>; (2013) *INTelligence: Geospatial Intelligence*, <https://www.cia.gov/news-information/featured-story-archive/2010-featured-story-archive/geospatial-intelligence.html>; (2018) *INTelligence: Open Source Intelligence*, <https://www.cia.gov/news-information/featured-story-archive/2010-featured-story-archive/open-source-intelligence.html>

²¹ These consist of three of the four aspects of accountability as identified by Peter Barberis. Not all oversight mechanisms cover or should cover all four aspects (from Lord Sharman (2001) *Holding to Account: The*

A “typology” of parliamentary oversight committees appears in “Parliament and Accountability”, a NSW Parliament research paper by Gareth Griffith. While the specific examples in the report are from the NSW Parliament, the typology also effectively describes committees in other parliaments.

Table 1: Griffith’s typology of parliamentary oversight committees

| Type | Function | Mandate |
|---|---|---|
| Legislative review committees | Scrutinise government and other bills | Guard against legislative invasion of individual rights |
| Public accounts committees | Supervise public finance | Guard the public purse |
| Estimates committees | Examine the appropriations of government departments and agencies | Watchdogs over the executive |
| Other select standing committees | Scrutinise policy and administration | Watchdogs over the executive |
| Specialised oversight committees | Supervise independent investigatory bodies | Guard the guardians of integrity |

Source: Griffith (2005) *Parliament and Accountability: The Role of Parliamentary Oversight Committees*, pp. 11–12, <https://www.parliament.nsw.gov.au/researchpapers/Pages/parliament-and-accountability-the-role-of-parlia.aspx>

Under this scheme, Australia’s Parliamentary Joint Committee on Intelligence and Security is mostly “type 4” – a standing committee that scrutinises policy and administration. It also reviews some legislation, although in an ad hoc manner. As later discussed, estimates committees (“type 3”) do also serve an oversight function.

Review of Audit and Accountability for Central Government, p. 16, <https://afraraymond.files.wordpress.com/2014/06/lord-sharman-holding-to-account.pdf>)

OVERSIGHT BY OTHER BRANCHES OF GOVERNMENT

This report compares the main parliamentary committees with oversight of national security agencies in each country. It is worth noting that no country's intelligence oversight is exclusively parliamentary; executive and judicial oversight can also play a significant role.

Judicial oversight

Judicial oversight of national security is "limited and divergent" in the Five Eyes countries. In Australia, it includes merits reviews by the Administrative Appeals Tribunal of adverse security assessments from ASIO.²²

Ministerial oversight

Ministers are responsible for the intelligence agencies within their portfolio, and more specifically the use of some types of warrants and authorisations requires executive oversight. There are also executive review bodies, which exercise either "before the event" or "after the event" oversight.²³

In Australia, five ministers are responsible for the six intelligence agencies of the Australian Intelligence Community:²⁴

- The Prime Minister is responsible for the Office of National Intelligence (ONI)
- The Minister for Foreign Affairs is responsible for the Australian Secret Intelligence Service (ASIS)
- ASIO is within the Home Affairs portfolio, but the Attorney-General has oversight over its use of special powers (ASIO used to come under the Attorney-General)
- The Minister for Defence is responsible for the Australian Signals Directorate (ASD), the Defence Intelligence Organisation (DIO) and the Australian Geospatial-Intelligence Organisation (AGO), which are collectively known as the Defence Intelligence Agencies.

The other agencies and bodies of the National Intelligence Community come under the Minister for Home Affairs (Australian Federal Police; AUSTRAC; Australian Criminal Intelligence Commission).

²² Barker et al. (2017) *Oversight of intelligence agencies: a comparison of the Five Eyes nations*, p. 53, https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1718/OversightIntelligenceAgencies

²³ Barker et al. (2017) *Oversight of intelligence agencies: a comparison of the Five Eyes nations*, pp. 48–49

²⁴ ASIO (n.d.) *Ministerial and Parliamentary Oversight*, <https://www.asio.gov.au/ministerial-and-parliamentary-oversight.html>; IGIS (n.d.) *Ministerial Oversight*, <https://www.igis.gov.au/accountability/ministerial-oversight>

Independent agencies

Independent agencies are also responsible for some oversight across the Five Eyes, with Australia hosting some of the more powerful agencies.

Both Australia and New Zealand have an Inspector-General of Intelligence and Security, in each case responsible for “reviewing the operational activities of the intelligence agencies to ensure legal compliance and propriety”; their powers include conducting inquiries and carrying out inspections.²⁵

Where agencies in the National Intelligence Community have law enforcement functions, they may also come under the Australian Commission for Law Enforcement Integrity (ACLEI).²⁶

John Menadue has recommended the formation of a standing Royal Commission to supervise the intelligence agencies.²⁷

Australia’s Independent National Security Legislation Monitor (“INSLM”), founded in 2011, is responsible for reviewing the operation, effectiveness and implications of national security and counter-terrorism laws. The INSLM is an adaptation of the UK’s Independent Reviewer of Terrorism Legislation.²⁸

The INSLM warrants special mention because its area of responsibility – reviewing legislation – has traditionally been associated with the Parliament, and parliamentary committees more specifically. However, the scope of INSLM’s reviews and its powers of investigation are much broader than those of PJCIS.

The INSLM can conduct own motion reviews into the operation, effectiveness and implications of national security and counter-terrorism laws. The INSLM Act also requires certain reviews to take place, and the PJCIS can refer certain matters to the INSLM.²⁹

In addition, the Prime Minister and Attorney-General can refer any topic relating to counter-terrorism or national security to the INSLM. This is much broader than the scope of the INSLM’s own motion reviews.³⁰

²⁵ Barker et al. (2017) *Oversight of intelligence agencies: a comparison of the Five Eyes nations*, pp. 52–53

²⁶ See for e.g. ACIC (n.d.) *Governance*, <https://www.acic.gov.au/about-us/governance>

²⁷ Menadue (2020) *We need a standing Royal Commission to supervise our intelligence agencies*

²⁸ Renwick (2019) *Encryption and citizenship-stripping legislation: Are Australia’s latest security laws necessary and proportionate?*

²⁹ Renwick (2019) *Encryption and citizenship-stripping legislation: Are Australia’s latest security laws necessary and proportionate?*

³⁰ Renwick (2019) *Encryption and citizenship-stripping legislation: Are Australia’s latest security laws necessary and proportionate?*

The INSLM's powers of investigation go far beyond those PJCS has been given. The INSLM has "an entitlement to see everything of relevance, even the most highly classified intelligence material".³¹

INSLM reviews must be tabled in Parliament and provided to the Prime Minister and/or Attorney-General.³² Where a report contains sensitive material, a classified report is provided only to the Prime Minister and/or Attorney-General while the unclassified report is tabled in Parliament (and sometimes provided to PJCS ahead of time).³³

The previous INSLM, James Renwick, has given public comments and written extensively about the growing body of national security and anti-terrorism legislation, noting that 10% of those convicted of terrorism offences are children, and that the number of people who have received terrorism convictions is about equal to the number of anti-terrorism statutes that have been passed.³⁴ Renwick's term ended on 30 June 2020.

The INSLM's reports have had a significant impact. For example, the Counter-Terrorism Legislation Amendment Bill 2019 was in part prompted by the INSLM's report into the prosecution and sentencing of children for terrorism offences, although the report was not publicly available for part of the time that the bill was under consideration.³⁵

The INSLM's robust powers of investigation and the broad scope of topics that they can investigate make them an important oversight body. However, in some ways the INSLM has been given responsibilities and powers that in other jurisdictions belong to democratically elected parliamentarians.

³¹ Renwick (2019) *Encryption and citizenship-stripping legislation: Are Australia's latest security laws necessary and proportionate?*

³² INSLM (n.d.) *About the INSLM*, <https://www.inslm.gov.au/about>; (n.d.) *Statutory Functions*, <https://www.inslm.gov.au/statutory-functions>

³³ Renwick (2019) *Review of the operation, effectiveness and implications of terrorism-related citizenship loss provisions contained in the Australian Citizenship Act 2007*, <https://www.inslm.gov.au/sites/default/files/2019-11/INSLM%20Citizenship%20unclassified%20report%20FINAL.PDF>

³⁴ Renwick (2019) *Encryption and citizenship-stripping legislation: Are Australia's latest security laws necessary and proportionate?*

³⁵ ABC News (2019) *Laws for locking up underage terrorists need urgent changes, experts say*, <https://www.abc.net.au/news/2019-04-08/child-terrorism-sentencing-breaches-international-law/10979810>; Law Council of Australia (2019) *Counter-Terrorism Legislation Amendment Bill 2019 submission*, p. 5, <https://www.lawcouncil.asn.au/tags/submissions>; Porter (2019) *Counter-Terrorism Legislation Amendment Bill 2019 - Explanatory memorandum*, <https://www.legislation.gov.au/Details/C2019B00056/Explanatory%20Memorandum/Text>

Limits of judicial, ministerial and independent oversight

While executive (ministerial, departmental and independent) and judicial oversight of security and intelligence agencies is important, parliamentary oversight is also crucial. Parliamentarians are the public's most direct link to these agencies. And while there are significant benefits to having independent agencies, accountability should not be exclusively administrative or managerial, or quarantined from politics. Academic Diana Woodhouse, talking about accountability measures in the United Kingdom in this instance, puts it well:

There is, additionally, a 'risk of accountability arrangements by-passing Parliament in a welter of auditors, watchdogs, ombudsmen, inspectors and charters' and thus of accountability being detached from the political process.³⁶

Parliamentary committees also serve a different function to and probe different issues than executive or judicial bodies. A review by the Parliamentary Library of the parliamentary and independent bodies' abilities notes:

the parliamentary/congressional committees and independent bodies typically perform different types of oversight, so if only one of them has jurisdiction to look at matters beyond the core intelligence community, the ability to properly examine all such issues remains constrained.³⁷

The Parliamentary Library is talking in that instance about oversight over bodies with intelligence functions outside of the core intelligence agencies, but the observation that parliamentary committees and independent bodies typically perform different types of oversight has broader implications: it is not sufficient for an independent body to have broad oversight. Parliament should as well.

³⁶ The quote within Woodhouse's quote is from the UK's public administration committee; Woodhouse (2005) *Changing patterns of accountability in Westminster systems: a UK perspective*, <https://apo.org.au/node/853>

³⁷ Barker et al. (2017) *Oversight of intelligence agencies: a comparison of the Five Eyes nations*, p. 48

Intelligence oversight: structure and jurisdiction

Parliamentary oversight of intelligence agencies varies across the Five Eyes in terms of how parliamentary committees are structured and what topics they have jurisdiction over.

STRUCTURAL CONSIDERATIONS

Sets own work program: Parliamentary committees that set their own agenda and work program and choose which inquiries they conduct have the discretion to direct their own activities. The alternative is committees that are limited by legislation in what they can review; they may have to request that topics be directed to them by the executive, may have routine reviews (e.g. of new and sunseting legislation) or may have to request that other agencies conduct the reviews.

Committees that direct their own inquiries are better able to hold the executive and intelligence agencies to account because inquiries do not require executive approval to take place. They encourage responsible government, with the executive required to account to directly-elected representatives.

Includes all intelligence bodies: Parliamentary committees are either given oversight over specific intelligence agencies, or over particular intelligence issues that may be an aspect of the operations of many agencies, or a combination of the two. As other departments and agencies include intelligence functions, a parliamentary committee that is limited to oversight of core intelligence agencies may not have oversight over the intelligence community as a whole or all intelligence issues.

Intelligence committees have the specialisation to properly investigate all intelligence bodies and intelligence issues. Inquiries into broader intelligence issues are stunted if they can only look at some intelligence bodies. Finally, intelligence bodies outside of the core intelligence agencies can fall through the cracks between committee jurisdictions if they do not come under the jurisdiction of the intelligence committee.

Minor party members: Appointments to parliamentary committees occur through a variety of mechanisms. Some countries have a culture of appointing minor party or independent parliamentarians to their committees.

There is often bipartisan agreement between the Coalition and Labor Party on national security issues. In a 2017 paper for The Australia Institute, Dr Andrew Carr shows the extent of that bipartisanship, and the ways in which bipartisanship can limit creative and critical

thinking on security issues. Carr notes that it was a minor party, the Australian Greens, that forced parliamentary debate on the War in Afghanistan.³⁸

Minor party or independent parliamentarians on security committees may help provide different viewpoints, and provide comment outside of the bipartisanship that Australia’s major parties have prioritised.

Table 2: Parliamentarian oversight by structure

| | Australia | Canada | NZ | USA | UK |
|--|-----------|--------|---------|---------|------|
| Sets own work program/initiates inquiries | Partial | Yes | Partial | Yes | Yes |
| Includes all intelligence bodies | No | Yes | No | Yes | Most |
| Minor party members | No | Yes | Yes | Partial | Yes |

SCOPE CONSIDERATIONS

Operations/activities: In most of the legislation establishing the Five Eyes intelligence committees, the terms “operations” and “activities” are used but not defined. The two terms appear to be used similarly, with “operational activities” sometimes used instead of “operations”.

The Australian legislation distinguishes between *particular* operations, which the committee cannot consider, and activities, which the committee can consider if given permission by the minister (provided those activities do not involve *particular* operations).³⁹

An example of the distinction is a review the Australian committee began into how legislation should handle the case of using telecommunications data to identify a journalist’s source. This is an “activity” of intelligence agencies, and therefore required a referral (in this case from Attorney-General George Brandis), but since it was considering a hypothetical it did not run afoul of the ban on considering particular operations.

Administration: Administration can include the internal policies, management, organisational structure or similar of intelligence bodies. This can include annual reviews or ongoing audits.

Finances/budget: Expenditure is the financial topic most often reviewed by committees. This can involve annual reviews, approving funding arrangements, questioning bodies in Senate Estimates or other hearings, and the like.

³⁸ Carr (2017) *I’m here for an argument: Why bipartisanship on security makes Australia less safe*, <https://www.tai.org.au/content/here-argument-why-bipartisanship-security-makes-australia-less-safe>

³⁹ Emphasis added.

Policy/legislation: Committees are sometimes responsible for reviewing all proposed intelligence and national security legislation. In other cases, committees depend on proposed legislation being referred to them, or for the committee to be tasked with reviewing legislation that has been passed but with sunset clauses.

Table 3: Parliamentarian oversight by category

| | Australia | Canada | NZ | USA | UK |
|------------------------------|-----------|--------|-----|-----|-----|
| Operations/activities | No | Yes | No | Yes | Yes |
| Administration | Yes | Yes | Yes | Yes | Yes |
| Finances/budget | Yes | Yes | Yes | Yes | Yes |
| Policy/legislation | Yes | Yes | Yes | Yes | No |

Australia

INTELLIGENCE COMMUNITY AND COMMITTEE

The Australian Intelligence Community (AIC) consists of the six security and intelligence agencies:⁴⁰

- The Office of National Intelligence (ONI) coordinates and evaluates Australia's foreign intelligence activities and provides "all-source" international assessments to top-level figures. It replaced the Office of National Assessment in 2018, with ONI having additional responsibilities to coordinate the National Intelligence Community.
- The Australian Security Intelligence Organisation (ASIO) collects and assesses intelligence about threats to national security. ASIO is primarily a domestic security agency, although it cooperates with international security partners.⁴¹
- The Australian Secret Intelligence Service (ASIS) collects foreign, secret human intelligence and conducts counter-intelligence activities.
- The Australian Signals Directorate (ASD) collects, analyses and distributes foreign signals intelligence, advises on information security and responds to cyber incidents.
- The Defence Intelligence Organisation (DIO) is responsible for the Department of Defence's "all-source" intelligence assessment. It assesses the military capabilities, defence technologies and weapons systems of foreign countries and organisations.
- The Australian Geospatial-Intelligence Organisation (AGO) provides geospatial intelligence (information about geographic features and events).

The National Intelligence Community consists of:⁴²

- The six AIC agencies
- The Australian Criminal Intelligence Commission (ACIC), which collects criminal intelligence and works with law enforcement.
- The intelligence functions of:
 - The Australian Federal Police (AFP), which focuses on counter-terrorism, national and transnational crime, and national security.
 - The Australian Transaction Reports and Analysis Centre (AUSTRAC), which is responsible for stopping money laundering and terrorism financing.

⁴⁰ IGIS (n.d.) *The Australian Intelligence Community*, <https://www.igis.gov.au/australian-intelligence-community>; ONI (n.d.) *Role of the NIC Agencies*, <https://www.oni.gov.au/role-nic-agencies>

⁴¹ ASIO (n.d.) *ASIO*, <https://www.asio.gov.au/vi/node/522.html>

⁴² ONI (n.d.) *The National Intelligence Community*, <https://www.oni.gov.au/national-intelligence-community>; (n.d.) *Role of the NIC Agencies*

- The Department of Home Affairs, which is responsible for intelligence on border threats and for intelligence to guide where resources should be allocated.

It is fair to note that the AIC is a closed community, boundaried by security classification conventions that effectively prevent any broader accountability or disclosure. It is largely self-referential, and while there is some mobility within and between the agencies that constitute the AIC, it is in most senses of the term a closed shop.

Australia's Parliamentary Joint Committee on Intelligence and Security is an 11-member committee formed by the *Intelligence Services Act 2001* (Cth). It is made up of 5 Senators and 6 members of the House of Representatives; the majority of committee members must be members of the Government.⁴³

The committee has existed since 1988, when it was responsible for supervising ASIO only. From 2005, it has had its current form and name.⁴⁴

In 2017, the Independent Intelligence Review made a number of recommendations for reforms to the committee and other aspects of Australia's intelligence oversight. These recommendations are discussed further below.

STRUCTURE

Does not set own work program/initiate inquiries: The committee can review any matter relating to an AIC agency referred to it by the relevant minister or the House of Representatives or the Senate (within the limits set by legislation, including most significantly that the committee may not review particular operations). It can also request that the minister refer a matter to them for inquiry; the minister can decline. So far, most inquiries the committee has conducted were referred to it by the minister and concerned legislative reforms.⁴⁵

Otherwise, the committee is limited to initiating inquiries into administration and expenditure only.⁴⁶

⁴³ *Intelligence Services Act 2001* (Cth), schedule 1

⁴⁴ Grayson (2018) *Intelligence committee: 'powerful', or toothless tiger?*,

<https://www.aspistrategist.org.au/intelligence-committee-powerful-or-toothless-tiger/>

⁴⁵ Barker et al. (2017) *Oversight of intelligence agencies: a comparison of the Five Eyes nations*, pp. 12–13; see also Faulkner (2014) *Surveillance, Intelligence and Accountability: An Australian Story*, pp. 44–45, <https://apo.org.au/node/41934>

⁴⁶ Barker et al. (2017) *Oversight of intelligence agencies: a comparison of the Five Eyes nations*, p. 51

The committee may only conduct a review in public with the approval of all relevant ministers.⁴⁷

In 2014, Senator John Faulkner, a former chair of the committee, recommended expanding the committee's powers to include initiating inquiries and setting its own work program, which would bring it in line with equivalent committees in the US and UK.⁴⁸

In 2015 and again in 2016, Senator Penny Wong introduced the Parliamentary Joint Committee on Intelligence and Security Amendment Bill. If passed, it would allow the committee to conduct inquiries after consultation with the relevant minister for that agency; it would not remove the ban on reviewing particular operations.⁴⁹

The 2017 Independent Intelligence Review recommended that the powers of the committee be expanded to include own-motion inquiries into administration and expenditure of the agencies and into proposed and expiring legislation. The review considered whether the committee's role should be expanded to own-motion inquiries into operational activities, but concluded it this "is not required to ensure agencies are operating effectively, legally and with propriety".⁵⁰

The review argued that, with the exception of New Zealand, none of the other Five Eyes countries has an equivalent to the Australian Inspector-General of Intelligence and Security (IGIS). Allowing the intelligence committee to conduct its own inquiries into intelligence operations could duplicate work. The review preferred strengthening the connections between the IGIS and the committee, among other IGIS reforms.⁵¹

However, there is still a case to be made for the committee's powers to be expanded, regardless of whether IGIS reforms are implemented. Duplication of effort could be avoided with communication between the IGIS and the parliamentary committee.

Amendments proposed by Senator Rex Patrick in 2018 would allow the committee to initiate inquiries into activities, as well as existing powers to initiate inquiries into administration and expenditure. In conjunction with removing other limitations on reviewing operational matters, the amendment would allow the committee to set its own work program, including inquiring into operations. The bill is currently on the notice paper for the 46th Parliament.⁵²

⁴⁷ *Intelligence Services Act 2001* (Cth), schedule 1, s 20(2)

⁴⁸ Faulkner (2014) *Surveillance, Intelligence and Accountability: An Australian Story*, pp. 44–45

⁴⁹ Barker et al. (2017) *Oversight of intelligence agencies: a comparison of the Five Eyes nations*, pp. 19–20

⁵⁰ L'Estrange & Merchant (2017) *2017 Independent Intelligence Review*, p. 123

⁵¹ L'Estrange & Merchant (2017) *2017 Independent Intelligence Review*, pp. 123–125

⁵² Intelligence Services Amendment (Enhanced Parliamentary Oversight of Intelligence Agencies) Bill 2018, p. 3, https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=s1140

Does not include all intelligence bodies: The committee is limited to the six agencies that make up the AIC and to parts of the AFP's operations, and does not cover the other three organisations that make up the NIC.⁵³ As discussed under Finances/budget below, other Senate committees may have jurisdiction over these agencies under the Senate Estimates process, but questions about most of these agencies are fielded by the departmental head, and Senate Estimates is a powerful but limited tool.

The 2017 Independent Intelligence Review recommended expanding the committee's jurisdiction to include all 10 intelligence agencies, not just the AIC.⁵⁴ It noted that there are already parliamentary committees with oversight over some of the other agencies, with the Parliamentary Joint Committee on Law Enforcement in particular having oversight over the AFP and the ACIC; if the committee's jurisdiction were expanded, duplication of oversight responsibilities would have to be addressed. The review recommends oversight of the AFP, ACIC and DIBP be limited to their intelligence functions.⁵⁵

There is precedent for expanding the scope of the committee. Between its creation in 1986 and 2001, the committee's remit was limited to ASIO. Legislation extended the jurisdiction to ASIS and what is now the Australian Signals Directorate in 2001, and to DIO, ONA and what is now AGO in 2005.⁵⁶

No minor party members: Members of the committee are appointed by resolutions of the House (for members of the House of Representatives) and Senate (for senators), as nominated by the Government. The Government must consult with leaders of recognised political parties before making their nominations.⁵⁷

The committee is limited to members of "recognised political parties" and should to some extent reflect representation in the Parliament; together these requirements have typically had the effect of excluding minor party members and independents.⁵⁸ The exception is independent MP Andrew Wilkie, who was nominated by Prime Minister Julia Gillard in 2010 and sat on the committee until 2013.⁵⁹

⁵³ *Intelligence Services Act 2001* (Cth), part 4

⁵⁴ Barker et al. (2017) *Oversight of intelligence agencies: a comparison of the Five Eyes nations*, p. 20

⁵⁵ L'Estrange & Merchant (2017) *2017 Independent Intelligence Review*, pp. 115–117

⁵⁶ L'Estrange & Merchant (2017) *2017 Independent Intelligence Review*, pp. 112–113

⁵⁷ *Intelligence Services Act 2001* (Cth), part 3

⁵⁸ *Intelligence Services Act 2001* (Cth), schedule 1; Bergin & Grayson (2019) *Intelligence oversight or out of sight? Recommendations for legislative review*, <https://www.aspistrategist.org.au/intelligence-oversight-or-out-of-sight-recommendations-for-legislative-review/>; Lewis & Samios (2019) *Cabinet agrees to probe into press freedom*, <https://www.theaustralian.com.au/nation/politics/alp-push-for-press-freedom-committee/news-story/314162de8da318ba97c829f80a098cbd>

⁵⁹ Grayson (2018) *Intelligence committee: 'powerful', or toothless tiger?*; Welch (2010) *Wilkie to oversee agencies*, <https://www.smh.com.au/national/wilkie-to-oversee-agencies-20101117-17xtg.html>

Greens Senator Nick McKim has proposed an amendment that would require one committee member to be a crossbencher. The amendment lapsed at the end of the last parliament, when the bill it was proposed to amend lapsed.⁶⁰

SCOPE

Operations/activities: The committee cannot review *particular* operations that have been undertaken, are being undertaken or are proposed to be undertaken; or intelligence gathering, assessment priorities, sources of information or operational methods. They cannot review complaints about individual activities.⁶¹

The one exception is that the committee can review retained metadata by ASIO and the AFP.⁶²

The committee can request that the minister refer a matter “in relation to the activities” of the AIC to the committee, however the existing prohibition on reviewing particular operations or potential operations would presumably still apply.⁶³

The Parliamentary Library finds that committee inquiries into “matters relating to the activities of an AIC agency” have “almost all” concerned proposed legislative reforms.⁶⁴

Senator John Faulkner considered, but did not explicitly recommend, the possibility of expanding the committee’s remit to include past operations.⁶⁵

In 2019, security analysts Anthony Bergin, a senior fellow at the Australian Strategic Policy Institute, and Kate Grayson, who has researched the parliamentary oversight of Australia’s security agencies in depth, recommended allowing the PJCIS to analyse operations and conduct its own inquiries.⁶⁶

Senator Rex Patrick has proposed a “major enhancement of the PJCIS’s mandate” that would remove most of the current limitations on the committee’s inquiries.⁶⁷ The committee would be permitted to review operations and activities, including ongoing

⁶⁰ Barker et al. (2017) *Oversight of intelligence agencies: a comparison of the Five Eyes nations*, p. 20
https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=s1011

⁶¹ *Intelligence Services Act 2001* (Cth), s 29, <https://www.legislation.gov.au/Details/C2018C00160>

⁶² L’Estrange & Merchant (2017) *2017 Independent Intelligence Review*, p. 112

⁶³ *Intelligence Services Act 2001* (Cth), s 29

⁶⁴ Barker et al. (2017) *Oversight of intelligence agencies: a comparison of the Five Eyes nations*

⁶⁵ Faulkner (2014) *Surveillance, Intelligence and Accountability: An Australian Story*, p. 43

⁶⁶ Bergin & Grayson (2019) *Intelligence oversight or out of sight? Recommendations for legislative review*

⁶⁷ Patrick (2018) *Intelligence Services Amendment (Enhanced Parliamentary Oversight of Intelligence Agencies) Bill 2018: Explanatory memorandum*,
https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=s1140

operations. However, where the review could interfere with an ongoing operation, the minister would have the power to require the review to cease.⁶⁸

Administration/policy and finances/budget: The committee reviews administration and expenditure of the six AIC agencies; these take the form of annual reviews, which are tabled and published.⁶⁹

ASIO is the only agency that releases an unclassified annual report. The existence of submissions from the other agencies to the committee's annual review is acknowledged, but the contents of the submissions are confidential.

The committee's annual review includes some financial details and some concerns raised by the agencies or their auditors, as well as other matters arising including use of ASIO's special powers, accommodation, language training, recruitment, diversity programs, and so on. In financial year 2017, ASIO's funding was \$445 million, ASIS' was \$276 million and ONA's was \$25 million. The three Defence Intelligence Agencies' budgets are not reported, but they are within the Strategic Policy and Intelligence Program, which had "departmental outputs" of \$973 million. Together, this represents around \$1.7 billion in annual funding.⁷⁰

Three Senate standing committees have jurisdiction over intelligence agencies in the Senate Estimates process: the Legal and Constitutional Affairs Legislation Committee, the Foreign Affairs, Defence and Trade Legislation Committee and the Finance and Public Administration Legislation Committee. In practice, only ASIO routinely appears before these committees; questions about other agencies are addressed by the department leads.⁷¹

Policy/legislation: The committee reviews the operation, effectiveness and implications of parts of national security legislation.⁷²

The 2017 Independent Intelligence Review recommended that the PJCIS role be expanded, including to consider counter-terrorism and national security legislation.⁷³

⁶⁸ Full details, including appeal mechanisms, in Intelligence Services Amendment (Enhanced Parliamentary Oversight of Intelligence Agencies) Bill 2018, p. 3

⁶⁹ *Intelligence Services Act 2001* (Cth), s 29, <https://www.legislation.gov.au/Details/C2018C00160>; Barker et al. (2017) *Oversight of intelligence agencies: a comparison of the Five Eyes nations*, pp. 12–13

⁷⁰ PJCIS (2018) *Review of Administration and Expenditure*, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Intelligence_and_Security/AandENo16/Report_1

⁷¹ Barker et al. (2017) *Oversight of intelligence agencies: a comparison of the Five Eyes nations*, p. 14

⁷² *Intelligence Services Act 2001* (Cth), s 29, <https://www.legislation.gov.au/Details/C2018C00160>

⁷³ L'Estrange & Merchant (2017) *2017 Independent Intelligence Review*, p. 22

RELEVANT RECOMMENDATIONS OF THE 2017 INDEPENDENT INTELLIGENCE REVIEW

The 2017 Independent Intelligence Review was conducted by Michael L'Estrange and Stephen Merchant at the behest of then Prime Minister Malcolm Turnbull. L'Estrange is a former public servant at Department of Prime Minister and Cabinet and was head of the ANU's National Security College between 2009 and 2014. Merchant is a former public servant who worked in the Australian intelligence community. The Independent Intelligence Review made two recommendations to increase the scope and powers of the Parliamentary Joint Committee on Intelligence and Security.

Recommendation 21 is for the committee's oversight role to be expanded to the 10 agencies in Australia's National Intelligence Community, not just the six core intelligence agencies of the Australian Intelligence Community.⁷⁴

Recommendation 23 is for the committee to:⁷⁵

- be enabled to request that the Inspector-General of Intelligence and Security conduct an inquiry into the legality and propriety of particular operational activities;
- be enabled to review proposed reforms to counter-terrorism and national security legislation and to review all such expiring legislation;
- be allowed to initiate its own inquiries into administration and expenditure of the 10 National Intelligence Community agencies (not just the six Australian Intelligence Community agencies), and into proposed and expiring legislation;
- be enabled to request briefings from the Independent National Security Legislation Monitor;
- receive regular separate briefings by the Director-General of the Office of National Security and the Inspector-General of Intelligence and Security.

Several of the review's recommendations relating to the ONI's leadership role, making the ASD a separate statutory agency and funding to expand the IGIS have been legislated. However, the recommendations to expand the IGIS's role and to expand the Parliamentary Joint Committee on Intelligence and Security's jurisdiction and powers are yet to be legislated.⁷⁶

⁷⁴ L'Estrange & Merchant (2017) *2017 Independent Intelligence Review*, p. 21

⁷⁵ L'Estrange & Merchant (2017) *2017 Independent Intelligence Review*, p. 22

⁷⁶ Barker (2019) *Intelligence community reforms*,

https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/BriefingBook46p/IntelligenceCommunity

In February 2020, Senator Jenny McAllister sponsored a private member's bill that would implement recommendations of the Independent Intelligence Review. At the time of writing, it has been referred to committee.⁷⁷

⁷⁷ McAllister (2020) *Intelligence and Security Legislation Amendment (Implementing Independent Intelligence Review) Bill 2020*,
https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=s1256

Canada

INTELLIGENCE COMMUNITY AND COMMITTEE

Canada's four main intelligence agencies are:

- the Communications Security Establishment, the foreign signals agency;
- Canadian Security Intelligence Service, a mostly human-source agency;
- Canadian Forces Intelligence Command, the defence intelligence agency; and
- Royal Canadian Mounted Police, the federal law enforcement agency.

More broadly, Canada's national security community includes 17 federal institutions that collect information for national security purposes and 21 departments and agencies with counter-terrorism responsibilities.

Since 2017, there has been a dedicated committee for national security and intelligence issues: the National Security and Intelligence Committee of Parliamentarians. It is a committee of parliamentarians, but not a parliamentary committee – it is appointed by and administered by the executive. Parliamentary privilege does not cover information the members learn during their committee work. The Canadian committee's findings and recommendations are tabled in Parliament, but reviewed first by the government for classified information.⁷⁸

The significance of parliamentary privilege can be seen from Australian MP Andrew Hastie's comments last year, made under privilege, about Chinese Communist Party bribery concerns. Hastie confirmed the information with US authorities while he was leading a delegation as chair of Australia's intelligence parliamentary committee.⁷⁹ Presumably, as information learned during committee work, the information would not have been privileged had Hastie been a Canadian politician on the Canadian committee.

Canada does have parliamentary committees with broad remits that include national security; they address national security "in an episodic manner". There are also occasional

⁷⁸ Barker et al. (2017) *Oversight of intelligence agencies: a comparison of the Five Eyes nations*, p. 28; Government of Canada (2017) *National Security and Intelligence Committee of Parliamentarians*, <https://web.archive.org/web/20170604002816/http://news.gc.ca/web/article-en.do?mthd=index&crtr.page=1&nid=1085649>

⁷⁹ Karp (2018) *Andrew Hastie's use of US intelligence over bribery allegation "a concern", Dreyfus says*, <https://www.theguardian.com/australia-news/2018/may/24/andrew-hasties-use-of-us-intelligence-over-bribery-allegation-a-concern-dreyfus-says>; Remeikis & Murphy (2018) *Chinese-Australian billionaire involved in UN bribery case, MP claims*, <https://www.theguardian.com/world/2018/may/22/chinese-australian-billionaire-involved-in-un-bribery-case-mp-claims>

special parliamentary committees formed.⁸⁰ Where this brief refers to Canada’s committee, it means the National Security and Intelligence Committee of Parliamentarians, not the parliamentary committees that have some jurisdiction on security.

STRUCTURE

Sets own work program/initiates inquiries⁸¹

Includes all intelligence bodies: The committee’s mandate is to review “any activity carried out by a department that relates to national security or intelligence” (apart from some ongoing operations).⁸²

Minor party members: Members of the committee are appointed by the Governor on the Prime Minister’s recommendation, after consultation.⁸³

The committee includes Liberal and Conservative members, as well as a New Democratic Party and one independent (formerly of the New Democratic Party) senator.⁸⁴

SCOPE

Operations/activities: The committee can review any activity “carried out by a department” relating to national security or intelligence, other than ongoing operations where the minister “determines that the review would be injurious to national security”; it can also consider any security matter that a minister refers to the committee.⁸⁵

Administration/policy: The committee reviews the administrative “framework” for national security and intelligence.⁸⁶

⁸⁰ Barker et al. (2017) *Oversight of intelligence agencies: a comparison of the Five Eyes nations*, pp. 24–25, 27–28

⁸¹ Barker et al. (2017) *Oversight of intelligence agencies: a comparison of the Five Eyes nations*, p. 51

⁸² *National Security and Intelligence Committee of Parliamentarians Act 2017* (Canada), s 8(1), <https://laws-lois.justice.gc.ca/eng/acts/N-16.6/FullText.html>

⁸³ *National Security and Intelligence Committee of Parliamentarians Act 2017* (Canada), s 5

⁸⁴ The committee has other independent senators who formerly belonged to either the Liberals or the Conservatives. National Security and Intelligence Committee of Parliamentarians (n.d.) *Committee Members*, <http://www.nsicop-cpsnr.ca/committee-members-membres-du-comite-en.html>

⁸⁵ *National Security and Intelligence Committee of Parliamentarians Act 2017* (Canada), s 8(1), https://laws-lois.justice.gc.ca/eng/annualstatutes/2017_15/page-1.html

⁸⁶ *National Security and Intelligence Committee of Parliamentarians Act 2017* (Canada), s 8(1), https://laws-lois.justice.gc.ca/eng/annualstatutes/2017_15/page-1.html

Finances/budget: The committee reviews the financial “framework” for national security and intelligence.⁸⁷

Regulation/legislation: The committee reviews the legislative, regulatory and policy “framework” for national security and intelligence.⁸⁸

⁸⁷ *National Security and Intelligence Committee of Parliamentarians Act 2017* (Canada), s 8(1), https://laws-lois.justice.gc.ca/eng/annualstatutes/2017_15/page-1.html

⁸⁸ *National Security and Intelligence Committee of Parliamentarians Act 2017* (Canada), s 8(1), https://laws-lois.justice.gc.ca/eng/annualstatutes/2017_15/page-1.html

New Zealand

INTELLIGENCE COMMUNITY AND COMMITTEE

The New Zealand Intelligence Community consists of:⁸⁹

- the New Zealand Security Intelligence Service, which conducts human intelligence;
- the Government Communications Security Bureau, which conducts signals intelligence, information assurance and cybersecurity
- the National Assessments Bureau (within the Department of Prime Minister and Cabinet).

Other departments and agencies also have intelligence capabilities.⁹⁰

New Zealand's Intelligence and Security Committee has provided parliamentary oversight since 1996. While the NZ House of Representatives retains the power to hold inquiries, in practice it prohibits committees other than the Intelligence and Security Committee from examining intelligence and security agencies.⁹¹

STRUCTURE

Does not set own work program/initiate inquiries: The committee can initiate inquiries into agencies' policies, administration and expenditure, but depends on referrals from the House of Representatives for inquiries outside of that scope.⁹²

Does not include all intelligence bodies: The committee's functions are limited to examining the intelligence and security agencies, which are defined as the New Zealand Security Intelligence Service and the Government Communications Security Bureau.⁹³

Minor party members: Both the Prime Minister and the Opposition Leader can appoint members to the committee, after consultation with other parties in government (by the Prime Minister) or other parties not in government (by the Opposition Leader).⁹⁴

⁸⁹ Barker et al. (2017) *Oversight of intelligence agencies: a comparison of the Five Eyes nations*, p. 31

⁹⁰ Barker et al. (2017) *Oversight of intelligence agencies: a comparison of the Five Eyes nations*, p. 31

⁹¹ Barker et al. (2017) *Oversight of intelligence agencies: a comparison of the Five Eyes nations*, p. 33

⁹² Barker et al. (2017) *Oversight of intelligence agencies: a comparison of the Five Eyes nations*, p. 51

⁹³ *Intelligence and Security Act 2017* (NZ), s 4, 193,

http://www.legislation.govt.nz/act/public/2017/0010/latest/whole.html?search=ts_act%40bill%40regulation%40deemedreg_intelligence_resele_25_a&p=1#DLM6920830

⁹⁴ *Intelligence and Security Act 2017* (NZ), s 194

The committee includes the NZ First leader Winston Peters and the Greens co-leader James Shaw, as well as Labour and National MPs.⁹⁵

SCOPE

Operations/activities: The committee cannot consider matters “relating directly to the activities of an intelligence and security agency” or inquire into operationally sensitive matters, including any intelligence collection and production methods.⁹⁶

Administration/policy: The committee’s functions include examining the administration and policy of each intelligence and security agency.⁹⁷

Finances/budget: The committee’s functions include examining the expenditure of each intelligence and security agency.⁹⁸

Regulation/legislation: The committee’s functions include considering bills, petitions and other matters referred to it by the House of Representatives.⁹⁹

⁹⁵ NZ Herald (2018) *Greens promise to behave on Intelligence and Security committee*, https://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=11986358

⁹⁶ *Intelligence and Security Act 2017* (NZ), s 193

⁹⁷ *Intelligence and Security Act 2017* (NZ), s 193

⁹⁸ *Intelligence and Security Act 2017* (NZ), s 193

⁹⁹ *Intelligence and Security Act 2017* (NZ), s 193

United Kingdom

INTELLIGENCE COMMUNITY AND COMMITTEE

The United Kingdom's intelligence community ("the Agencies") consists of:¹⁰⁰

- the Secret Intelligence Service (SIS/MI6), which "collects secret foreign intelligence";
- the Security Service (MI5), which is responsible for "protecting the UK against covertly organised threats to national security"; and
- Government Communications Headquarters, which intercepts communications.

Intelligence functions are also performed within government departments, including defence intelligence, counter-terrorism, and so on.

The United Kingdom's Intelligence and Security Committee was formed as a committee of parliamentarians in 1994; it was given more powers and turned into a parliamentary committee in 2013 (see Canada's section for more information on the distinction between committees of parliamentarians and parliamentary committees).

STRUCTURE

Sets own work program/initiates inquiries¹⁰¹

Includes most intelligence bodies: By statute, since 2013 the committee has been responsible for overseeing "the Agencies".¹⁰²

The legislation also allows for the committee to examine and oversee other intelligence and security activities, provided they are covered in memoranda of understanding. The committee now "takes an interest in" Defence Intelligence, the Joint Intelligence Committee (an interagency coordination body analogous to Australia's ONI) and law enforcement agencies. This covers most, but not all, of the UK's intelligence community.¹⁰³

¹⁰⁰ Barker et al. (2017) *Oversight of intelligence agencies: a comparison of the Five Eyes nations*, p. 39

¹⁰¹ Faulkner (2014) *Surveillance, Intelligence and Accountability: An Australian Story*, pp. 44–45; see also Barker et al. (2017) *Oversight of intelligence agencies: a comparison of the Five Eyes nations*, p. 51

¹⁰² *Justice and Security Act 2013* (UK), c 18 Part 1, <http://www.legislation.gov.uk/ukpga/2013/18/contents>

¹⁰³ *Justice and Security Act 2013* (UK), c 18 Part 1; Barker et al. (2017) *Oversight of intelligence agencies: a comparison of the Five Eyes nations*, p. 40

Minor party members: The committee is chaired by an independent MP, Julian Lewis (formerly of the Conservative Party), and has a Scottish National Party MP member, as well as Labor and Conservative members.¹⁰⁴

Members are nominated by the Prime Minister, then appointed by their house of parliament.¹⁰⁵

SCOPE

Operations/activities: The committee can examine or oversee the operations of “the Agencies” (and other bodies if there’s a memorandum of understanding). However, it must fall in one of three categories:¹⁰⁶

- (a) the matter is of significant national interest and not part of an ongoing operation,
- (b) the Prime Minister referred the matter to the committee, or
- (c) the committee only considers information voluntarily provided by “the Agencies”.

Administration/policy: The committee can examine or oversee the policy and administration of “the Agencies”.¹⁰⁷

Finances/budget: The committee can examine or oversee the expenditure of “the Agencies”.¹⁰⁸

Legislation: The committee does not appear to be responsible for overseeing national security and intelligence legislation.

¹⁰⁴ Intelligence and Security Committee of Parliament (n.d.) *Committee Members*, <http://isc.independent.gov.uk/committee-members>

¹⁰⁵ *Justice and Security Act 2013* (UK), part 1

¹⁰⁶ *Justice and Security Act 2013* (UK), s 2

¹⁰⁷ *Justice and Security Act 2013* (UK), s 2

¹⁰⁸ *Justice and Security Act 2013* (UK), s 2

United States

INTELLIGENCE COMMUNITY AND COMMITTEES

The United States Intelligence Community consists of 17 “elements”:¹⁰⁹

- the Office of the Director of National Intelligence,
- the Central Intelligence Agency,
- eight bodies in the Department of Defence, and
- seven bodies in other departments

The Senate Select Committee on Intelligence and House Permanent Select Committee on Intelligence were formed in the 1970s.

As noted by the CIA, “All Members of Congress have access to intelligence by virtue of their elected positions. They do not receive security clearances per se”. However, in practice, committees wholly outside of intelligence do not receive intelligence publications or a list of publications they could choose from. The two intelligence committees have electronic access to most “finished intelligence” (reports, etc). Other committees that cover aspects of intelligence include Appropriation, Armed Services, Judiciary and Homeland Security committees. These committees receive access to some intelligence by default, and must request other intelligence from lists provided to them.¹¹⁰

This broad, if sometimes nominal, access to intelligence for all parliamentarians seems to be distinctive to the United States, a consequence of how the separation of powers is arranged in its constitution. It must be noted that in practice members of Congress have had requests for information denied or ignored, and in other cases senators knew significant national security information but were prohibited by law from disclosing it.¹¹¹

¹⁰⁹ Miles (2016) *The US Intelligence Community: Selected cross-cutting issues*, p. 2, <https://fas.org/sgp/crs/intel/R44455.pdf>

¹¹⁰ Home Affairs Committee (2014) *Seventeenth report: Counter-terrorism*, <https://publications.parliament.uk/pa/cm201314/cmselect/cmhaff/231/23102.htm>; Barker et al. (2017) *Oversight of intelligence agencies: a comparison of the Five Eyes nations*, p. 47; Haas (2019) *Rules of the House of Representatives: 116th Congress*, pt. X:2, 3(m), 11, <https://naturalresources.house.gov/imo/media/doc/116-House-Rules-Clerk.pdf>; Snider (1997) *Sharing Secrets with Lawmakers: Congress as a User of Intelligence*, chap. III, <https://www.cia.gov/library/center-for-the-study-of-intelligence/csi-publications/books-and-monographs/sharing-secrets-with-lawmakers-congress-as-a-user-of-intelligence/3.htm>

¹¹¹ Greenwald (2013) *Members of Congress denied access to basic information about NSA*, <https://www.theguardian.com/commentisfree/2013/aug/04/congress-nsa-denied-access>

STRUCTURE

Sets own work program/initiates inquiries: Both Senate and House Intelligence Committees “set their own work programs, conduct hearings, receive evidence on oath, and engage in a range of detailed work to assist the performance and accountability of the US intelligence community”.¹¹²

Includes all intelligence bodies: Congress oversees all agencies in the US Intelligence Community, as do the Senate and House of Representatives Intelligence Committees.¹¹³

Partially includes minor party members: The US Congress contains a Libertarian MP (formerly Republican and independent) and an independent MP (who caucuses with the Democrats). It also has two independent senators who caucus with the Democrats.

Parties put forward “rosters” to fill their allocated seats on a committee; these rosters sometimes include independent members.¹¹⁴ Senator Angus King, who caucuses with the Democrats, is a member of the Senate Intelligence Committee as part of the Democrats’ allocation.¹¹⁵

SCOPE

Operations/activities: The Senate Intelligence Committee meets twice weekly, typically in closed sessions, to hear testimony from intelligence community officials. The topics include “agency activities, intelligence collection programs, and intelligence analysis on a geographic region or issue”.¹¹⁶

The House Intelligence Committee reviews and studies the programs and activities of the intelligence community;¹¹⁷ the House Committee on Homeland Security reviews and studies “all Government activities relating to homeland security”.¹¹⁸

Administration/policy: The Senate Intelligence Committee has dedicated staff responsible for audits and oversight. The Senate Intelligence Committee also considers and makes

¹¹² Faulkner (2014) *Surveillance, Intelligence and Accountability: An Australian Story*, pp. 44–45; see also Barker et al. (2017) *Oversight of intelligence agencies: a comparison of the Five Eyes nations*, p. 51

¹¹³ Barker et al. (2017) *Oversight of intelligence agencies: a comparison of the Five Eyes nations*, p. 47; Haas (2019) *Rules of the House of Representatives: 116th Congress*, pt. X:2, 3(m), 11

¹¹⁴ U.S. Senate (n.d.) *Senate Committees*,
<https://www.senate.gov/artandhistory/history/common/briefing/Committees.htm>

¹¹⁵ U.S. Senate (n.d.) *Select Committee on Intelligence*,
https://www.senate.gov/general/committee_membership/committee_memberships_SLIN.htm

¹¹⁶ US Senate Select Committee on Intelligence (n.d.) *About the Committee*,
<https://www.intelligence.senate.gov/about>

¹¹⁷ Haas (2019) *Rules of the House of Representatives: 116th Congress*, sec. X: 3(m), 11

¹¹⁸ Haas (2019) *Rules of the House of Representatives: 116th Congress*, sec. X: 3(g)

recommendations to the Senate on nominees to intelligence positions that require Senate confirmation.¹¹⁹

Senate and House Committees on Homeland Security are responsible for the organisation, administration and general management of the Department of Homeland Security.¹²⁰

Finances/budget: The Senate Intelligence Committee is responsible for the annual legislation that caps agency funding.¹²¹ Appropriations must also pass the House.¹²²

Regulation/legislation: The Senate Intelligence Committee considers stand-alone legislation and reviews intelligence aspects of treaties during the Senate ratification process.¹²³

The House of Representatives Standing Committee on Homeland Security is responsible for reviewing homeland security and domestic terrorism legislation.¹²⁴ Laws on a number of national security issues are referred to the House of Representatives Standing Committee on the Judiciary.¹²⁵ Otherwise, the House Intelligence Committee reviews the laws of the intelligence community.¹²⁶

¹¹⁹ US Senate Select Committee on Intelligence (n.d.) *About the Committee*

¹²⁰ Haas (2019) *Rules of the House of Representatives: 116th Congress*, sec. X: 1(j)

¹²¹ US Senate Select Committee on Intelligence (n.d.) *About the Committee*

¹²² Haas (2019) *Rules of the House of Representatives: 116th Congress*, sec. X: 11(i)

¹²³ US Senate Select Committee on Intelligence (n.d.) *About the Committee*

¹²⁴ Haas (2019) *Rules of the House of Representatives: 116th Congress*, pt. X: 1(j)

¹²⁵ Haas (2019) *Rules of the House of Representatives: 116th Congress*, sec. X: 1(l)

¹²⁶ Haas (2019) *Rules of the House of Representatives: 116th Congress*, sec. X: 3(m), 11

Conclusion

Australia lags behind its partners in the Five Eyes when it comes to parliamentary oversight of security agencies.

Most significantly, the parliamentary committees in the United States and United Kingdom and the committee of parliamentarians in Canada have oversight over operational matters and activities, something that the parliamentary committees in Australia and New Zealand lack.

Proposals to expand the Parliamentary Joint Committee on Intelligence and Security's powers and oversight areas should be pursued. They would help bring Australia's parliamentary oversight into line with that of its Five Eyes partners.