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Implementing Australia's *Comprehensive Review of the Legal Framework of the National Intelligence Community* : A need for future review, reform and improvement of implementation and enactment processes?

Greg Carne*

1. Introduction

This article analyses and critiques the process of implementation in Australia of the *Comprehensive Review of the Legal Framework of the National Intelligence Community* (the Review). It first outlines important background issues, examines the distinctive review and enactment processes applicable to Australian national security laws, and then identifies relevant context for matters influencing and informing review of the Review's recommendations, alongside their legislative implementation. Key aspects canvassed include the distinctive methodological characteristics of the Review, contemporary practicalities of progressing the Review's implementation from Coalition to Labor governments, the impact of establishing an Office of National Intelligence, as well as recurrent features and signature characteristics affecting implementation of the Review. Upon reflection, it was highly desirable that an improved review and legislative process be in place from the inception of implementing the Review recommendations, but this did not occur.

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The article then examines and assesses selected aspects of the legislative response to the Review's recommendations up until the present. Implementation has been a varied experience, but one open to improvements. The concluding observations suggest three major sets of reforms for Review and post-Review implementation to more closely align review, legislative process and implemented legislation with core aspects of participatory liberal democracy and the democratic accountability of the National Intelligence Community, informed and framed by contemporary Australian and international democracy-related developments.

2. The Richardson Review: some background

Australian Coalition Government Prime Minister Malcolm Turnbull and Attorney General Christian Porter announced on 30 May 2018 the 'most significant review of intelligence legislation in more than 40 years', referencing 1970s Hope Royal Commissions on Intelligence and Security.¹ The former Director General of Security and Head of the Australian Security Intelligence Organisation (ASIO) from 1996 to 2005, Dennis Richardson AO,² was appointed to conduct the *Review of the Legal Framework of The National Intelligence Community*.³ The Review was to comprehensively examine the effectiveness of the legislative framework governing the National Intelligence Community (NIC) and make findings and recommendations for reform.⁴ A review of this type had been recommended by the 2017 *Independent Intelligence Review*⁵ in the following terms:

A comprehensive review of the Acts governing Australia's intelligence community be undertaken to ensure agencies operate under a legislative framework which is clear, coherent and contains consistent protections for Australians. This review should be carried out by an eminent and suitably qualified individual or number of individuals ...⁶

It was not until 4 December 2020 that the Morrison government released the unclassified version of the Review Report,⁷ along with the Government Response.⁸ The Government

1 'Review of national intelligence legislation' Attorney General Media Release 30 May 2018 (Christian Porter).

2 Mr Richardson was also Secretary of the Defence Department (2012–2017), Secretary of the Department of Foreign Affairs and Trade (2010–2012) and Australia's Ambassador to the United States (2005–2010).

3 'The Review'.

4 Commonwealth Attorney-General's Department 'Comprehensive review of the legal framework of the National Intelligence Community – Review' 1 December 2019 (hereafter *Comprehensive Review*); *Comprehensive Review* Terms of Reference, setting out ten points that the Review will consider ...

5 Michael L'Estrange and Stephen Merchant 2017 *Independent Intelligence Review* Department of Prime Minister and Cabinet (2017).

6 *Ibid*, 15.

7 'Government response to the Comprehensive Review into Intelligence Legislation' (Richardson Review) Attorney General Media Release 4 December 2020 (Christian Porter).

8 Australian Government Attorney-General's Department *Commonwealth Government Response to the Comprehensive Review of the Legal Framework of the National Intelligence Community* (December 2020) (*Government Response*).

Response highlighted two contrasting, but interlocking, aspects: the National Intelligence Community's (NIC) legislative framework was considered as 'being well-maintained ... largely fit for purpose ...' and the NIC is 'well adapted to meeting current and future challenges'.⁹ To ensure such continued functionality, it said, 'the Government will take forward a number of targeted reforms based on the Richardson Review and has agreed in full, part or principle to 186 of the 190 unclassified recommendations.'¹⁰

Following criticism of extended delays in releasing the Review report,¹¹ the Commonwealth Parliament passed Coalition legislation implementing one set of Review recommendations in 2021.¹² The Albanese Labor government, elected in 2022, then became responsible for implementing the remaining recommendations.¹³ Distinctive responses emerged, including an urgency paradigm around implementation,¹⁴ alongside improved, connected accountability mechanisms,¹⁵ whilst other accountability measures were delayed.¹⁶

3. Context and practice are important: understanding the Australian national security context for conducting the Review and the practice of implementing its recommendations

Certain underlying rationales, themes and methodologies emerge from the process of reviewing and enacting Australian national security laws since the United States 2001 terrorist attacks, applying both to the Review itself and the translation of its recommendations into legislative provisions. Considerable variability in the quality of review processes and enacted legislative tranches of different Review recommendations reflects previous Australian national security law legislative experience.

An understanding of the above helps identify deficiencies in, and points to desirable remediation of, overarching Australian national security legislative policy. This is

⁹ Attorney General Media Release 4 December 2020 (n 7); see also *Government Response, Ibid*, 3

¹⁰ (n 7).

¹¹ Mark Dreyfus 'Time's Up – Time to Release The Richardson Review' *In Box News* (20 August 2020); "Indefensible": Labor Wants \$18 m National Security Review Released' *Sydney Morning Herald* (19 August 2020).

¹² *National Security Legislation Amendment (Comprehensive Review and Other Measures No 1) Act 2021* (Cth).

¹³ Labor Government introduced Acts: *National Security Legislation Amendment (Comprehensive Review and Other Measures Act No 2) 2023* (Cth); *National Security Legislation Amendment (Comprehensive Review and Other Measures Act No 3) 2023* (Cth); and *Inspector General of Intelligence and Security and Other Legislation Amendment (Modernisation) Act 2023* (Cth).

¹⁴ See urgency issues under headings 'Legislating the second tranche of Review recommendations: *National Security Legislation Amendment (Comprehensive Review and Other Measures No 2) Bill 2023* (Cth)' and 'Legislating the third tranche of Review recommendations: *Inspector General of Intelligence and Security and Other Legislation Amendment (Modernisation) Act 2023* (Cth)'.

¹⁵ See subsequently, 'Legislating the third tranche of Review recommendations: *Inspector General of Intelligence and Security and Other Legislation Amendment (Modernisation) Act 2023*'.

¹⁶ *Intelligence Services Legislation Amendment Bill 2023* (Cth): *Ibid*.

important for charting and tempering an increasing securitisation of the Australian polity.¹⁷ A clearer appreciation of the features, peculiarities and orientation of this sequenced, framework Australian national security reform is consequentially obtainable for both Australian and international audiences.

In the Australian context this necessarily involves making choices and reconciling different sets of national security interests, where no framework human rights charter exists to consistently require and structure the consideration of human rights principles of legality, necessity and proportionality. The enactment experience of Review recommendations is further contextualised by the facilitating and co-ordinating intelligence role played by the Office of National Intelligence (ONI) for the National Intelligence Community (NIC).

The implementation (and future review) of the Review's recommendations is now further framed by the Commonwealth Parliamentary Joint Committee on Human Rights Report,¹⁸ recommending the enactment of a statutory charter of rights on an evolved Australian Human Rights Commission anti-discrimination legislation model.¹⁹ That development, and the improvements to accountability principles and institutions in related parallel national security legislation that would flow from it, offers an alternative human-rights orientated methodology, contrasting with the way in which the Review recommendations have been implemented so far.

The overall conclusion of the Review, being a reaffirmation 'that the fundamental principles that underpin Australia's intelligence legislation remain fit-for-purpose' but that there is a 'need for targeted legislative change in other areas to ensure that agencies can undertake their functions effectively',²⁰ provides a rationale for breadth and scale of legislative response, with the reforms in question and the methods by which they are pursued forming the subject for present critique. Australian and international readerships will better comprehend the conduct of the Review, its content and the implementation of its recommendations, through awareness of some key aspects.

4. The Review's distinctive methodologies

A distinctive feature of the conduct of the Review, shaping its recommendations, was the application of a narrow consultative framework. A single reviewer was appointed.²¹ Copies of submissions made to the Review were not published on the Review web page,²² nor made public following the eventual release of the Report. The consultative process

17 'Securitisation refers to the systematic transformation of regular public policy matters into security issues': Chris Wallace, 'Cabinet Papers 2001: How "Securitisation" Became a Mindset to Dominate Australian Politics for a Generation' *The Conversation* (1 January 2022).

18 Commonwealth Parliament, Parliamentary Joint Committee on Human Rights (PJCHR) *Inquiry into Australia's Human Rights Framework* May 2024.

19 *Ibid*, Recommendation 2. *Ibid*, example Human Rights Bill, Appendix 5.

20 *Ibid*.

21 Dennis Richardson AC.

22 A simple *Comprehensive Review* submissions list appears, without submission content: *Comprehensive Review* (n 4) Volume 4 Annex A 131–4.

overwhelmingly involved engagement with intelligence agencies, members of the defence, foreign relations and intelligence communities and government ministers and ministries, as well as their overseas equivalents in the major English speaking democracies, along with the Netherlands and France.²³ Consultation and engagement with academic and legal expertise outside of the national security establishment was minimal, and highly selective.²⁴ These combinations suggested a methodology crafted towards outcomes amenable to the intelligence community.

An alternative model to that employed by the Review can be found in three Australian reviews on national security matters conducted by distinguished judicial figures – the Clarke Review,²⁵ the Sheller Review²⁶ and the Whealy Review²⁷ – each bringing an independent, experienced judicial background to the reviewing function. That model more closely replicated, at three or four decades distance, the appointment of Justice Robert Marsden Hope²⁸ for the review of Australia's intelligence and security agencies in the First Hope Report²⁹ and the Second Hope Report.³⁰ The Coalition Government had this judicial model open to it when appointing the Reviewer and formalising the Review's terms of reference. Why this model was not adopted can only be speculated upon. The selected methodology and appointee does though lean towards a further securitisation of the Australian polity in the distinctive form of a distinguished insider reviewing the vast sweep of national intelligence community capacities, powers and activities and recommending changes, often with profound consequences for the functional character of Australian democratic governance.³¹

²³ *Ibid.* List of consultations 126–31.

²⁴ *Ibid.*, 126–9 – see especially 'Others' at 129 and omissions to consult relevant academic submitters at 133–4. The 1 April 2019 Oversight and Transparency Workshop had a limited list of non-government attendees: *Ibid.*, Volume 1, 26, 28–9.

²⁵ *Inquiry by the Hon John Clarke QC into the case of Dr Mohamed Haneef* (November 2008). Mr Clarke was a New South Wales Court of Appeal Judge (1987–1997).

²⁶ *Security Legislation Review Committee* The Chair, Honourable Simon Sheller AO QC, was a former New South Wales Supreme Court Judge. Members included a Law Council of Australia representative, the Inspector General of Intelligence and Security, the Commonwealth Privacy Commissioner, the Human Rights Commissioner, an Attorney-General's department nominee and the Commonwealth Ombudsman.

²⁷ *COAG Review of Counter Terrorism Legislation* The Chair, Hon Anthony Whealy AO KC, was a retired New South Wales Court of Appeal Judge – other members included a State Ombudsman, a State Police Commissioner, the Deputy Commonwealth DPP, a retired state judge who was a current State Law Reform Commissioner and an AFP Assistant Commissioner.

²⁸ Peter Edwards, *Law, Politics and Intelligence A Life of Robert Hope* (New South 2020). Robert Marsden Hope was a New South Wales Court of Appeal judge; Graeme Dobell, 'Oz Intelligence Review: The Justice Hope Legacy' *The Strategist* (28 August 2017) and Peter Edwards, 'Keeping Australians and their civil liberties safe: Who was Robert Marsden Hope?' *The Strategist* (28 April 2020).

²⁹ *Royal Commission on Intelligence and Security*, Government Printer, Canberra, 1976, First to Eighth Reports.

³⁰ *Royal Commission on Australia's Security and Intelligence Agencies*, General Report (December 1984) AGPS Canberra, 1985.

³¹ Michael Kirby, 'The Changing Legal Framework of the Australian Intelligence Community: From Hope to Richardson' (2021) 95 *Australian Law Journal* 752, 756, 763.

This choice means that the Report recommendations are more readily susceptible to a bias towards conventional (and narrow) national security interests, rather than underpinning and promoting participatory and representative democracy institutions and cultures. The volume of Review recommendations,³² and the elongated time frame for implementation,³³ exacerbates these tendencies. It makes important the explicit anchoring of legislative review in the democracy-enhancing values, processes and outcomes that national security initiatives should safeguard in the first place – and not determined by bureaucratic convenience or intelligence agency aggrandisement. The potential for the values and interests of intelligence agency, unified by measures for co-ordination, co-operation and interchangeability, to take precedence over all, must be openly acknowledged so it can be avoided.

Relativities are, however, important to acknowledge. It is notable, and ironic, that Richardson himself, in general discussion around the legislative framework,³⁴ favoured a more moderate approach to positioning security intelligence activities within a liberal democratic political system.³⁵ This contrasts with examples of senior NIC officials failing to adequately comprehend security intelligence activities within that liberal democratic context, or considering procedural or legislated checks and balances an improper hindrance, or administrative burden, and advocating their removal in Review consultations.³⁶ Such senior management attitudes were contrary to the basic assumptions of the Hope Royal Commissions, the foundations and rationales of which continue to underpin national security legislation.³⁷ Similarly, induction and training were found to be needed 'to ensure proper consideration is given to the history, principles and philosophy underpinning the legislative framework, and the balance sought by government and the Parliament'.³⁸

5. Progressing implementation of the Review – contemporary implementation practicalities from Coalition to Labor

The Review – a substantial document comprising four volumes and hundreds of pages³⁹ – was finalised and provided to the Government in December 2019. The Morrison Government

³² There are 203 Review recommendations: *Government Response* (n 8) 52; *Comprehensive Review* (n 4) Volume 4, 9.

³³ *Government Response* (n 8) 3.

³⁴ *Comprehensive Review* (n 4) Volume 1, 34–5.

³⁵ *Ibid*, 33–4, 35.

³⁶ *Ibid*, 34.

³⁷ *Ibid*, 114–8, 121–5 references the two Hope Royal Commissions on Intelligence and Security and resultant legislative and other reforms.

³⁸ *Ibid*, 35.

³⁹ *Ibid*, Volume 1: Recommendations and Executive Summary Foundations and Principles; Control, Coordination and Cooperation; Volume 2 Authorisations, Immunities and Electronic Surveillance; Volume 3 Information, Technology, Powers and Oversight; Volume 4 Accountability and Transparency; Annexes.

took a full year to release the unclassified version of the Review,⁴⁰ simultaneously providing a Government Response to the Review Recommendations.⁴¹ Criticism was made of the delay in making this response and communicating the government's intentions.⁴²

Whilst the Morrison government introduced and had passed the first tranche of legislation associated with the Review, claims arose about the dilatory nature of the process in the release of the Report and the Government response,⁴³ and also in subsequent Labor government responses by expedited remediation for implementation delays.⁴⁴ Later statements⁴⁵ by Home Affairs Minister Clare O'Neill, expressed the importance of implementing the recommendations in a timely fashion,⁴⁶ alongside the constantly changing nature of terrorist threats.⁴⁷ A commitment to passing implementing legislation was therefore partly animated by the political imperative of contradistinguishing Labor action from Coalition delays. In the present circumstances, however, a heightened focus on timeliness around implementation may produce unintended and distorting consequences by prioritising implementation over cautious assessment of legislative scope and necessity, including the incorporation of adequate accountability mechanisms.

It was anticipated that the extent of the Review and its recommendations would result in an extended time frame for legislative implementation.⁴⁸ The Review's extended implementation time frame made it important, from the inception of the legislative reforms, for revised review and enactment methodologies to optimally align with the objectives of instilling and protecting Australia's liberal democratic values and institutions. That has not been the case. Moreover, academic commentary,⁴⁹ from different

40 *Government Response* (n 8); The public version of the Richardson Report and the Government response to it were not released until 4 December 2020: Attorney General Media Release 4 December 2020 (n 8) more than two and a half years after establishing the review: Attorney General Media Release 30 May 2018 (n 1); 'Intelligence-Sharing Flaws Spark Biggest Spy Review in 40 Years' *The Australian* (30 May 2018).

41 *Government Response* (n 8).

42 'Time's Up – Time to Release the Richardson Review' (n 11); "'Indefensible': Labor Wants \$18 m National Security Review Released' (n 11); Peter Edwards, 'Richardson Intelligence Review Recommendations Must be Implemented – and Soon' *The Strategist* (10 March 2021).

43 *Government Response* (n 8).

44 'Delivering overdue reform of intelligence and criminal justice frameworks' Attorney General Media Release 29 March 2023 (Mark Dreyfus).

45 *Parliamentary Debates* House of Representatives 30 November 2023 8926–7 (Clare O'Neill) *National Security Legislation Amendment (Comprehensive Review and Other Measures No 3) Bill 2023* (Cth).

46 *Ibid*, 8926 (Clare O'Neill).

47 *Parliamentary Debates* House of Representatives 14 May 2024 69 (Clare O'Neill) *National Security Legislation Amendment (Comprehensive Review and Other Measures No 3) Bill 2023*.

48 *Government Response* (n 8) 3.

49 Examples include Nicola McGarrity, 'Reconciling Security and Human Rights: The Australian Experience' in Paula Gerber and Melissa Castan (eds), *Critical Perspectives on Human Rights Law in Australia* (Thomson Reuters 2021) Ch 16; George Williams and Kieran Hardy, 'Two Decades of Australian Counterterrorism Laws' (2022) 46 *Melbourne University Law Review* 34; Maria O'Sullivan 'Human Rights and National Security' in Danielle Ireland-Piper (ed), *National Security Law in Australia* (Federation Press 2024) Ch 7; Greg Carne, 'Re-orientating Human Rights Meanings and Understandings? Reviving and Revisiting Australian Human Rights Exceptionalism through a Liberal Democratic Rights Agenda' (2015) 17 *Flinders Law Journal* 1.

perspectives, has identified and assessed the various deficiencies in properly integrating human rights checks and balances, which ultimately protect and facilitate democratic practices and institutions, in enacting Australian national security legislation.

5.1. Progressing implementation of the Review—contemporary practicalities from the 2018 establishment of an Office of National Intelligence (ONI)

The conduct and timing of the Review follows the formation of an Office of National Intelligence (ONI) in 2018. Its key features (centralisation, co-ordination, co-operation and collaboration in relation to various national security activities) are mirrored in the Review's recommendations, which are intended to facilitate the ONI's objectives.

The formation of the ONI⁵⁰ to facilitate co-ordination, integration and sharing of intelligence in the National Intelligence Community⁵¹ represented a pivotal moment in Commonwealth governance. The creation of the ONI will raise the prominence and reach of security intelligence within Commonwealth policy formation, administration and legislative development. 'Such developments' actually 'anticipate the ONI emerging as a powerful centralising organisation in Commonwealth governance, through which a vast quantum of intelligence will be collated, filtered and applied to government decision making processes, extending beyond national security'.⁵² Through the ONI's organisational co-ordination role and operative mechanisms, the impact and interaction of the progressive implementation of the Review's already liberalising provisions may be further magnified.⁵³

Preceding amendments of the *Intelligence Services Act 2001* (Cth)⁵⁴ have facilitated such a cultural shift, as have other earlier Australian policy changes, including re-conceptualisation of what properly falls within the concept of national security.⁵⁵ The sharing of skills and capabilities is variously attractive to NIC members, from economic, institutional capacity and informational perspectives. Normalising an ever-expanding scope of intelligence and an increasing seamlessness of flows of information and staffing

⁵⁰ *Office of National Intelligence Act 2018* (Cth).

⁵¹ The NIC comprises ONI, ASIO, ASIS, DIO, ASD and AGO and the intelligence functions of AFP, ACIC, ATRC and DOHA.

⁵² Greg Carne, 'Designer Intelligence or Legitimate Concern?: Establishing An Office Of National Intelligence and Comprehensively Reviewing The National Intelligence Community Legal Framework' (2019) 46 *University of Western Australia Law Review* 144, 144–5.

⁵³ *Ibid*, 147–9 and see *ONI Act* s.7 (1) (g); *ONI Act*, s.7 (c) (i); *ONI Act*, s.7 (d) (ii).

⁵⁴ See particularly *Intelligence Services Act 2001* (Cth) s.13A (1).

⁵⁵ The concept of 'national security' exponentially expanded in Rudd-Gillard Labor governments: see Kevin Rudd, *First National Security Statement to the Parliament* (Prime Minister's National Security Statement 2008); Commonwealth, *Parliamentary Debates* House of Representatives, 4 December 2008, 12549 (Kevin Rudd); Ric Smith, *Summary and Conclusions Report of the Review of Homeland and Border Security* (2008) (*Smith Review*); *Counter-Terrorism White Paper: Securing Australia Protecting our Community* (2010); Department of Prime Minister and Cabinet *National Security Information Environment Roadmap; 2020 Vision* (2010). S.90.4 *Criminal Code* (Cth) provides an extended national security definition.

between NIC members will inevitably increase the prominence of security considerations within Australian governance policy and legislative formation. The salient point is that the legislative implementation of the Review's recommendations creates subsequent interactive effects upon the ONI conferred functions and powers.⁵⁶

6. Some recurrent features of Australian national security law legislative process impacting implementation of the Review

It is useful to summarily identify certain features of the Australian experience of legislating for national security, to both contextualise and frame an understanding of process and content issues which have arisen in implementing Review recommendations. A unifying influence in enactments by the Coalition and Labor is rhetorical bi-partisanship consistency in national security matters.⁵⁷ Two points are important.

First, implementation of the Review recommendations sits within a Parliamentary scrutiny mechanism operating without a statutory charter of rights. The starting point for contextual analysis of engaging human rights analysis in legislative implementation arises from commentary concerning Commonwealth Parliamentary Human Rights Scrutiny mechanisms, such commentary broadly applicable to all Commonwealth legislation.⁵⁸ It has been observed of the capacities of the Parliamentary Joint Committee on Human Rights (PJCHR):

A first principle around PJCHR review is its inherent limits as an exclusive parliamentary model, with no judicial interpretive function for identified international human rights obligations (as impacting bills or legislation) ... These weaknesses derive from a parliamentary self-regulatory model – a government maintaining confidence and supply in the lower house can determine qualitative or nominal compliance with the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth).⁵⁹

Various other explanations have been offered for the compromised effectiveness of PJCHR review.⁶⁰

⁵⁶ *Office of National Intelligence Act 2018* (Cth), ONI functions s.7 (h) 'to cooperate with and assist *bodies referred to in section 14* in accordance with that section'; and s.11.

⁵⁷ Greg Carne, 'Reviewing The Reviewer: The Role Of the Parliamentary Joint Committee On Intelligence and Security – Constructing Or Constricting Terrorism Law Review?' (2017) 43 *Monash University Law Review* 334, 344–6.

⁵⁸ Principally through the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth).

⁵⁹ George Williams and Lisa Burton, 'Australia's Exclusive Parliamentary Model of Rights Protection' (2013) 34 (1) *Statute Law Review* 58, 90–1, 92–3; George Williams and Daniel Reynolds, 'The Operation and Impact Of Australia's Parliamentary Scrutiny Regime for Human Rights' (2015) 41 *Monash University Law Review* 469, 506–7; and Shawn Rajanayagam, 'Does Parliament Do Enough? Evaluating Statements of Compatibility Under the Human Rights (Parliamentary Scrutiny) Act ?' (2015) 38 (3) *University of New South Wales Law Journal* 1046, 1073, 1076–7.

⁶⁰ Zoe Hutchinson, 'The Role, Operation and Effectiveness of the Commonwealth Parliamentary Joint Committee on Human Rights after Five Years' (2018) 33 (1) *Australasian Parliamentary Review* 72, 90–4, 99–100, 100–3 and 103–5.

Second, within that general Parliamentary approach, distinctive features and practices have emerged in the specific context of the review of national security legislative matters, potentially adversely impacting how the Review's recommendations are legislatively implemented and themselves reviewed.

In the Australian context, the capacity to engage human rights analysis in the implementation of national security legislation is a sensitive subset of the above, its issues sharply manifested in the interactions and relationship between the Parliamentary Joint Committee on Intelligence and Security (PJCIS) and the PJCHR in conducting reviews of bills. This includes the level of government engagement with and responsiveness to such reviews, which give a clear primacy to, and display a clear preference for, the PJCIS's recommendations, with PJCHR processes and recommendations marginalised or excluded.

Similarly, the effectiveness of parliamentary committee review in national security matters is assessed somewhat differently between different commentators.⁶¹ Such difference in opinion speaks more broadly to the issue of which particular factors are considered synonymous with effective Parliamentary Committee review, and the operative characteristics such review should have.⁶² Importantly, though, there is no clear parliamentary obligation to deliberatively consider PJCHR review findings.⁶³ Accordingly, a practice or requirement⁶⁴ regarding the timing of legislation and the tabling of PJCHR reports, and for PJCIS obligations to engage with, list and consider PJCHR review findings in its reports would be a positive, broadening development.

6.1. Further issues in implementing the Review recommendations

Implementing the Review recommendations is also framed and influenced by some signature realities. First, the considerable volume of Australian national security laws⁶⁵

61 Greg Carne, 'Guiding Light Or Opaque Filter?: The Minister's Guidelines For the Australian Security Intelligence Organisation In Performing Its Functions and Exercising Its Powers As Relevant To Security' (2022) 43 (2) *Adelaide Law Review* 814, 832 (n 99).

62 PJCIS review primarily focuses upon legislative operability; PJCHR review consistently articulates a human rights framework : Greg Carne, 'The Legal Rhetoric of Safety and Security: Improving National Security Law Process, Enactment and Content By Moderating Its Executive and Legislative Influence' (2023) 50 (1) *University of Western Australia Law Review* 168, 208–11.

63 Williams and Reynolds (n 59), 476–9; Rosalind Dixon, 'A New (Inter) National Human Rights experiment For Australia' (2012) 23 *Public Law Review* 75, 75–6.

64 For example, through changes to Parliamentary Standing Orders.

65 George Williams, 'A Decade of Australian Anti-Terror Laws' (2011) 35 *Melbourne University Law Review* 1136; George Williams, 'The New Terrorists: the Normalisation and Spread of Anti-Terror Laws in Australia' (2014) 38 *Melbourne University Law Review* 361; Kieran Hardy and George Williams, 'Two Decades of Australian Counterterrorism Laws' (2022) 46 *Melbourne University Law Review* 34; *Comprehensive Review* (n 4) Volume 1, 33; *Comprehensive Review* (n 4) Volume 4, 137–62 Annex B Acts that have amended NIC legislation (11 September 2001–1 August 2019) and Annex C Summary of amendments to legislation in the Terms of Reference.

passed since the 2001 United States terrorist attacks, including provisions significantly curtailing human rights, is highly influential. The volume, and frequency, of these new laws has created receptivity, regularity and incrementalism towards securitisation.⁶⁶ Securitisation is associated with the articulation of security as an recurrent influence upon government policy and legislation, readily able to be leveraged to political advantage.

The Review itself found evidence of securitisation, in that the volume of national security laws enacted since 2001 had created a complex and overlapping legislative network,⁶⁷ the result of an ongoing ad hoc accretion of laws. This accumulation of laws has created difficulties in interpretation and application (particularly in relation to telecommunications interception),⁶⁸ which the Review considered problematic and warranting attention. Implementing the Review recommendations is considered a remedy for these interpretation and application problems. However, unchanged methods of Parliamentary review and legislative implementation are likely to reproduce, not resolve, the deficiencies identified.

Second, normalising the practice of reviewing and enacting serial national security laws has created undesirable review practices and hierarchies amongst committees.⁶⁹ Aside from volume, claims of urgency⁷⁰ around law-making have often created overlaps, inconsistencies and unintended consequences. The boundaries of what once would have been considered legislatively excessive and potentially oppressive have incrementally accommodated and normalised far-reaching laws.

Implementation of Review recommendations is also located within the Australian practice of an ongoing, constant review of national security laws.⁷¹ Such ongoing review normalises instability, promotes an anticipatory and preventative outlook, aimed at keeping ahead of a plethora of real or imagined national security risks, and induces legislative and policy anxiety.

The Review's role is to help realisation of the ONI's directional goals, and in doing so consolidate the very concept of the NIC⁷² – in particular, the expansionary,

66 The characteristics and consequences of securitisation are briefly outlined by Chris Wallace, 'Cabinet Papers 2001: How "Securitisation" Became a Mindset to Dominate Australian Politics for a Generation' *The Conversation* 1 January 2022.

67 *Comprehensive Review* (n 4) Volume 1, 34.

68 *Ibid*, 33.

69 The review relationship of the PJCIS and the PJCHR; Government PJCIS preference as the premier national security law Committee; the post 2014 practice of excluding the Senate Legal and Constitutional Affairs Committee from national security law review; Gabrielle Appleby, 'The 2014 Counter-Terrorism Reforms in Review' (2015) 26 *Public Law Review* 4, 5–6.

70 Andrew Lynch, 'Legislating With Urgency- The Enactment of the Anti-Terrorism Act [No 1] 2005' (2006) 30 *Melbourne University Law Review* 747; Andrew Lynch, 'Legislating Anti-Terrorism: Observations on Form and Process' in Victor V Ranraj et al (eds), *Global Anti-Terrorism Law and Policy* (2nd edn, Cambridge University Press 2012).

71 An Australian government assumption: *Government Response* (n 8) 3; Greg Carne, 'Prevent, Detain, Control and Order? Legislative Process and Executive Outcomes in Enacting the Anti-Terrorism Act No 2 2005 (Cth)' (2007) 10 *Flinders Journal of Law Reform* 17, 76.

72 *Comprehensive Review* (n 4) Volume 1, 32–3 and 148–51.

integrative and co-operative institutional assumptions embedded in such arrangements,⁷³ and the institutional centralisation and elevation of national security within Australian public policy formation and delivery.

6.2. Implementing Review recommendations – aiming from inception for an improved review and legislative process

In light of the above realities and the far-reaching impact of legislating the Review's recommendations, a clear commitment to the implementation of changes to review methodology and accountability frameworks was desirable prior to legislating. This was not evidenced by the Coalition government. It was similarly desirable that the Labor Government in 2022 pause and re-appraise the process of implementing the Review recommendations. A more integrated, accountability-based, approach to that implementation, including a human rights orientation, would have provided reassurance. This should have coincided with the new Labor phase of the implementation process, but again did not occur. Further, a much clearer focus upon the needs for, and proportionality of, the recommendations was required, which would have been facilitated by improved legislative review and ex post review processes. Mechanisms to attain these operational framework reforms were available.

Indeed, it was suggested during the conduct of the Review that the next Independent Intelligence Review should be constituted as a Royal Commission (with such implementation frameworks and mechanisms incorporated in its terms of reference):

As part of the process, there should be a reassessment of the structures, legislation and operations of the whole intelligence community. The next independent intelligence review, which normally would have been expected in 2022–23, should be upgraded to a royal commission and initiated in coming months ... The commission should have far-reaching and open-ended terms of reference ... but it should be encouraged to address such questions as ... Should the scope of national security legislation be reassessed in the light of not only the report by Dennis Richardson but also the views of successive INSLMs?⁷⁴

Another commentator, focusing upon the extended powers, public advocacy and debate influencing roles of Australia's intelligence agencies, called for a standing Royal Commission:

It is vitally important to our national interest to have external and independent supervisors of our intelligence agencies, strong minded people who are not part of or likely to

⁷³ Commonwealth, *Parliamentary Debates*, House of Representatives, 28 June 2018, 6741 (Christian Porter).

⁷⁴ Peter Edwards, 'Keeping Australians and their Civil Liberties Safe: The Future of the Hope Model' *The Strategist* (13 May 2020) 2. Kirby (n 31) 764–5 endorses this idea and Edwards refers to it in 'Richardson Intelligence Review Much More Than an "Inside Job"' *The Strategist* (5 March 2021) 2.

join the intelligence club ... we need to go beyond that [Justice Hope Royal Commissions] with a standing Royal Commission headed by a strong willed, competent and independent person.⁷⁵

Such an augmented approach could have independently appraised the Review's recommendations, shifting review of proposed national security enactments towards greater independence, similar to the Hope Royal Commissions.⁷⁶ It would build democratic confidence and induce moderation, being modelled on earlier national security inquiries which resulted in key legislative reforms. Instead, emphasis has been upon acquiring momentum and progressing implementation of the Richardson review, while the task of strengthening legislative review processes has lagged behind.

The need for a more refined and nuanced approach was incidentally confirmed by the Attorney General's announcement of PJCHR review of Australia's Human Rights Framework.⁷⁷ However, the existing arrangements for PJCIS review of national security legislation remain unaltered. The recommendations highlight the importance of clearly aligning legislative review with democratic objectives, particularly sensitivities around trust and confidence in government, ensuring stringent accountability. The Labor government's decision to proceed without incorporating broader perspectives and greater independence is therefore disappointing. Another option for timely supplementary review would have been a reference to the Independent National Security Legislation Monitor (INSLM) to (re)consider the most contentious of the Review's recommendations,⁷⁸ an option not apparently contemplated.

A matrix of factors explains the lack of revision of implementation mechanisms by the Labor government. These include that national security law reform may be warranted by demonstrably serious changes in circumstances;⁷⁹ criticisms of the Morrison Government's delays and minimal implementation following its Government Response to the Review;⁸⁰ the inclusion of aspects of previous Labor advocacy of national security law

⁷⁵ John Menadue, 'We Need a Standing Royal Commission to Supervise our Intelligence Agencies' *Pearls and Irritations* (31 August 2020) 3.

⁷⁶ The Labor Government commissioned a conventional 'insider -like' 2024 *Independent Intelligence Review*: Anthony Albanese, 'Independent Intelligence Review' *Prime Minister Media Release* (22 September 2023), appointing Reviewers Dr Heather Smith, a former Department of Industry, Innovation and Science Secretary and former Deputy Director General of ONA, and Mr Richard Maude, a former Director-General of the ONA and presently Executive Director of Policy at Asia Society, who reported in 2024: Australian Government, Department of the Prime Minister and Cabinet web page '2024 Independent Intelligence Review'. Their report was only publicly released shortly before the 2025 Commonwealth election: Anthony Albanese, 'Release of the 2024 Independent Intelligence Review' *Prime Minister Media Release* (21 March 2025).

⁷⁷ Mark Dreyfus, 'Review Into Australia's Human Rights Framework' *Attorney General Media Release* (22 March 2023).

⁷⁸ See *Independent National Security Legislation Monitor Act 2010* (Cth) s.7 and s.6(1)(c).

⁷⁹ Such as in relation to foreign interference, cyber-attacks, espionage, and recently, nationalist and racist violent extremism, anti-Semitism and other religious or ethnic based hate crimes: *Annual Threat Assessment 2025 - Director General of Security* (ASIO 19 February 2025).

⁸⁰ *Commonwealth Government Response* (n 8); Mark Dreyfus, 'Delivering Overdue Reform of Intelligence and Criminal Justice Frameworks' *Attorney General Media Release* (29 March 2023).

reform;⁸¹ the establishment of the ONI, with a mission fostering co-operation and co-ordination between intelligence agencies; and the strong residual influence of bipartisanship forged by PJCIS membership which instils confidence in PJCIS review processes, places trust and confidence in intelligence agencies, and substantially limits contestability of that intelligence information in shaping accountability response and alternatives.⁸²

7. Assessing implementation of the Review recommendations: the tranches of recommendations legislated

In reviewing the implementation of the Review's recommendations, it is impossible to exhaustively assess each and every recommendation, its adoption, review and legislative trajectory, and its legislative content. Such an approach would assume consistencies in adoption and enactment of recommendations whilst discounting distinctive features of the implementation which raise more intriguing questions.

In critiquing the Review's implementation, it is more revealing to assess selected aspects of the legislation formation, focusing upon the tranches of recommendations so far implemented. This approach is adopted in forthcoming sections of this article. It reveals that alternatives existed, different choices were constructed and that effective future reform and review of implemented measures is highly desirable and should be informed by experience. Such an approach will better shape national security measures by substantively defending and reflecting values of liberal democratic parliamentary government, and by incorporating strong and integrated accountability measures. Some common national security review problems have emerged in the tranches of Review recommendations so far legislated – in particular the unsatisfactory PJCIS-PJCHR review relationship, the paradigm of legislative urgency, and delays in implementing a more connected and comprehensive accountability framework, with a stronger human rights foundation.

The article now proceeds to critically examine four tranches of Review recommendations implementation, prior to arriving, in the concluding observations, at some suggested reforms.

⁸¹ Senator John Faulkner, 'Surveillance, Intelligence and Accountability: An Australian Story'; 'Greater Oversight of Spies Needed, Says Faulkner' *Australian Financial Review* (online 24 October 2014); Senator Penny Wong's introduction of the *Parliamentary Joint Committee on Intelligence and Security Amendment Bill 2015* (Cth); Senator Jenny McAllister's introduction of the *Intelligence and Security Legislation Amendment (Implementing Independent Intelligence Review) Bill 2020* (Cth). See also s.30 *Intelligence Services Act* (Cth).

⁸² Commonwealth Parliament Parliamentary Joint Committee on Intelligence and Security (PJCIS) *Advisory Report on the National Security Legislation Amendment (Comprehensive Review and Other Measures No 1) Bill 2021* (Cth), 41, noting substantive Bill changes proposed by the Law Council (when it lacked access to sensitive NIC operational information).

7.1. *Legislating the first tranche of Review recommendations: the National Security Legislation Amendment (Comprehensive Review and Other Measures No 1) Bill 2021 (Cth)*⁸³

Following the initial delay by the Morrison Government in publishing and responding to the Review,⁸⁴ the government took almost a further year before introducing to Parliament the *National Security Legislation Amendment (Comprehensive Review and Other Measures No 1) Bill*.⁸⁵ The Bill was referred to the PJCIS for inquiry and report by Home Affairs Minister Andrews by undated letter,⁸⁶ submissions were sought by 3 February 2022 and the PJCIS reported on 23 March 2022.⁸⁷ The Bill passed the House of Representatives and the Senate on 30 March 2022, and was assented to on 1 April 2022.

This truncated legislative timeline, completed before the May 2022 election, is partially a consequence of the delays in releasing the unclassified version of the Review and subsequently the Bill's preparation and introduction. Importantly, this impacted upon the capacity to assess and absorb the findings of a PJCHR inquiry into the Bill, and in the limited submissions received,⁸⁸ as the submission process commenced at the end of the Parliamentary year, coinciding with the Australian holiday season.

Given the ongoing significance of democratic structures and practices to implementing the Review's recommendations, an unfortunate precedent was established at the commencement of large-scale legislative implementation. Established, inherited review processes and methodologies were activated as though the Parliament was merely enacting any other national security statute, rather than the most extensive and fundamental reforms since the first Hope Royal Commission. This impression was compounded by the PJCIS report, which made just a single substantive recommendation, of a relatively specific and narrow ambit,⁸⁹ advising that upon that Parliamentary adoption of that recommendation, the bill should be passed.⁹⁰

⁸³ This Bill passed the Commonwealth Parliament on 30 March 2022, was assented to on 1 April 2022, implementing 11 Review recommendations. This Bill was reviewed by the PJCIS Report of 23 March 2022, and by two PJCHR scrutiny reports – PJCHR Report 1 of 2022 9 February 2022 and PJCHR Report 2 of 2022 25 March 2022.

⁸⁴ See text content under 'Progressing Review implementation – contemporary implementation practicalities from Coalition to Labor.'

⁸⁵ *Parliamentary Debates* House of Representatives 25 November 2021, 1 (Karen Andrews). The *Intelligence Oversight and Other Legislation Amendment (Integrity Measures) Bill 2020 (Cth)* was further introduced to the House of Representatives on 9 December 2020, lapsing at Parliament's dissolution on 11 April 2022.

⁸⁶ Hon Karen Andrews MP Minister for Home Affairs to Senator James Patterson Chair of the PJCIS Letter Ref No MS21-002153 (on 25 November 2021).

⁸⁷ PJCIS Report (n 82) 1, 2, 47.

⁸⁸ *Ibid*, Appendix A List of submissions. Only ten submissions were received.

⁸⁹ *Ibid*, List of Recommendations, xi, Recommendation 3.15 relating to amending the Bill's Explanatory Memorandum.

⁹⁰ *Ibid*, List of Recommendations, xi Recommendation 2.

The Bill's purpose was described as seeking '... to implement recommendations of the Comprehensive Review of the Legal Framework of the National Intelligence Community and other measures.'⁹¹ More specifically, the Bill implemented 'the government response to thirteen comprehensive review recommendations',⁹² stating that four key issues were being addressed – improving the workability of the ministerial authorisation framework for the Australian Geospatial Intelligence Organisation (AGO), Australian Signals Directorate (ASD) and Australian Secret Intelligence Service (ASIS);⁹³ strengthening of co-operative arrangements for the intelligence agencies;⁹⁴ enhancing and supporting existing intelligence agency powers;⁹⁵ and improving the transparency of agencies' privacy protections.⁹⁶

As the initial implementing measure, the bill might be considered a collated response to less complicated matters amongst the Review's recommendations, reflected in the discrete content of each of the Bill's eleven schedules.⁹⁷ These schedules dealt with Emergency Authorisations,⁹⁸ Authorisations relating to counter-terrorism,⁹⁹ Authorisations for activities in support of the Australian Defence Force,¹⁰⁰ Authorisations for producing intelligence on Australians,¹⁰¹ ASIS cooperating with ASIO,¹⁰² the AGO cooperating with authorities of other countries,¹⁰³ the ONI cooperating with other entities,¹⁰⁴ suspension of travel documents,¹⁰⁵ online activities,¹⁰⁶ privacy,¹⁰⁷ assumed identities,¹⁰⁸ authorities of other countries,¹⁰⁹ ASIO authorisations¹¹⁰ and amendments related to the *Intelligence Services Amendment (Establishment of the Australian Signals Directorate) Act 2018*.¹¹¹

Consideration of selected schedules involving the most controversial or substantial change – those likely, to impact upon the functioning, culture and democratic

91 PJCHR Report 1 of 2022 (n 83) 2.

92 Karen Andrews, *Parliamentary Debates* (House of Representatives 25 November 2021) 2. (including four items recommended by both the Review and the 2017 *Independent Intelligence Review*).

93 *Ibid.*, 1.

94 *Ibid.*, 2.

95 *Ibid.*

96 *Ibid.*

97 See PJCHR Report 1 of 2022 (n 83) 2, 3; *National Security Legislation Amendment (Comprehensive Review and Other Measures No 1) Bill 2021* Contents – Schedule 1 to Schedule 14.

98 Schedule 1.

99 Schedule 2.

100 Schedule 3.

101 Schedule 4.

102 Schedule 5.

103 Schedule 6.

104 Schedule 7.

105 Schedule 8.

106 Schedule 9.

107 Schedule 10.

108 Schedule 11.

109 Schedule 12.

110 Schedule 13.

111 Schedule 14.

traditions of Australian representative government – is the best way to provide insights into improving the methodology of national security review and in proposed legislative responses to the Review's recommendations. Coalescing functions, and emphasis on co-operation between internally-focused and externally-focused national security agencies, particularly in relation to those intelligence agency powers affecting an Australian person or a class of Australian persons, is relevant to improvements and responses in legislative reforms. Implementing this cache of Review recommendations therefore meant engaging with the traditional distinctions between (i) domestic and foreign intelligence and (ii) Australians and foreign nationals. How the reconciliation was made between two competing sets of principles (and where separation was traditionally a deliberate means of safeguarding the rights of Australian persons) is relevant to Schedule 2,¹¹² Schedule 4¹¹³ and Schedule 5.¹¹⁴ There are some common themes in these Schedules emerging in how they are legislatively translated in both process and content. The fundamental point is that each of these Schedules facilitates a greater intelligence agency focus and intrusiveness into the lives of categories of Australian persons, broadening the spectrum of circumstances categorised as involving security intelligence.

The Review itself supported the retention of the distinction between foreign intelligence (offshore) and domestic intelligence (onshore) and its corollary, that between non-Australians and Australians, as a foundational legislation and policy organising principle.¹¹⁵ The importance of these principles was stated:

The principles and distinctions outlined above¹¹⁶ are founded in history, practice and philosophy, and establish important delineations between, and limits on the roles and functions of, agencies. They are of enduring importance in their provision of safeguards, clarification of agency roles and responsibilities, and ensuring lines of accountability. We

¹¹² Schedule 2 would enable ASIS, ASD and ASIO to seek ministerial authorisations 'to produce intelligence on a class of Australian persons who are, or are likely to be, involved with a listed terrorist organisation'.

¹¹³ Schedule 4 inserts new provisions to

limit the requirement for ASIS, ASD and AGO to obtain ministerial authorisation to *produce intelligence on an Australian person* to circumstances where the agencies seek to use covert and intrusive methods, which include methods for which ASIO would require a warrant to conduct inside Australia,

to 'make explicit the long-standing requirement for ASIS, ASD and AGO to seek ministerial authorisation before requesting a foreign partner agency to produce intelligence on an Australian person'.

¹¹⁴ Schedule 5 enhances the ability of ASIS to cooperate with ASIO in Australia when undertaking less intrusive activities to collect intelligence *on Australian persons relevant* to ASIO's functions, without ministerial authorisation.

¹¹⁵ *Comprehensive Review* (n 4) Volume 1, 36, 38–9, 39.

¹¹⁶ This included other foundations and principles such as operation according to law, propriety and impartiality, separated intelligence assessment-analysis and collection functions and agencies. *Ibid*, Volume 1, 40.

see no reason to abandon them- and many good reasons to retain them – but do recommend some changes to how they are reflected in legislation.¹¹⁷

Consistent with the above, the Review examined the continuing relevance of the identified two distinctions,¹¹⁸ and in both instances recommended their retention.¹¹⁹

An examination of these issues as a preliminary matter necessarily informs how key recommendations of the Review underpin and shape in different ways the content of the selected schedules of the Bill – there are a variety of Review recommendations relevant to Schedule 2,¹²⁰ Schedule 4¹²¹ and Schedule 5.¹²² The Executive's choices about how the Bill is constructed in relation to these recommendations and how closely or otherwise (for different reasons) the recommendations are followed, signals the degree of alignment with, or departure from – negatively or positively – democratic values and accountability mechanisms. Ultimately a set of choices is being made, and the manner of implementation of key recommendations helps discern the orientation of those choices.

Schedule 2¹²³ of the Bill draws upon Recommendation 45¹²⁴ and Recommendation 30¹²⁵ of the Review. Schedule 4¹²⁶ of the Bill draws upon Recommendation 41 of the Review and its confining the need for warrant authority to circumstances of the gathering and production of intelligence where covert and intrusive collection activities occur, where ASIO would require warrant authority to undertake such activities.¹²⁷ Schedule 5¹²⁸ of the Bill similarly reflects the content of Recommendation 41 of the

117 *Ibid*, 37.

118 *Ibid*, 222–3 (on shore/offshore distinction) and 243–4 (Australians and non- Australians).

119 *Ibid*, Recommendation 4 and Recommendation 6.

120 Authorisations relating to counter-terrorism.

121 Authorisations for producing intelligence on Australians.

122 ASIS co-operating with ASIO.

123 PJCHR *Human Rights Scrutiny Report 1 of 2022*, 2 'Schedule 2 would enable ASIS, ASD and AGO to seek ministerial authorisations to produce intelligence on a class of Australian persons who are, or are likely to be, involved, with a listed terrorist organisation.'

124 Recommendation 45 endorsed the 2017 *Independent Intelligence Review* recommendation that *Intelligence Services Act* agencies be able to obtain ministerial authorisation in respect of a class of Australian persons where the class is defined by reference to involvement with a terrorist organisation.

125 Recommendation 30 supported continuing the ministerial authorisation system of ASIO and Intelligence Act agencies, rejecting a judicial or independent authorisation model.

126 PJCHR *Human Rights Scrutiny Report 1 of 2022* (n 123) 2 'Schedule 4 inserts new provisions to

limit the requirement for ASIS, ASD and AGO to obtain ministerial authorisation to produce intelligence on an Australian person to circumstances where the agencies seek to use covert and intrusive methods, which include methods for which ASIO would require a warrant to conduct inside Australia',

and 'make explicit the long-standing requirement for ASIS, ASD and AGO to seek ministerial authorisation before requesting a foreign partner agency to produce intelligence on an Australian person'.

127 *Government Response* (n 8) 14–15.

128 PJCHR *Human Rights Scrutiny Report 1 of 2022* (n 123) 2–3 'Schedule 5 seeks to enhance the ability of ASIS to cooperate with ASIO in Australia when undertaking less intrusive activities to collect intelligence on Australian persons relevant to ASIO's functions, without ministerial authorisation'.

Review, being consistent with advocacy of fostering co-operation between intelligence agencies and strengthening the integration of the intelligence community, presently and in the future, reflected in the Government's response rejecting Recommendation 57.¹²⁹

These three schedules collectively represent a loosening of controls on the accountability of intelligence agencies, an easing of checks and balances in the authorisation of intrusive surveillance and collection methods, and an increased cooperative intelligence footprint superimposed upon the activities of Australian persons. The horizontal reach of intelligence agency activity has expanded, and the increased integration of the activities of a traditionally overseas-focused agency (ASIS) with those of a domestic agency (ASIO) challenges the Hope Inquiry assumptions of a separation in the standards of the regulatory regime between domestic-focused and foreign-focused intelligence agencies.

These legislative changes highlight a disjuncture between the preference expressed in the Review for maintaining that offshore/onshore distinction,¹³⁰ and the subsequent blurring of that distinction, which is likely to be more substantively eroded in the long-term by the new enabling powers. The minimal recommendation of the PJCIS Report¹³¹ reflects a premium of trust, reliance upon, and deference to, intelligence expertise by the PJCIS in assessing the case for these amendments, including as a result of private briefings and assurances:

Whilst some changes, particularly those in Schedule 5 where ASIS are permitted to further assist ASIO onshore, are significant and required deep consideration, the Committee is satisfied by the detailed classified and unclassified evidence received throughout this inquiry. The Committee thanks the agencies for their candour and has confidence that the changes are proportionate and are as transparent as possible given the national security aspects of the changes ...¹³²

The PJCIS's confidence in the Bill (and its perfunctory approach to its review functions) was assisted by the few submissions to it,¹³³ two of which were classified.¹³⁴ Further, the PJCIS report, dated 23 March 2022,¹³⁵ makes no reference to the PJCHR rights scrutiny reports on the Bill.¹³⁶

¹²⁹ *Government Response* (n 8) 19. Recommendation 57 stated that Section 13 B of the *Intelligence Services Act* should not be extended to apply to ASIS's onshore activities.

¹³⁰ *Comprehensive Review* (n 4) 38–39 'Security and foreign intelligence'; Brendan Walker-Munro, 'The Richardson Review: Reviving the "Purpose" Of Law Enforcement and Intelligence Legislation' (2023) 46 *University of New South Wales Law Journal* 268, 283–4.

¹³¹ *PJCIS Advisory Report* (n 82) Recommendation 1 for amendment of the Bill's explanatory memorandum. Subject to that amendment being made, the PJCIS recommended that the Bill be then passed: Recommendation 2.

¹³² *Ibid*, 47.

¹³³ *Ibid*, 49 Appendix A (ten submissions). Only four submissions were received from organisations likely to raise objections to, or raise critical concerns as to, the content of the Bill.

¹³⁴ Those of ASIS and the ONI.

¹³⁵ PJCIS Report (n 82) 47.

¹³⁶ PJCHR *Human Rights Scrutiny Report 1 of 2022* (n 123) and Commonwealth Parliament Parliamentary Joint Committee on Human Rights *Human Rights Scrutiny Report Report 2 of 2022* 25 March 2022 (in both instances, the PJCHR focused on Schedules 2, 3, 5 and 8 of the Bill).

Greater public reassurance as to the necessity of, and the existence of safeguards on, powers in the Bill was desirable, and would have been promoted by adopting a more rigorous assessment of those points. This was particularly so as this initial Bill implementing the Review recommendations was likely to provide a legislative template for incremental but serial enactment of other recommendations.

7.2. *Legislating the second tranche of Review recommendations: the National Security Legislation Amendment (Comprehensive Review and Other Measures No 2) Bill 2023 (Cth)*¹³⁷

The *National Security Legislation Amendment (Comprehensive Review and Other Measures No 2) Bill 2023 (Cth)* was referred to the PJCIS by the Attorney General on 21 March 2023, though notice of that referral only appeared by Media Release on the PJCIS web page with an issue date of 31 March 2023.¹³⁸ This stated that

The Attorney-General has requested that the Committee report by the end of April 2023. Accordingly, submissions to the inquiry are invited by midday on Thursday 6 April 2023. The Committee acknowledges the very tight timeframe requested for submissions and appreciates all efforts to support the Committee with its review.¹³⁹

An immediate consequence of this exceptionally short time frame was that only eleven submissions were received,¹⁴⁰ severely restricting the quantum and quality of critique from outside the intelligence community. Further, a single public hearing was held in Canberra on Tuesday 11 April 2023 (the day after Easter Monday), in which representatives of the Law Council of Australia (which had provided a submission) were not called.¹⁴¹ This example of hyper-urgency significantly impacting upon the capacity of the PJCIS to discharge its review function is documented in the PJCIS report.¹⁴² It represented an unfortunate revival of the urgency paradigm in national security law, with the likely consequence of suboptimal laws being enacted. Several aspects of this phenomenon are identifiable in the process of legislating for the second tranche of Review recommendations. First, submitters to this PJCIS inquiry voiced concerns

¹³⁷ This Bill passed the House of Representatives and the Senate on 7 August 2023 and was assented to on 11 August 2023. This Bill implements ten Review recommendations, being Recommendations 18, 19, 66, 135, 145, 167, 186, 188, 191 and 192. It also comprised amendments to the *Intelligence Services Act 2001 (Cth)* including the composition of the PJCIS: *Parliamentary Debates* House of Representatives 29 March 2023, 11–12 (Mark Dreyfus) and Mark Dreyfus, 'Delivering Overdue Reform of Intelligence and Criminal Justice Frameworks' *Attorney General Media Release* (29 March 2023). The Bill was reviewed by PJCIS Report of 12 May 2023 and by PJCHR Scrutiny Report 5 of 9 May 2023.

¹³⁸ 'PJCIS to consider Comprehensive Review and Other Measures Bill No 2' *PJCIS Media Release* (31 March 2023).

¹³⁹ *Ibid.*

¹⁴⁰ PJCIS *Advisory Report on the National Security Legislation Amendment (Comprehensive Review and Other Measures No 2) Bill 2023* May 2023, 57, Appendix A.

¹⁴¹ *Ibid.*, 59, Appendix B.

¹⁴² *Ibid.*, 4 'Conduct of the inquiry' and 41 'Committee comment'.

about the timescale.¹⁴³ Second, in seeking to meet the Attorney-General's requested timeframe the PJCIS adopted improvised working arrangements.¹⁴⁴ This created informal time pressures on the delivery of a report,¹⁴⁵ compromising the PJCIS's ability to substantively and comprehensively engage with the Bill's provisions and submissions to it. The impact of this pressure is obliquely acknowledged by the PJCIS's reference to endeavouring 'to identify a way to achieve the most expedient process for reviewing the Bill',¹⁴⁶ and its expression of gratitude 'to those submitters and witnesses who devoted time to engaging with the review in these circumstances'.¹⁴⁷

These issues are candidly identified in the dissenting Opposition report:

The manner in which the Government has conducted this Inquiry has been irregular, rushed and contrary to the good conduct of a national security inquiry of this importance ... Such a short timeframe is disrespectful to stakeholders and otherwise unacceptable when it involves the examination of important amendments to national security legislation ... No appropriate justification has been provided to the Committee by the Attorney-General as to the compression of relevant timeframes in the conduct of this inquiry. The Committee relies heavily upon well researched, considered, meaningful submissions made by stakeholders in order to do its important work. If the Committee is to properly perform its statutory role of oversight of intelligence agencies and relevant legislation, it must be afforded appropriate timeframes in which to conduct its work.¹⁴⁸

Third, there were significant consequences for the substance of the review. One example was that where whole aspects of the Bill did not attract from submissions any substantive non-government evidence or commentary,¹⁴⁹ no comment was provided on those matters in the PJCIS Report.¹⁵⁰ Whole subject matters in the nine Parts to Schedule 1 to the Bill were affected. This reduced scrutiny was a direct consequence of the compression of inquiry time:

The Law Council has been unable to consider all aspects of the Bill in detail because of limited time for consultation, nor has it had the opportunity to adequately consult with its membership on the proposed reforms.¹⁵¹

Fourth, the PJCIS acknowledged that beyond the publicly disclosed submissions, it had 'also received some classified correspondence from relevant intelligence agencies and

¹⁴³ *Ibid*, 41.

¹⁴⁴ *Ibid*. 'the Bill was referred to the Committee by the Attorney-General on 29 March 2023, the request was made for the Committee to report by the end of April 2023'.

¹⁴⁵ *Ibid*. The Attorney-General had requested that the Committee report by the end of April 2023.

¹⁴⁶ *Ibid*.

¹⁴⁷ *Ibid*.

¹⁴⁸ *Ibid*, 51, 53.

¹⁴⁹ That is submission commentary 'beyond that provided in the Explanatory Memorandum (EM) or in statements in support from affected Departments and National Intelligence Community (NIC) agencies': *Ibid*, 41 and 17.

¹⁵⁰ *Ibid*.

¹⁵¹ *Ibid*, 51.

oversight bodies providing further information relevant to the development of certain amendments contained in the Bill'.¹⁵² This matter highlights a further issue, compounded by the inquiry's time compression. The traditionally bipartisan approach of the PJCIS¹⁵³ lends itself to risks of institutional capture and insufficient scepticism towards or testing of the claims of national security agencies relating to classified information, conceding an excessive reliance in trust and confidence of those agencies. It requires the PJCIS to have faith in those agencies as to the accuracy, cogency and claims as to potential security scenarios flowing from that information. It places alternative non-government submissions as to faults in, omissions from, or possible improvements to, legislation at a substantial disadvantage in their inability to contest or address unknown government sourced perspectives, ultimately shaping the legislation implementing the Review's recommendations.¹⁵⁴

One consequence of these matters was that a relatively brief 'Amendments for Committee Comment' was included in the PJCIS report.¹⁵⁵ A first significant item in Part 1 of the Bill related to the capacity to delegate the Attorney-General's powers and functions under the *ASIO Act 1979* (Cth) and the existing ability to create a substituted reference order for the Attorney-General's powers under the that Act and the *Telecommunications (Interception and Access) Act 1979* (Cth). This issue, significantly, involved the integrity of the Attorney-General's ministerial responsibility for ASIO and the AFP. The PJCIS endorsed both the Review recommendation,¹⁵⁶ and its extension in the Bill beyond these Attorney-General warrant authorisations,¹⁵⁷ to the authorisation of Special Intelligence Operations and the appointment of prescribed authorities for the purpose of overseeing the carrying out of ASIO questioning warrants.¹⁵⁸

A second significant item was the potential inclusion of ASIO affiliates within the new proposed definition of an ASIO officer in the *Criminal Code Act 1995* (Cth), thereby creating defences in relation to national infrastructure related offences, for a wider range of persons, including human sources.¹⁵⁹ On this occasion, the PJCIS made two recommendations: first, amending or providing a second Explanatory

¹⁵² *Ibid*, 4.

¹⁵³ Reflected, inter alia, in its major party membership.

¹⁵⁴ In the present bill, this arose from

concerns regarding the proposed changes to Part 2 of the IS Act related to Ministerial directions from the Foreign Minister to the Australian Secret Intelligence Service ... the majority of detail and evidence provided to the Committee regarding the need for and impact of this proposed change is highly classified ...

PJCIS Advisory Report (n 140) 47.

¹⁵⁵ *Ibid*, 41–8.

¹⁵⁶ *Ibid*, 42 being *Comprehensive Review* recommendation 18.

¹⁵⁷ This aspect was not a *Comprehensive Review* recommendation.

¹⁵⁸ *PJCIS Advisory Report* (n 140) 42.

¹⁵⁹ *Ibid*, 43–4.

Memorandum, acknowledging that human sources are included in the scope of an ASIO affiliate for the purposes of the proposed new definition of ASIO officer in section 473.1 of the *Criminal Code Act 1995*,¹⁶⁰ and secondly, in reviewing the ASIO Ministerial Guidelines,¹⁶¹ consider whether additional safeguards are required to ensure appropriate control by ASIO over the activities of its affiliates in relation to the mentioned defences.¹⁶² The PJCIS then recommended passage of the Bill, albeit with an Opposition dissenting report objecting strongly to the majority's proposed changes to the composition and quorum requirements of the Committee.¹⁶³

The compressed time frame for examination of the Bill exaggerated an extant practice in review of national security legislative reforms – the marginalisation and disregard of the parallel scrutiny reports of the PJCHR. The PJCHR human rights scrutiny report¹⁶⁴ briefly engaged only with the issue of spent convictions,¹⁶⁵ seeking to implement Recommendation 136 of the Review. Further, there is no reference to the PJCHR report within the PJCIS report, including issues raised by the PJCHR concerning personal information and the right to privacy. Indeed, without access to ASIO policies regarding access to the retention of personal information, required by the ASIO Guidelines,¹⁶⁶ it was not possible for the PJCHR 'to fully assess the compatibility of this measure with the right to privacy'.¹⁶⁷

7.3. *Legislating the third tranche of Review recommendations: the Inspector General of Intelligence and Security and Other Legislation Amendment (Modernisation) Act 2023 (Cth)*¹⁶⁸

Some distinctive characteristics of this next legislative episode were that only two Review recommendations were being implemented;¹⁶⁹ no report was produced by the PJCHR; and that improving oversight and accountability mechanisms – such as enhancing IGIS powers and authority – is ordinarily viewed positively. However, such legislative changes still warrant scrutiny for effectiveness and scope, particularly when such mechanisms are instituted or improved *ex post facto* to the prioritised Review implementing legislation.

¹⁶⁰ *Ibid*, 45 Recommendation 1.

¹⁶¹ Made under s.8A of the *Australian Security Intelligence Organisation Act 1979* (Cth).

¹⁶² See Recommendation 1, *PJCIS Advisory report* (n 140) 45.

¹⁶³ *Ibid*, 49–55. See also *Intelligence Services Act 2001* (Cth) Part 4 s.28 and Part 3 of Schedule 1, s.14.

¹⁶⁴ PJCHR *Human Rights Scrutiny Report* Report 5 of 2023 9 May 2023 (n 137).

¹⁶⁵ *Ibid*, 33–5.

¹⁶⁶ Minister for Home Affairs (Cth) *Minister's Guidelines in Relation to the Performance by the Australian Security Intelligence Organisation of its Functions and the Exercise of Its Powers* (August 2020) See also *Carne* (n 61).

¹⁶⁷ PJCHR *Human Rights Scrutiny Report* Report 5 of 2023 (n 164) 7, 35.

¹⁶⁸ The Bill passed the Commonwealth Parliament on 6 September 2023 and was assented to on 20 September 2023. The PJCIS reviewed the Bill: Parliament of Australia, *PJCIS Advisory Report on the Inspector-General of Intelligence and Security and Other Legislation Amendment (Modernisation) Bill 2022* (March 2023). The PJCHR did not review the Bill.

¹⁶⁹ Namely Recommendation 172 and Recommendation 174 of the *Comprehensive Review* (n 4).

A pointed consideration is that these oversight and accountability mechanisms generally follow a model of legislative enactment scheduled after the suite of other Review expansive enabling implementations,¹⁷⁰ rather than as part of a carefully configured integration of national security legislative review¹⁷¹ tailored to its importance and the extended time frame for Review implementation. The referral from the Attorney General set a very short deadline for the PJCIS report,¹⁷² minimising the number of submissions to the PJCIS inquiry,¹⁷³ and once more raising concerns from submitters.¹⁷⁴ These arrangements may however be partly explained by a preceding inquiry engaging various related IGIS matters, presented in February 2022,¹⁷⁵ shortly before the 2022 election.¹⁷⁶

The Review recommendations addressed by the Bill, 172 and 174, were straightforward:

The Inspector-General of Intelligence and Security Act should be amended to preclude the appointment to the Office of the IGIS of a person whose immediate prior role was as head or deputy head of an agency within the IGIS' oversight remit.¹⁷⁷

The Inspector General of Intelligence and Security Act should be amended to give the IGIS an inquiry function for employment-related grievances of staff employed under the Office of National Intelligence Act.¹⁷⁸

The PJCIS engaged with and supported the general gist of the recommendations, albeit with a fairly relaxed interpretive latitude. It responded to Recommendation 174 with its own quite general recommendation 3, devolving responsibility for these employment matters to the ONI.¹⁷⁹ It responded to Recommendation 172 with a looser recommendation for IGIS appointments,¹⁸⁰ indicating the willingness of the bipartisan PJCIS to craft responses on occasion more accommodating of

170 The first two tranches of Review recommendations legislated, under the above headings: *Legislating the first tranche of Review recommendations: National Security Legislation Amendment (Comprehensive Review and Other Measures No 1) Bill 2021* (Cth) and *Legislating the second tranche of Review recommendations: National Security Legislation Amendment (Comprehensive Review and Other Measures No 2) Bill 2023* (Cth).

171 See discussion under the above heading 'Implementing Review recommendations – Aiming from inception for an improved review and legislative process'.

172 See PJCIS *Advisory Report* (n 168) 1, and 2, similar to the truncated referral and review process for *The National Security Legislation Amendment (Comprehensive Review and Other Measures No 2) Bill 2023*.

173 Only four submissions were received: *Ibid*, 29.

174 *Ibid*, 23 including the Law Council of Australia.

175 PJCIS *Advisory Report on the Inspector-General of Intelligence and Security and Other Legislation Amendment (Integrity Measures)* February 2022.

176 See *Parliamentary Debates*, House of Representatives, 30 November 2022, 3923 (Mark Dreyfus) (Second reading speech for the *Inspector General of intelligence and Security and Other Legislation Amendment (Modernisation) Bill 2023*).

177 *Comprehensive Review* (n 4), Recommendation 172.

178 *Ibid*, Recommendation 174.

179 PJCIS *Advisory Report* n (168) 25.

180 *Ibid*, 26.

executive discretion,¹⁸¹ and so loosening the precise and more protective requirements sensibly advanced by the Review.

Responses to issues beyond the two Review recommendations provide further contrast. In 2023, the PJCIS revisited the desirability of measures proposed in the (previously reviewed) *Inspector General of Intelligence and Security and Other Legislation Amendment (Integrity Measures) Bill 2020* – to expand and enhance oversight of intelligence agencies, including coverage of the entirety of the National Intelligence Community,¹⁸² which the present bill did not do.¹⁸³ A further element of such oversight related to concern expressed about the restrictions on information sharing between the PJCIS and the IGIS, which

actively prevent the Inspector-General from sharing non-operational information with the Committee even when the information would be directly relevant to the functions of the Committee and the Inspector General may be minded to share the information if not for legislative limitations.¹⁸⁴

This issue was accentuated by a claim that the limitations could impact on the PJCIS's ability to carry out its statutory functions.¹⁸⁵

These claims demonstrate the potential for accountability mechanisms to coincide with the self-interest of the PJCIS – in expanding access to knowledge and information – and so enhancing its status, the scope of its review functions and its scope for engagement with the IGIS, again likely informed by bipartisan approaches. These features coincide with an enhanced capacity for PJCIS to hold NIC agencies to account. The Attorney-General's 2022 statement that full consideration was being given to expanded oversight¹⁸⁶ was subsequently realised with the introduction of the separate *Intelligence Services Legislation Amendment Bill 2023* (Cth).¹⁸⁷ It included important reforms to the scope of IGIS and PJCIS powers, and the interactive relationship of the PJCIS with IGIS and INSLM.¹⁸⁸ It attracted

¹⁸¹ The membership of which exclusively comprised at the time the parties of present and future governments.

¹⁸² PJCIS *Advisory Report* (n 168) 22.

¹⁸³ *Ibid*, 23 and *Parliamentary Debates*, House of Representatives, 30 November 2022, 3923 (Mark Dreyfus). The *Inspector –General of Intelligence and Security and Other Legislation Amendment (Modernisation) Bill 2023* passed the Commonwealth Parliament on 6 September 2023 and was assented to on 20 September 2023.

¹⁸⁴ PJCIS *Advisory Report* (n 168) 24.

¹⁸⁵ *Ibid*.

¹⁸⁶ *Parliamentary Debates*, House of Representatives, 30 November 2022, 3923 (Mark Dreyfus).

¹⁸⁷ The Bill was introduced on 22 June 2023, referred to the PJIS on 26 June 2023 and considered by the PJCHR in its Report 10 of 2023. The Bill lapsed with the dissolution of the 47th Commonwealth Parliament on 28 March 2025, prior to the 2025 election, before the PJCIS could report. A new Bill was introduced in July 2025: *Strengthening Oversight of the National Intelligence Community Bill 2025* (Cth) : *Parliamentary Debates* House of Representatives 30 July 2025, 7–9 (Michelle Rowland) (second reading speech).

¹⁸⁸ PJCIS 'Review of the Intelligence Services Legislation Amendment Bill 2023' Inquiry web page: <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Intelligence_and_Security/ISLAB2023>.

some controversy,¹⁸⁹ but, freed from the identified constraints and purposes of the Review, it offered increased oversight responsibilities and strengthened relationships between the accountability organs. In this sense it more closely approximated the methodological approaches of the Hope Report, along with earlier Labor government national security accountability reforms proposed by Senators Faulkner, Wong and McAllister.¹⁹⁰

7.4. Legislating the fourth tranche of Review recommendations: National Security Legislation Amendment (Comprehensive Review and Other Measures No 3) Bill 2023 (Cth)¹⁹¹

This Bill sought to implement 12 Review recommendations,¹⁹² within the ministerial responsibility of the Minister for Home Affairs.¹⁹³ Importantly, there was only PJCIS review of the Bill, with no PJCHR review. The PJCIS report¹⁹⁴ usefully includes a progress update on Review recommendation implementation,¹⁹⁵ tracking recommendations implemented in the preceding three pieces of implementing legislation.¹⁹⁶

The most important examples from this fourth piece of legislation¹⁹⁷ for assessing the manner of implementing the Report's recommendations are the extended protections introduced for intelligence information and documents,¹⁹⁸ and the revised,

¹⁸⁹ See submissions 1 (with Supplementary Submission) and 2 to the PJCIS Inquiry regarding the *Intelligence Services Legislation Amendment Bill 2023*.

¹⁹⁰ (n 81).

¹⁹¹ This Bill passed the Commonwealth Parliament on 15 May 2024 and was assented to on 21 May 2024. The PJCIS reviewed the Bill: PJCIS *Advisory Report on the National Security Legislation Amendment (Comprehensive Review and Other Measures No 3) Bill 2023* (March 2024) There is no PJCHR Report.

¹⁹² *Parliamentary Debates* House of Representatives 30 November 2023 8926–8927 (Clare O'Neil). This second reading speech sets out the basic content of the four schedules, noting that

the bill would make targeted amendments to the legal framework governing our intelligences agencies ... It will also make some related changes which will strengthen protections for the identity of ASIS, ASD and ASIO staff and clarify or redefine elements of the Intelligence Services Act.

¹⁹³ PJCIS *Advisory Report* (n 191) 3.

¹⁹⁴ *Ibid.*

¹⁹⁵ *Ibid.*

¹⁹⁶ *National Security Legislation Amendment (Comprehensive Review and Other Measures No 1) Act 2022* (Cth) – implementing 11 recommendations (Recommendations 12, 36, 37, 41, 45, 46, 52, 74, 103, 183 and 189); *National Security Legislation Amendment (Comprehensive Review and Other Measures No 2) Act 2023* (Cth) –implementing 10 recommendations (Recommendations 18, 19, 66, 136, 145, 167, 186, 188, 191 and 192) and *Inspector-General of Intelligence and Security and Other Legislation Amendment (Modernisation) Act 2023* – implementing 2 recommendations (Recommendations 172 and 174).

¹⁹⁷ *National Security Legislation Amendment (Comprehensive Review and Other Measures No 3) Bill 2023* comprised four schedules: Schedule 1 – Security Assessments; Schedule 2 – Protecting identities and information; Schedule 3 – Authorisations for intelligence activities; Schedule 4 – Security vetting and security clearance related activities.

¹⁹⁸ Recommendations 143 and 190.

more flexible authorisation processes, for identified intelligence agency activities.¹⁹⁹ In relation to the extended protections for intelligence information and documents, the tendency in more recent Commonwealth legislation has been towards expanded secrecy offences,²⁰⁰ including differentiation between Commonwealth officials and non-officials who release information.²⁰¹ In contrast, the Bill's engagement with secrecy offences is framed instrumentally in terms of efficiency, warranting assessment of how the processes of reviewing the Bill responded to such assertions and influenced the formation of the legislation.

Examples of the efficiency claims include consolidation, but not expansion of the scope, of secrecy offences in the *Intelligence Services Act*; the updating and modernising of the existing *ASIO Act* publication offence to (i) take into account developments in technology and modern communication and (ii) to strengthen protection for the identity of ASIO officers and affiliates so as to more closely align with ASIS officer protection under s.41 of the *Intelligence Services Act*.²⁰²

The consolidation of security offences is explicitly linked in context to both a completed²⁰³ and a later review of Commonwealth secrecy offences.²⁰⁴ It is self-evident that having specific individual secrecy offences for ASIS, ASD, AGO and DIO dealing with identical subject matters means 'that charging a person with one of those offences would immediately identify their association with a particular agency'.²⁰⁵ The absence of a PCJHR review of this bill still make it rational to await the relevant INSLM report before proceeding with legislation.²⁰⁶

In relation to updated and new offences relating to publication of ASIO identities, present and future varied proliferation of technology and communications may justify removal of reference to specific methods of publication.²⁰⁷ In contrast, there is an opacity and lack of justification in extending liability through a new multi-layered s.92A offence,²⁰⁸ which appears crafted to broadly multiply prosecutorial reach, discretion and deterrence regarding communications leading to or which could reasonably lead to the identification of a current or former ASIO employee or affiliate – potentially

¹⁹⁹ Recommendations 2, 17 and 68.

²⁰⁰ With new general offences in the Criminal Code Act 1995.

²⁰¹ Contrast s.122.1 and 122.2 of the *Criminal Code* (Cth) Current and former Commonwealth officer offences dealing with information handling, release and disclosure with s.122.4A of the *Criminal Code* (Cth) (information communicating and dealing by non-Commonwealth officers).

²⁰² *Parliamentary Debates* House of Representatives 30 November 2023, 8927 (Clare O'Neil).

²⁰³ Commonwealth, Attorney General's Department, *Review of Secrecy Provisions: Final Report 2023*.

²⁰⁴ Commonwealth, INSLM, *Review of Secrecy Offences in Part 5.6 of the Criminal Code 1995 Issues Paper* January 2024.

²⁰⁵ *PJCIS Advisory Report* (n 191).

²⁰⁶ *Ibid*, Recommendation 4, Australian Government response to PJCIS Advisory Report (relating to INSLM recommendations in the secrecy offences review of Part 5.6 of the *Criminal Code*).

²⁰⁷ The conditioning conduct now is 'for a person to make information public, or to cause or permit information to be made public, that identifies a current or former ASIO employee or affiliate': *Ibid*, 17.

²⁰⁸ See the several variations in intent and knowledge in disclosing information or engaging in conduct leading to disclosure about current or former ASIO employees and affiliates: *Ibid*, 18.

creating a chilling effect on communications by those seeking to hold the Organisation to account.²⁰⁹

In relation to more flexible authorisation processes for identified intelligence agency activities, the government claimed that its proposed amendments would provide greater legal certainty and clarity regarding ministerial authorisations and warrants, as well as streamlining the authorisation process.²¹⁰ It introduced an 'interchangeability sequence' for approval from a relevant Intelligence Services Act minister²¹¹ and the Attorney General²¹² for ASIS, AGO or ASD to undertake activities regarding Australians.²¹³ In no longer requiring the Attorney General to approve the authorisation first, this change increases executive discretion, whilst potentially and informally restricting the ability of the Attorney General to frame legal scrutiny from the outset – a point that escaped attention of the PJCIS review.²¹⁴

Similarly, a broadening impact was created by the replacement of more specific s.9 (1A) of the *Intelligence Services Act* precise language of 'a person's safety' by the more general language of 'any person's safety' as it relates to ministerial satisfaction as to the existence of actual or likely involvement of *risks to safety* by an Australian person or a class of Australian persons. Importantly, this further amendment, though it enlarges ministerial authorisation powers, was not a response to a Review recommendation; however, the PJCIS sought to assuage any concerns about it by reference to IGIS oversight of ASIS ministerial authorisation powers.²¹⁵

An important general assessment of the subtle extensions of executive power in the above examples would consider whether the PJCIS review process identified broad and potentially unintended consequences arising from the reforms, and responded accordingly, or too readily accepted government claims, without evidence of greater probing. It would seem that the latter is more likely. The PJCIS review process in these circumstances clearly reflected some of the long-standing problems identified earlier in this article. Nevertheless, the PJCIS's recommendations are conveyed as modest and uncontroversial, more a question of fine tuning, rather than raising harder questions of review methodology and legislative necessity – in turn reflected in Government agreement to, and one case mere noting of, the PJCIS recommendations.²¹⁶

²⁰⁹ See the ASIO submission on this point, with the PJCIS observing critically that no evidence was provided 'that consideration had been given to how these new provisions would interact with pre-existing secrecy offences in Commonwealth legislation': *Ibid*, 18 and 19.

²¹⁰ *Parliamentary Debates* House of Representatives 30 November 2023, 8927 (Clare O'Neil).

²¹¹ Being the relevant Minister responsible for ASIS, AGO or ASD.

²¹² Giving effect to Recommendation 2 of the *Comprehensive Review* (n 4).

²¹³ In circumstances where Australian persons are, or are likely to be, involved in activities that are, or are likely to be a threat to security or involved with a listed terrorist organisation: PJCIS *Advisory Report* (n 191).

²¹⁴ *Ibid*, 20–1.

²¹⁵ *Ibid*, 21.

²¹⁶ *Australian Government response to the Parliamentary Joint Committee on Intelligence and Security Report: National Security Legislation Amendment (Comprehensive Review and Other Measures No 3) Bill 2023*.

7.5. *The Commonwealth Attorney-General's Department Electronic Surveillance Reform Project and Forthcoming Review Legislation*

The word limits of this article preclude detailed consideration of review and legislative methods around remaining (and yet to be actioned) Review recommendations. A PJCIS report²¹⁷ offers a convenient summary of matters still outstanding:

The Government identified 53 recommendations that required no further action because the proposed changes did not require legislative amendment or because they included a recommendation to maintain the status quo. The Government rejected four recommendations at the outset ...²¹⁸

Additionally, *approximately 53 recommendations* are currently being considered as part of the ongoing electronic surveillance reform project led by the Attorney-General's Department.²¹⁹ Of the remaining recommendations still to be implemented, a further 23 sit within the Attorney-General's portfolio and the remainder are to be implemented by another relevant minister.²²⁰

The complexity of the harmonisation and modernisation of surveillance frameworks for existing, evolving and emerging electronic communications technologies is likely to warrant separate academic analysis. A substantial risk, however, in a consolidated approach is that the threshold for authorisations will default to a lowest common approval denominator of the present arrangements – so that a policy position grounded in commonality incidentally broadens the scope for national security electronic surveillance, and communications of its content amongst the NIC. Of similar concern are authorisations of more particular opacity under the *Intelligence Services Act*, by ministers such as the Minister for Foreign Affairs and the Minister for Defence,²²¹ and indeed in all circumstances, for substitute and emergency ministerial authorisation processes.²²²

8. Concluding observations: reforming Review implementation approaches and the desirability of subsequent, different review of implemented recommendations

Both the conduct of the Review and the implementation of its recommendations have been complex, reflecting some commonly identified characteristics of Australian national security law making and review. Implementation has produced mixed or uneven results. Given the significant implications of such legislative reforms for Australian democracy, much can be learnt from the implementation experience to date, with it

²¹⁷ PJCIS *Advisory Report* (n 191).

²¹⁸ *Ibid.*, 3.

²¹⁹ *Ibid.* See also *Comprehensive Review* (n 4) Volume 2: Authorisations, Immunities and Electronic Surveillance, Table of recommendations – Volume 2.

²²⁰ PJCIS *Advisory Report* (n 191) 3.

²²¹ In contrast to, for example, the more familiar ministerial authorisations under the *ASIO Act 1979* (Cth).

²²² See for example, *Intelligence Services Act 2001* (Cth) s.8 (Ministerial directions), s.9 (Ministerial authorisation) and s.9A (Authorisations in an emergency – Ministerial authorisations) and s.9B (Authorisations in an emergency – Ministers unavailable).

being possible to identify essential and practical improvements to the construction and review of national security legislation and apply those to the implemented Review recommendations.

In assessing the implementation experience, desirable reforms would more closely align the legislative process and resulting legislation with core aspects of participatory liberal democracy and the democratic accountability of the NIC. Such reforms would institute greater levels of review independence, introduce more contestation of, and alternatives to, the content and form of implementation, and recognise that bipartisanship may restrict constructive critique and alternative responses. A more independent style of subsequent review, similar to the reviews conducted by judicial figures, such as Hope, Clarke, Sheller and Whealy,²²³ with subsequent legislative amendment, is desirable. It would moderate the NIC's ambition for incremental expansion, which is further leveraged by the legislated co-ordinating and co-operative role of the ONI, by instituting additional justificatory thresholds.

An important issue considered was the nature of the relationship between the PJCIS and the PJCHR, and institutional hierarchies, as well as the timing of, and non-consideration of PJCHR reports by the PJCIS and Government in implementing Review recommendations. Reforms would recognise the value of disagreement between Committees and facilitate these processes.

Improved processes and reform alternatives are desirable. Several reasons exist. The present methodology of legislative enactment and review, and its shortcomings, has arisen over time from the enactment of many individual national security laws. The present model approaches these problems in an individualised manner, modelled in an ad hoc way to retrofit improvements to individual bills, including to existing actors – PJCIS, IGIS and INSLM – during or after substantive implementation of recommendations. Ongoing pressures will arise to cede more discretion and powers to intelligence agencies, to extend and overlap functions and increase interoperability and co-operative arrangements, co-ordinated through the ONI and the NIC. Present implementation, and later review, of comprehensive reforms of the operations of NIC agencies reflected in the Report demands a more holistic, integrated approach to review and improvement. These enhanced review questions need acknowledgment, with reforms of review processes directed to that reform objective.

Three foci offer guidance and pathways towards possible reforms.

8.1. *Role of suggested Charter of Rights in changing the PJCIS – PJCHR relationship and strengthening review processes*

The report of the PJCHR *Inquiry into Australia's Human Rights Framework*²²⁴ offers a general framework for addressing the unsatisfactory review relationship of national

²²³ Discussion under the above heading 'The Review's distinctive methodologies'.

²²⁴ (n 18).

security legislation between the PJCIS and the PJCHR, namely the marginalising and excluding the influence of the latter. Reform through the introduction of a Commonwealth Human Rights Act would strengthen PJCHR and lead to application of human rights analysis as a standard methodology. The recommendations of the Inquiry²²⁵ include measures that within the proposed Commonwealth statutory charter to strengthen, re-balance and enhance the PJCHR role and its centrality, offering it a more substantial and constructive human rights review role.

Other possible Parliamentary procedural and practice reforms to address this difficulty relate to the interactions of the reporting functions of the PJCHR and the PJCIS, such as the reform of Standing Orders – particularly around the timing of reports, the actual presentation of reports, and the introduction of a requirement for the PJCIS to formally acknowledge and engage with the PJCHR reports in its own reviews.

8.2. *The call for a scheduled periodic Independent Intelligence review – by a genuinely independent appointee or the INSLM*

The view had earlier been expressed²²⁶ that given the circumstances and implications of the Review, it should be further considered by a (then due) periodic Independent Intelligence Review,²²⁷ conducted by a judicial figure or a more broadly based panel, before being implemented. This did not occur, and was likely seen as liable to exacerbate the delays identified with the public release of the report and clash with the subsequent enactment of the first tranche of legislated review recommendations. There was considerable merit in this idea, and it could sensibly be re-purposed to review the process of and legislative enactment of the Review's recommendations, when that enactment is close to completion (save, perhaps, for the more complicated electronic surveillance reform project). Such review should offer a broader perspective on the configuration and calibration of the relevant legislation, particularly as to if and how qualitative democratic institutional characteristics can be best reconciled with the collaborative, co-operative and integrative dimensions of the Review recommendations.

Ex post facto review of the implemented recommendations of the Review and the legislative process by which this took place would identify omissions and improvements, and make obvious, free from a politicised debate, the need for conscious and deliberate legislative alignment with liberal democratic values and practices in such improvements. A part of such process would be examining the coherence of measures in the *Inspector General of Intelligence and Security and Other Legislation (Modernisation)*

²²⁵ *Inquiry into Australia's Human Rights Framework* (n 18) especially Recommendation 2, Recommendation 13, Recommendation 14, Recommendation 16. See also Appendix 5, Example Human Rights Bill, 2024.

²²⁶ See the references at (n 74) to the Peter Edwards and Michael Kirby articles and (n 75) to the John Menadue article and associated text in it.

²²⁷ *Independent Intelligence Review June 2017* (n 5) 5–9 Executive Summary.

Act 2023 (Cth) and the very recently introduced *Strengthening Oversight of the National Intelligence Community Bill 2025* (Cth). Such additional review might ideally be conducted by the INSLM or another specifically appointed independent reviewer, with the objective of reviving the stronger legal ethos and broader perspectives represented by the Hope Royal Commissions, and similar national security related inquiries.

8.3. Re-orientating or revising the implementation of Review recommendations within the context of national and international contestations of democracy

The implementation of the Review's recommendations, encompassing a range of national security reforms, requires much greater contextualisation in relation to the institutions and practices of contemporary democracy, and their functioning. This conceptual and contextual underpinning of democracy by national security legislative reforms is noticeably unarticulated in the Review documents – an important omission, shaping the Review's orientation as an enabler for the role of the ONI and the NIC. Too little contextualisation of the priority, content and consequences of the national security reforms recommended by the Review, has meant that contemporary matters such as ongoing public confidence in Australian democracy,²²⁸ the contraction and contestation of international democracy,²²⁹ and reviews of the workings of critical aspects of Australia's democratic systems,²³⁰ have neither influenced or shaped the priorities of Review implementation, nor its legislative construction or orientation. An alternate, preferable view would be that the reforms arising out of the Review need to be ultimately calibrated to the protection and fostering of participatory, liberal democratic, parliamentary democracy, and that this characteristic should in future be an important threshold test in reviewing and legislating for the Review's recommendations. Such an

²²⁸ Contemporary Australian studies include: the ANU Election study: *Explaining the 2022 Australian Federal Election Result*: ANU Centre for Social Research and Methods (20 June 2022); the Scanlon Foundation study, *Mapping Social Cohesion* (Scanlon Foundation 2022); the Lowy Institute Poll 2022 Democracy, *Attitudes to Democracy* (Lowy Institute 2022); the Grattan Institute studies, *Who's in the room? Access and Influence in Australian politics* (Grattan Institute Report 2018) and *A Crisis of Trust the Rise of Protest Politics in Australia* (Grattan Institute Report 2018); studies from the Democracy 2025 Project, *How Does Australia Compare: What Makes a Leading Democracy? Two Paradoxes for Australian Democratic Governance* (Museum of Australian Democracy and University of Canberra April 2020); *Political Trust and Democracy A Snapshot of the Findings from a National Survey* (Museum of Australian Democracy and University of Canberra July 2020); *Political Trust and the Covid 19 Crisis Pushing Populism to the Backburner?* (Museum of Australian Democracy August 2020) and the Commonwealth Government, *Covid 19 Response Inquiry Report* (Covid 19 Response Inquiry Panel 2024).

²²⁹ Significant topical reports include: *Freedom in the World 2024 The Mounting Damage of Flawed Elections and Armed Conflict* (Freedom House 2024); *Democracy Index 2024: Conflict and Polarisation Drive a New Low for Global Democracy* (The Economist Economic Intelligence Unit 2024); *Democracy Report 2024 Democracy Winning and Losing at the Ballot* (V- Dem Institute, University of Gothenburg 2023).

²³⁰ Important Commonwealth Parliament reports are the Senate Legal and Constitutional Affairs References Committee *Nationhood, National Identity And Democracy* (February 2021); Commonwealth Parliament Joint Standing Committee on Electoral Matters *From Classroom to Community Civics Education and Political Participation in Australia* (2025) and Commonwealth Strengthening Democracy Taskforce: *Strengthening Australian Democracy A Practical Agenda for Democratic Resilience* (2024).

objective should now be explicitly adopted as an updated policy gloss on the Government Response. However, as many Review recommendations have already been implemented, this reform could be given effect within an Independent Intelligence Review or INSLM review. Such greater practical conceptualisation of the function and consequences of national security law reforms upon Australia's political and legal systems, would help revise and re-centre the construction of those reforms as part of the Australian polity, in the way that earlier reviews were so centred.

The above three reform foci illustrate how, by future review and reform, implementation of the Review's major national security law proposals could be revisited to increase accountability, mediate and reconcile contested principles and more strongly underpin Australia's democratic institutions, practices and culture.

Disclosure statement

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