

ADDRESS TO SUPREME AND FEDERAL COURT JUDGES' CONFERENCE - HOBART, 26 JANUARY 2009

Introduction

Thank you for the opportunity to speak today.

I thought it might be of most interest to you if I cover two things. The first is the role I currently perform, why it was established, how it sits in the overall accountability framework and what recent developments have been.

The second area I thought I could usefully cover is my involvement in the Sheller Review of certain aspects of the anti-terrorism laws and what the upshot of that and other reviews has been, at least to date.

IGIS features

In a nutshell, there are six key features to the position of Inspector-General of Intelligence and Security:

1. The jurisdiction of the Inspector-General is limited - at present - to the activities of the six agencies referred to as the Australian Intelligence Community (AIC). The six agencies are Australian Security Intelligence Organisation (ASIO); the three foreign intelligence collectors Australian Secret Intelligence Service (ASIS), Defence Imagery and Geospatial Organisation (DIGO) and Defence Signals Directorate (DSD); and the two assessment agencies Office of National Assessments (ONA) and Defence Intelligence Organisation (DIO). Intelligence and security related activities of other agencies such as the Australian Federal Police (AFP) or the Defence Security Authority (DSA) are not currently within my jurisdiction.
2. The specific focus of the Inspector-General's review is the operational activities of the AIC agencies and in particular whether these activities comply with Australian law and ministerial directions, are carried out with propriety, and respect human rights. The focus is not, at least in a direct sense, efficiency or effectiveness or financial management.
3. Two forms of review are provided for in the IGIS Act - inspections and formal inquiries. Inspections involve examining selected records e.g. every month ASIO's requests for special powers warrants are examined to see if they comply with the legislative requirements. I should note that the inspection program is the larger portion of my office's activities, based on a view that such activity

has a substantial normative effect on behaviour and is a useful means of identifying systemic control issues. Inquiries are formal investigations and can be either preliminary or full. Preliminary inquiries can be escalated to full inquiries, although on appropriate occasions I can move straight to a full inquiry.

The outcomes of review can include apologies by an agency, the payment of compensation, disciplinary proceedings against agency officers, or referral for consideration of prosecution action.

4. In conducting full inquiries the IGIS can use strong coercive powers if necessary. Oral evidence can be compelled (with use immunity) and taken on oath or affirmation. Production of records can also be required, and premises accessed.
5. The IGIS has an own motion capacity, as well as responding to complaints from the public or considering requests from ministers. The scope of each inquiry can be as flexible as is needed in the judgement of the Inspector-General. The IGIS cannot be directed by ministers or the government as to how inquiries and inspections are conducted. The only minister who can require the Inspector-General to examine a particular matter is the Prime Minister, but it is still the case that how the Inspector-General conducts the inquiry is a matter for him or her.
6. The independence of the IGIS is further strengthened by the fact that the position is a statutory one with a fixed term and strong tenure. There is also consultation with the Leader of the Opposition before a recommendation for appointment is made to the Governor-General, to try to ensure that a potential appointee is not tainted politically.

Some history

Creation of a position of Inspector-General of Intelligence and Security (IGIS) was a recommendation in 1984 of the second Hope Royal Commission into the Australian intelligence services. Legislation to give effect to the recommendation was enacted in 1986 and the office started operating from 1 February 1987.

There were two reasons for the creation of the position.

The first of these was concerns that the intelligence and security agencies were not sufficiently under ministerial control, nor subject to enough scrutiny and were being caught up in domestic politics.

No doubt some of you will recall the incident in 1973 when the Attorney-General of the day, The Hon Lionel Murphy, conducted what was referred to as a “raid” on ASIO’s Melbourne headquarters. While one can query the judgement involved in taking such a step, one must also appreciate his belief that as Attorney-General he was not being provided all information of legitimate interest to him.

Yet another prominent incident was when a training exercise conducted by ASIS in the environs of the Sheraton Hotel in Melbourne went badly awry in 1983.

This training exercise, which involved the “rescue” of a “hostage” from a hotel room was intended to be conducted without publicity and without involving persons other than those directly taking part. However, members of the public did become involved and it was publicly revealed the next day that the trainees had been carrying weapons, had threatened members of the public and had forced entry into a room of the hotel causing damage.

There was also the Coombe-Ivanov affair in 1983, which raised suspicions that ASIO might be meddling in domestic politics.

The second motivation for the creation of the position of IGIS relates to the desire in the 1970s and since then that Commonwealth departments and agencies be made more accountable.

Important developments have included what can be referred to as the administrative law reforms package (the Ombudsman, the Administrative Appeals Tribunal, the AD(JR) Act and the Freedom of Information Act); but the developments also encompass the creation of other watchdog bodies such as the Privacy Commissioner and the Australian Humans Rights Commission. There is also the impact of the Auditor-General undertaking performance audits, a form of audit with a much wider scope than traditional financial auditing.

The significance of this set of developments should not be underestimated. Chief Justice Spigelman has pointed out that there is what can be described as an integrity/accountability arm of government.¹ This arm of government is a notable addition to protecting the rule of law in Australia.

It has been seen as important - indeed vital - that the intelligence and security agencies also be accountable. Yet there is something of a dilemma because most of the activities of the agencies necessarily take place in secret and some

¹ The Hon J J Spigelman AC, *The Integrity Branch of Government*, and *Jurisdiction and Integrity*, first and second lectures in the 2004 National Lecture Series of the Australian Institute of Administrative Law, April and August 2004.

elements of that work cannot be detailed in the public domain without impairing future activities.

One part of the solution to this dilemma was to establish a specialised review body - the Inspector-General of Intelligence and Security.

Range of mechanisms

It should also be appreciated that the IGIS is not the only means by which the AIC agencies are constrained and held accountable. International studies have emphasised that controlling intelligence agencies requires a comprehensive framework.

Legislation is an essential part of the framework, to spell out agency functions, and to set parameters to their activities. In Australia the functions of ASIO are spelt out in the *Australian Security Intelligence Organisation Act 1979*, those of the three foreign intelligence collectors in the *Intelligence Services Act 2001*, while ONA is a creature of the *Office of National Assessments Act 1977*. This legislation emphasises that the agencies can only do things that are within the legislative charter set out for them and within the other limitations contained in the legislation.

Similarly Australian legislation spells out the conditions and approval processes for special powers warrants or authorisations sought by relevant agencies. It also carefully specifies the relationship between the relevant minister and the head of the agency. Ministers are responsible for policy, are advised about or approve specified matters, and are accountable to Parliament. However, there are significant limitations on a minister's capacity to direct the agency operationally, lest a minister succumb to the temptation to direct agency resources to inappropriate purposes.

There also needs to be the right culture and governance within intelligence agencies. This includes formal internal policies and procedures that guide staff as well as internal mechanisms to promote them. In addition, training programs need to emphasise ethics and accountability. These are currently features of the AIC agencies. In the last four years I or my senior staff have addressed close to 4,000 AIC agency staff during training courses and seminars about their accountability and the importance of them behaving lawfully and properly. That is in addition to the many contacts we have through inspection and inquiry work.

As well as my external monitoring and review role, the AIC agencies are also subject to review by a Parliamentary Joint Committee on Intelligence and Security (PJCIS).

It is probably worth noting at this point that in the aftermath of the report on the Haneef matter by the Hon John Clarke QC the Government has announced that it will establish a Parliamentary Joint Committee on Law Enforcement to increase parliamentary oversight of the Australian Federal Police.²

The AIC agencies are also subject to the Auditor-General's scrutiny, and certain assessments by ASIO can be appealed to the Administrative Appeals Tribunal.

To complete the picture - but by no means to suggest that it is the least important - the Courts are potentially available to people who are aggrieved with an AIC agency e.g. Mr Mamdouh Habib has been pursuing a civil action against the Commonwealth.

Developments

I should now turn to some of the particular challenges since the events of 11 September 2001. Since that time the AIC agencies and a range of other agencies such as police services, have had significant increases in powers and capabilities. Some of these have been particularly controversial, touching as they do on issues such as detention without charge and intrusion on privacy.

As IGIS I have seen it as essential that my office pay particular attention to how new AIC powers and capabilities are used. This has meant some strengthening and refocussing of my office's inspection program.

Arguably the most controversial of the new powers for ASIO was the introduction of questioning and detention warrants into the ASIO Act. One of the safeguards in the relevant provisions is that the IGIS can attend questioning sessions at his or her discretion and if the IGIS raises a concern during such a session, it must be considered by the prescribed authority (a retired judge who oversees the questioning), if necessary by suspending the questioning.

It is entirely understandable that there is sensitivity about the existence of such a category of warrants, and it is entirely appropriate that the provisions are subject to a sunset clause. However, I must also say that some of the commentary on these warrants is not accurate. They are not readily available and innocent people are not swept off the streets and held for up to a week in darkened rooms.

In the five years since the introduction of the relevant provisions there have been 15 such warrants related to a very small number of important investigations. Effectively they are available only as a last resort.

² The Hon Robert McClelland MP, Attorney-General, Media Release 137/2008.

Notably none of these 15 warrants have involved the person concerned being held in detention. And I can assure you - having seen all the warrant documentation and having sat in on much of the questioning - that there was good reason to have obtained a warrant in each of the cases.

Moreover, these are not cruel, inhumane or degrading proceedings. You don't simply have to take my word for this. The PJC conducted a review which included viewing video recordings taken of questioning sessions. The Committee concluded that the provisions have "...been useful and administered in a professional way". The Committee's view of the questioning was that "...it was very formal and certainly polite and dispassionate, if persistent".³

Other controversial powers such as control orders, preventative detention orders and extended police questioning time have not been vested in ASIO or the other AIC agencies, and are not matters which have been within my jurisdiction to monitor and review.

Legislative review

In addition to my functions under the IGIS Act, I was also one of the eight members of the Security Legislation Review Committee chaired by the Hon Simon Sheller AO QC which conducted a six month one-off review in 2005-06 of the operation, effectiveness and implications of amendments in six Acts relating to terrorism which were passed in 2002 and 2003.⁴ The focus was the criminal offence provisions contained in Divisions 100-103 of Part 5.3 of Chapter 5 of the *Commonwealth Criminal Code*. The Committee's remit did not include the police powers I have mentioned above, nor the *National Security Information (Civil and Criminal Proceedings) Act 2004* (NSI Act).

As a Committee we made a number of recommendations for change, and expressed concern about the damaging effect on community relations of aspects of the new laws and the limited dissemination of accurate information about them. We emphasised that legislative refinements should be seen as an essential part of effective security strategies, not a softening of approach.

The Committee was further concerned that there be adequate future review of the whole of Part 5.3 of the *Criminal Code* i.e. the criminal offence provisions, control orders and preventative detention orders. And we noted that in the future consideration might have to be given to mechanisms such as a public interest monitor (as in Queensland) or special counsel (as in the UK), given the challenges which dealing with sensitive classified material in court can involve.

³ Parliamentary Paper 454/2005, tabled 30 November 2005.

⁴ Security Legislation Review Committee 2006, Report of the Security Legislation Review Committee, SLRC, Attorney-General's Department, Canberra.

The Sheller Committee's report was in turn the subject of two inquiries by the Parliamentary Joint Committee on Intelligence and Security, and that body agreed with a significant number of our recommendations (but not all) and made some additional recommendations of its own.⁵

When the Commonwealth Attorney-General recently announced that the Government would implement the ten recommendations made by Mr Clarke, the Attorney-General also announced the Government's response to each of the PJC's recommendations in its two reports. A significant number of the recommendations were accepted. Furthermore, the announcement included acceptance by the Government of the recommendations made by the Australian Law Reform Commission about amendment of the sedition offences in the *Criminal Code*.⁶

The various responses in the Government announcement include two matters that have a special significance for my role as IGIS.

The first is that a position of National Security Legislation Monitor will be established as a priority. The Monitor is to be an independent statutory position and will report to Parliament.

I have consistently supported the creation of such a position. I believe the occupant will be able to provide advice to the Parliament on Part 5.3 of the *Criminal Code*, the operation of the NSI Act and where necessary the whole gamut of terrorism related provisions. I imagine that when the Monitor is appointed he or she will wish to speak with members of the judiciary about various issues.

My office will, I hope, also be asked periodically by the Monitor for comment on aspects of the provisions which are relevant to the AIC agencies, and will be in a position to provide some useful commentary. Similarly, the Commonwealth Ombudsman will be able to provide comment on aspects which relate to other bodies such as the Department of Immigration and Citizenship (DIAC), Customs or the AFP.

The second point of particular significance to my office is that in some instances the Inspector-General will be able to include within the scope of formal inquiry under the IGIS Act, agencies outside the AIC (e.g. the AFP, DSA, the Department of Foreign Affairs and DIAC).

I see this as providing the Government with another option for having certain issues investigated with the benefit of coercive powers and protections being available. The IGIS is also a standing mechanism and so can be readily deployed. My office has a detailed understanding of intelligence work.

⁵ Parliamentary Papers 423/06, tabled 4 December 2006 and 201/07, tabled 20 September 2007.

⁶ The Hon Robert McClelland MP, Attorney- General, Media Release 137/2008.

This is not to say that I am the only review mechanism which needs to be available. There may be matters which the Parliament will wish to have reviewed by a parliamentary committee. There may be matters for which a Royal Commission is appropriate. There may be matters which are broader than the IGIS or the Ombudsman or the Law Enforcement Integrity Commissioner should sensibly tackle.

Interestingly, one of the Government responses to the Clarke Report recommendations has been to provide the Australian Law Reform Commission with a reference to review the Royal Commissions Act and to consider the scope for an alternative form of executive inquiry which would have access to a flexible range of special powers relating to matters such as production of documents, appearances before an inquiry, maintenance of confidentiality and protection of witnesses.

Close

I sometimes think that Hollywood, TV and infotainment have something to answer for in the impressions they may have created about how the Australian intelligence and security agencies actually operate.

In regard to the monitoring and review of our six Australian intelligence and security agencies, there is a better framework in place than one would glean from some of our media. Having worked in the public sector for a lengthy period, I can say that the scrutiny of the activities of these agencies is no less, and in some ways greater, than that of other public sector agencies.

Some reassurance can also come from the fact that there are several elements involved, as I hope I have adequately explained to you.

There is a body of writing on the concept of “National Integrity Systems”, something which is said to be a necessary underpinning for the rule of law, quality of life and sustainable development. The concept emphasises that a significant number of institutions must operate effectively for there to be integrity, in the exercise of power in society. Naturally, an independent judiciary is one of those, but among the range of other institutional arrangements there also needs to be independent watchdog bodies such as an auditor-general and an ombudsman.⁷

This is not to say that our review framework is perfect. The new position of National Security Legislation Monitor should be a valuable addition to ongoing consideration of the controversial anti-terrorism laws. Certainly the occupant has some substantial issues to examine - these include the association offence,

⁷ e.g. Griffith University and Transparency International Australia, *Chaos or Coherence? Strengths, Opportunities and Challenges for Australia's Integrity Systems*, December 2005.

strict liability provisions in Part 5.3 of the Criminal Code, and I imagine the NSI Act. One imagines that they won't be bored.